

**Conference
International Labour Office
Geneva Switzerland
8-10 July 2010**

A Diagnostic Methodology for Regulating Decent Work

Diane F. Frey
London School of Economics
EROB, Dept of Management
Houghton Street
London
WC2A 2AE
Tel: +44 (0) 1865 205 156
Email: D.F.Frey@lse.ac.uk

I. Introduction

This paper proposes a diagnostic methodology to provide insight into the interventions and processes necessary to progressively achieve decent work. Substantial progress has been made in developing Decent Work Indicators and also in bringing Decent Work Indicators into spheres beyond the ILO such as the targets for the Millennium Development Goals (MDGs). Indicators will no doubt play a critical role in measuring progress in achieving the ILO Decent Work Agenda. Yet, indicators have limitations. They are not intended to be diagnostic and they do not tell us a great deal about the underlying processes associated with improving or deteriorating performance. Further, they do not generally help to clarify or build consensus about which policy interventions will improve progress towards achieving decent work for all. The diagnostic methodology presented here intends to complement decent work indicators by addressing these limitations.

Drawing on institutions theory from political economy the paper reframes labour market regulations as holistic institutions, comprised of rules, norms and actual behaviours the so-called 'rules of the game' of employment. Based on the understanding that institutions reinforce and contribute to labour rights violations, the paper presents an approach to improving labour market regulation and compliance based on Harold Koh's compliance theory from international law.

Methodologies based on institutions theory have already usefully guided examinations of work-time regulation. For example, they are implicitly used by the CEACR when it examines "the effect given in law and practice" to Conventions such as Nos. 1 and 30 on work time for purposes of assessing

compliance.¹ Lee and McCann have also emphasized the importance of examining not just labour laws but their impact and actual outcomes.² Their notion of “observance” of statutory labour regulation is a composite encompassing enforcement by labour ministries and courts, as well as the influence of regulation through norms even in the absence of enforcement.³ While the present effort also emphasizes outcomes, it attempts to examine more closely the institutional basis of “observance” of work-time limits as “compliance” where an actor’s behaviour conforms to specified rules.

Following this introduction, Part II of the paper briefly introduces institutions theory and illustrates it with the example of work-time limits and obligatory overtime. Using this institutional framework, it is possible to assess institutional outcomes and to identify problems and combinations of problems that arise in implementing work-time limits. For example, there may be rule-based problems in which the written rules contradict or fail to adequately give effect to normative goals and therefore undermine them. Alternatively, well-written rules may not be effectively enforced. Additionally, formal institutions interact with informal institutions such as corruption, bribery or blacklisting, and in the face of weak formal institutions, they may prevail in structuring social behaviour. Finally, institutions beyond the immediate sphere of work-time rules may impact on the observance of work-time limits. These include, for example, immigration institutions interacting with labour institutions.

Part III explains how institutional arrangements can be systematically mapped to correspond to dimensions of Harold Koh’s compliance theory from international law. In this way, institutional shortcomings can be matched to compliance interventions. Compliance theory is well suited to institutional approaches because it, like institution theory, treats norms, rules and behaviours as critical components in achieving change and compliance. The paper contends that, to be successful, interventions must be integrated, multiple and mutually reinforcing to achieve effective work-time limits in line with decent work. In the longer range, the goal of these interventions is to create circumstances where actors adopt norm-based behaviours because they have internalized them into their own system of values.⁴

¹ International Labour Organisation (ILO) (2005) ‘*Hours of Work: Fixed or Flexible?* Report of the Committee of Experts on the Application of Convention 1 and Convention 30, Report to the 2005 International Labour Conference, International Labour Organization, Geneva: para 2. [Hereinafter ILO Fixed or Flexible?]

² Lee, S. & McCann, D. (2008) ‘Measuring Labour Market Institutions: Conceptual and Methodological Questions on Working Hours Rigidity’, in Berg, J. & Kucera, D. (eds). In *Defence of Labour Market Institutions: Cultivating Justice in the Developing World*, Geneva: International Labour Organization, Houndmills, Basingstoke, Hampshire and New York, New York: Palgrave MacMillan 2008 p. 47.

³ Ibid.

⁴ Koh, H. (1997) ‘Why Do Nations Obey International Law?’, *Yale Law Journal* 106: 2599; Koh, H (1998) ‘The 1998 Frankel Lecture: Bringing International Law Home’, *Houston Law Review* 35:623.

Part IV illustrates the diagnostic methodology with a case study on work-time limits and obligatory overtime constraints in the maquilas of Honduras. Based on evidence taken from the reports of the ILO, non-governmental organizations such as the International Trade Union Confederation (ITUC), and US State Department Reports, it presents an analysis of the formal, informal and multiple institutional arrangements associated with the non-observance of work-time limits and obligatory overtime constraints. It also links the institutional arrangements to interventions recommended to improve compliance. Finally, Part V draws some conclusions about the diagnostic methodology based on the illustration in Part IV.

II. Institutions on Work-Time Limits

Labour institutions are the formal as well as informal rules, practices and policies that structure all the conditions in which people work.⁵ Work-time limits and obligatory overtime, like minimum wages, vocational training, social security and collective bargaining, are examples of different sets of labour market rules, practices and policies here called labour market institutions. According to Berg and Kucera labour institutions such as work-time limits are the outcome of a complex system of social relations, production and national laws.⁶ Power and political compromise play a key role in the establishment of these institutions.⁷ The contention and compromise that gives rise to institutions on work-time limits is illustrated by the debate over whether a national law should mandate overtime premium pay after 40 or 48 hours in a week. The adoption of either rule will affect the absolute and relative income of employers and workers.

The Effectiveness of Formal Institutions

The first dimension of this analysis is the effectiveness of the formal institutions related to work-time limits and constraints on obligatory overtime. Formal institutions are effective to the degree that the obligatory overtime and work time are actually constrained and governed as opposed to being widely ignored or circumvented.⁸

Formal institutions include inter-related elements including the substantive content of formal rules along with their interpretation and enforcement.⁹ Rules are institutional statements and include (1) designations identifying to whom the statement applies, (2) verbs that permit, obligate or

⁵ Berg, J. & Kucera, D. (2008) 'Introduction' in Berg, J. & Kucera, D., supra note 2.

⁶ Ibid. p. 11.

⁷ Knight, J. (1992) *Institutions and Social Conflict*. Cambridge: Cambridge University Press; See also Lukes, S. (2005) *Power: A Radical View*, 2nd Edition, Houndmills, Basingstoke, Hampshire and New York, New York: Palgrave MacMillan 2005.

⁸ Amable, B. (2003) *The Diversity of Modern Capitalism*, Oxford: Oxford University Press; Helmke, G. & Levitsky, S. (eds) (2006) *Informal Institutions and Democracy: Lessons from Latin America*. Baltimore: The John Hopkins University Press.

⁹ Frey, D.F. (2009) 'An Institutional Approach to Compliance: The Case of Forced Labor in Central America and the Dominican Republic' ARTICLE, *Advances in Industrial and Labor Relations*, volume 17, FORTHCOMING.

forbid, (3) the particular actions or outcomes to which the verbs apply, (4) conditions defining when, where, how and to what extent that action or outcome in question is permitted, obligatory, or forbidden, and (5) the “or else” statement defining the sanctions to be imposed for not following the rule.¹⁰ The substance of the rules on obligatory overtime and work-time limits, whether in national law or ILO Convention, can be analyzed using this institutional grammar.

In this framework, the regulation is not problematic simply because it is not enforced. Instead, the *formulation* of the rules can, alone, as well as in combination with their interpretation and enforcement, undermine observance of work-time limits. In other words, rules ostensibly created to limit work-time can actually undermine its effective limitation. Similarly, rules ostensibly prohibiting obligatory overtime can make it easier for employers to impose obligatory overtime. Some of the ways that formal rules do this are by containing contradictory verbs, some of which prohibit while others allow work beyond nationally-established limits.¹¹ Substantive rules can also be limited by narrowly naming the categories of workers for whom the rule applies or equally by exempting categories of workers from application of the rule.¹² Alternatively, rules may clearly prohibit obligatory overtime but then contain inadequate or entirely absent procedures and sanctions to address violations of the rules.¹³

Interpretation is an authoritative decision on whether the rule has been violated. The process often involves a challenge, in for example an administrative or judicial proceeding, followed by a decision, defining and elaborating on the rules and their definitions in relation to particular circumstances.¹⁴ The *enforcement* of a rule is the application of the corresponding sanction, which raises the cost of noncompliance by eliminating potential profit as well as imposing additional costs as punishment.¹⁵ Enforcement mechanisms include monitoring and penalties, such as fines and prison sentences, as well as the procedural rules through which the mechanisms are applied, which may increase or decrease the probability of conviction.¹⁶ Alternatively, it is possible to imagine that rules might establish positive incentives and rewards for conformance such as tax breaks.

¹⁰ Crawford, S.E.S & Ostrom, E. (1995) ‘A Grammar of Institutions’, *American Political Science Review*, 89(3): 582-600, p. 584.

¹¹ Frey, *supra* note 9, p. 22 (Nicaragua).

¹² *Ibid.* p. 17 (Guatemala).

¹³ *Ibid.* p. 22 (Honduras).

¹⁴ Koh 1998, *supra* note 4.

¹⁵ Scholz, J.T. (1997) ‘Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory’, *Law and Contemporary Problems*, 60(3): 253-268; Fisher, R. (1981) *Improving Compliance with International Law*. Charlottesville: University Press of Virginia.

¹⁶ Becker, G.S. (1968) ‘Crime and Punishment: An Economic Approach’, *Journal of Political Economy*, 76(2): 169-217. Also, it is possible to imagine that rules might establish positive incentives and rewards for conformance such as tax breaks.

Interactions between Formal and Informal Institutions

The second dimension of institutional analysis is the interaction between formal and informal institutions. Informal institutions are not created through official channels such as legislatures or courts, and penalties imposed for their breach are not official but are, nonetheless real and include social exclusion, loss of reputation and retaliation.¹⁷ Informal institutions include social norms and social conventions.¹⁸ Social norms are values that are observed irrespective of the behaviours of other and correspond to ideas of prudential behaviour.¹⁹ For example, it may be considered virtually unthinkable to schedule work on highly important national or religious holidays. In contrast with the prudential values associated with norms, social conventions are about shared expectations.²⁰ Adherence to social conventions depends on the fact that others adhere.²¹ Bribe taking is a common example of a social convention.

Informal institutions interact with formal institutions and contribute to the observance or non-observance of work-time limits and constraints on obligatory overtime. They can contribute to observance by strengthening incentives to comply and can even substitute for deficits in ineffective formal institutions such as ambiguous substantive rules.²² As Lee and McCann point out “laws can have an effect on practice ... even in the absence of enforcement.”²³ Alternatively, informal institutions can undermine observance of work-time limits by displacing formal institutions and thereby contributing to their irrelevance.²⁴ Even when formal institutions are not openly violated, informal institutions can undermine observance through, for example, creative compliance, meaning situations where actors comply with the letter of the law while violating its normative spirit.²⁵

Institutions Beyond those Directly Related to Work-time Limits

The third dimension of institutional analysis is the influence of institutions in spheres of economic and social life that are not directly related to work-time limits and constraints on obligatory overtime. Institutions in different spheres interact and reinforce each other in several ways.²⁶ One example is where workers in general are protected against obligatory overtime by specific institutions but have difficulty gaining effective access to

¹⁷ Helmke & Levitsky, supra note 8.

¹⁸ Ibid.

¹⁹ North, D.C. (1990) *Institutions, Institutional Change and Economic Performance*. Cambridge: Cambridge University Press p. 4; Ostrom, E. (2005) *Understanding Institutional Diversity*. Princeton: Princeton University Press.

²⁰ Amable, supra note 8.

²¹ Ibid

²² Helmke & Levitsky, supra note 8.

²³ J. Browne, S. Deakin, and F. Wilkerson (2002) ‘Capabilities, Social Rights and European Market Integration’, ESRC Centre for Business Research Working Paper 253, University of Cambridge cited in Lee & McCann 2008, supra note 2, p.47 FN 57

²⁴ Helmke & Levitsky, supra note 8.

²⁵ Ibid.

²⁶ Amable, supra note 8; Hall, P. & Soskice, D. (2001) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford: Oxford University Press.

protection because citizenship institutions put them at risk of deportation if they file complaints. Another example is when one set of institutions imposes its logic on another institution. Market-oriented institutions can undermine labour protection institutions as, for example, when governments respond to World Bank Doing Business Indicators by weakening their enforcement of labour regulations. The main contribution of this last dimension is to be mindful of and attempt to identify influences on observance that may be seemingly unrelated or tangential.

Power and contention in institutions can be seen in all three dimensions. In the settlement over the establishment of formal institutions, power asymmetries result in differential formulations of institutional rules and enforcement regimes. Once the formal rules are established there may not be sufficient power to fundamentally change an unwanted formal institutional settlement but there are still opportunities for contentious skirmishing to subvert or strengthen formal institutions.²⁷ Finally, institutional hierarchies imply the imposition of one set of institutional rules over others is possible based on power.

III. Compliance Theory²⁸

Institutional arrangements concerning work-time limits and constraints on obligatory overtime can be systematically analyzed for their compliance with the norms established in numerous international instruments, such as the ILO's sixteen Conventions and 11 Recommendations on hours of work, weekly rest, the organization of work time, night work and holidays with pay.²⁹ Outside of the ILO framework, the same institutions could be assessed for their compliance with the provisions of the International Covenant on Economic, Social and Cultural Rights, including those protecting the right to just and favourable conditions of work (article 7), the right to safe and healthy working conditions (article 7b), and the right to "rest, leisure and reasonable limitation on working hours and periodic holidays with pay" (article 7d).

Compliance is a state of conformity between a specified rule and an actor's behaviour.³⁰ According to Harold Koh, the best chance of achieving compliance is to create circumstances in which actors, such as states and employers, adopt norm-based behaviours because, over time, they have internalized the norms into their own systems of values.³¹ In the interim, building towards this state of compliance is made possible by multiple complementary mechanisms corresponding to the diverse motivations people have to comply. These include (1) being coerced into adopting and enforcing rules, (2) acting out of self-interest by making non-compliance costly and irrational, (3) enhancing the legitimacy of the norms by reinforcing them as

²⁷ Mershon, C. A. (1994) 'Expectations and Informal Rules in Coalition Formation', *Comparative Political Studies*, 27:1 pp. 40-79.

²⁸ This is spelled out in detail in Frey 2009, *supra* note 9.

²⁹ ILO Fixed or Flexible?, *supra* note 1 para 11

³⁰ Fisher, *supra* note 15 p. 20.

³¹ Koh 1998, *supra* note 4 p. 4.

company, community, national and international values, and (4) internalizing international legal norms into domestic legal, social and political processes.³²

Internalization takes place in different dimensions, which usefully correspond to institutional components. *Legislative internalization* occurs when “international legal norms become embedded into binding domestic legislation”.³³ National legislation can be assessed for whether its institutional grammar is consistent with the international legal norm. It is also possible using institutional grammar to locate specific problems such as contradictory substantive rules, overly broad exemptions from substantive rules, and inadequate procedures and sanctions.

*Judicial internalization*³⁴ is the incorporation of an international norm into the domestic legal system via judicial interpretation or in some cases, executive action, legislative action or some combination of all three actions.³⁵ Institutional frameworks can help with assessing the congruence between domestic laws and international legal norms. They can help locate the potential sources of incongruence in formal institutions such as the formulation of rules, their interpretation and enforcement. They can also help to frame the role of informal institutions, such corruption, in contributing to failed implementation and non-observance of international legal norms.

Koh’s ultimate goal is *social internalization*, which is the condition in which a norm acquires such a degree of public legitimacy that there is widespread general obedience with it.³⁶ A lack of social internalization is to be expected where there is widespread non-observance of international legal norms. There are however useful diagnostics possible with institutional frameworks. It is possible to assess (or at least ask) whether there is evidence that the legislature, judiciary or executive branches actively work to enhance, or alternatively undermine, the normative legitimacy of the international legal norm. Similarly, it is possible to assess (or at least ask) whether there are social norms counter to the international legal norm that are championed by branches of government and other social actors.

Crosscutting these three dimensions of internalization is Koh’s concept of *political internalization*, which occurs when political elites accept an international norm and incorporate the norm into domestic policy.³⁷ This, in many ways is the most difficult assessment to make. Here too, institutional theory may help guide an assessment. For example, it is helpful to assess whether the government itself observes the relevant international legal norm in its role as employer. If the government does not adhere to international legal norms on labour then it may well be less likely to enforce these norms against other employers. Similarly, it is helpful to assess the government’s success in addressing incongruities that are brought to its attention. If the

³² Koh, supra note 4.

³³ Ibid. p. 643.

³⁴ Koh, supra note 4, calls this “legal internalization.”

³⁵ Ibid; Koh 1997, supra note 4.

³⁶ Koh, 1997, supra note 4.

³⁷ Ibid.

government takes no action, for example, this may indicate a de facto lack of acceptance of the legal norm despite its formal ratification. Finally, it is important to ask and assess, with input of the social partners, whether power relations in establishing and maintaining domestic institutions have resulted in their congruence with international legal norms.

Institutional and compliance assessments are not only useful for criticizing and encouraging domestic internalization of international legal norms. Systematically comparing domestic institutions to international legal norms also helps to identify gaps and shortcomings in the international legal norms themselves. For example, it is possible to identify practices imposing obligatory overtime that are not currently addressed in the CEACR's treatment of obligatory overtime and forced labour. Similarly, practices imposing obligatory overtime may be entirely in compliance with CEACR legal norms yet produce perverse outcomes counterproductive to decent work. Systematic comparison of domestic institutions to international norms is a potential source of iterative improvement to both domestic institutions and the international norms.

In sum, well-selected indicators can be extremely useful in measuring progress towards achieving decent work but invariably reduce the breadth and qualitative complexity of the information on which they are based. They must do so in order to reduce extensive and complex bodies of information to a limited group of decent work components. As a result, even well chosen indicators may contribute little to identifying the underlying impediments to achieving decent work.³⁸ Without systematic identification of the obstacles, however, there is little diagnostic information upon which to base recommendations for reform.

The goal of the present diagnostic methodology is to buttress and complement decent work indicators with assessments to help to identify obstacles and inform debates about policy reforms needed to achieve decent work. Its goals are: (1) to produce meaningful diagnostic categorizations and typologies of obstacles to effectively achieving observance of decent work-related regulation; and (2) to identify possible interventions aimed at achieving decent work that could be the basis for policy agenda setting and substantive discussions. Table 1 shows the correlation between institutions and compliance frameworks and thereby provides guidelines for this diagnostic methodology.

³⁸ Lee & McCann 2008, supra note 2, p. 55 "...further comparative research is needed on the processes of observance of labour law across developing countries; one that does not take into account only enforcement by government agencies, but also the deviations from the principal statutory norms that are permitted by the regulations...and all the other factors that play a part in ensuring that labour laws are observed."

Table 1: An Institutional Approach to Compliance

Obstacles	Description	Institutional Theory Explanation	Compliance Theory Intervention	Effect
Text	Laws are poorly written	Rules are ambiguous or contradictory - sanctions are ineffective	Legislative internalization of international rules	Align domestic <i>rules</i> and sanctions with international norms
Interpretation	Well-written laws are interpreted poorly by courts	Defections from rules are formally supported and legitimized	Judicial internalization of international rules enacted in domestic law	Align <i>interpretations</i> of domestic rules and sanctions with international norms
Enforcement	Well-written and faithfully interpreted Rules are poorly enforced	Defections from rules are tolerated becoming <i>de facto</i> conventions	Political internalization of follow through on enforcement intended by international rules	Align <i>enforcement</i> of domestic rules with international norms
Social Norms	Well-written and faithfully interpreted rules are undermined by non-supportive social norms	Formal institutions are undermined by informal institutions – Actors pursue socially-legitimate behaviours counter to formal institutions	Social internalization of legitimacy of norms underlying the rules	Align <i>social norms</i> with domestic rules by enhancing the normative legitimacy of the rules
Conventions	Well-written and faithfully interpreted and enforced rules are undermined by conventions	Formal institutions are undermined by informal institutions- Actors pursue “expected” but not socially-approved behaviours counter to formal institutions	Social internalization of legitimacy of norms underlying the rules	Align <i>conventions</i> with domestic rules by enhancing the normative legitimacy of the rules
Other Institutions	Well-written and faithfully interpreted and enforced rules are undermined by other institutions	Formal institutions undermine (or reinforce) each other – Institutional complementarities and hierarchies	Enmeshment and linking of issues ensuring institutional hierarchy in line with international rules	Align <i>multiple institutions</i> to create hierarchies intentionally reinforcing compliance outcomes

IV. An Illustration

Institutional and compliance theories each have contributions to make in assessing and improving observance of labour market regulations but in order to do so they must be operationalized. This paper next illustrates the application of the institutional and compliance frameworks as a diagnostic methodology to assess labour market regulation and practices holistically and to inform discussion of reform interventions.

For a number of reasons, the paper uses the example of work-time limits and constraints on obligatory overtime for purposes of demonstrating the diagnostic methodology. First, the limitation of work-time is among the original concerns at the founding of the ILO. This demonstrates the centrality of work-time limits to the enjoyment of life in, as well as beyond, the workplace. These rules are intended to by provide “protection against undue fatigue and ensuring reasonable leisure and opportunities for recreation and social life” as well as promoting health and safety.³⁹ Second, work-time limits and obligatory overtime demonstrate the porous boundaries between the Decent Work Pillars and fundamental human rights. Obligatory overtime can, in some circumstances, amount to forced labour in violation of Convention 29.⁴⁰ Third, focusing on work-time limits and constraints on obligatory overtime helps to simplify a potentially very complex discussion of work-time limits alone for purposes of highlighting the methodology.⁴¹ Finally, limits on work time and obligatory overtime remain a source of tension between employers and workers and are linked to many other aspects of decent work, such as employment security and minimum wages.⁴²

Textile assembly in Honduran maquilas provides a brief but very good example to illustrate the many institutional combinations that prevent compliance with labour market regulations such as work-time limits. To include a variety of perspectives on work-time limits in Honduras, this illustration is based on narrative documentary evidence from ILO CEACR Individual Direct Requests and Individual Observations, reports from non-governmental organisations including the International Trade Union Confederation (ITUC) and the Asociación Servicios de Promoción Laboral

³⁹ ILO Fixed or Flexible?, supra note 1 at FN 25; para 24.

⁴⁰ International Labour Organisation (ILO) (2007) *‘Eradication of Forced Labour’*, Report of the Committee of Experts on the Application of Convention 29 and Convention 105, Report to the 2007 International Labour Conference, International Labour Organization, Geneva: para 132, footnotes 314-316. Obligatory overtime may also violate article 6 of the International Covenant on Economic, Social and Cultural Rights, article 8 of the International Covenant on Civil and Political Rights in addition to numerous other treaties.

⁴¹ Murray, J. (2008) ‘Time for a New Working-Time Convention? Ideas, Themes and Possibilities’, *Labour and Industry* Vol. 18 No. 3 April 2008 pp. 4-5; See also ILO Fixed or Flexible?, supra note 1 at para 11, there were 16 ILO Conventions and 11 Recommendations created between 1919 and 2004 on hours of work, weekly rest, the organization of work time, night work and holidays with pay.

⁴² ILO Fixed or Flexible?, supra note 1 at para 24; McCann, D. (2005) ‘The Role of Work/Family Discourse in Strengthening Traditional Working Time Laws: Some Lessons from the On-Call Debate’, *Law in Context* Volume 23, No. 1 cited in Murray, J. (ed.) *Work, Family and the Law*, Federation Press, Sydney, pp. 127-47: 130-133 cited in Murray, supra note 41 p. 12.

(ASEPROLA), and finally, U.S. State Department Human Rights Reports. The specific documents from all three types of sources that were used in this study are listed in Table 2.

Table 2: Work-time Limits and Obligatory Overtime Evidence Honduras		
NGOs	ILO	US State Department Human Rights Reports
ASEPROLA 2004 ITUC (ICFTU) GSP Plus 2005	CEACR C29 IO (1997) CEACR C29 DR (2008) CEACR C105 IO (2000) CEACR C14 DR (2002) CEACR C106 DR (2008)	2006 reported 2007

The distinct perspectives in these documents represent at least some of the collective voices in debates over decent work. Ultimately, a transparent assessment based on these sources explicitly allows independent evaluators to identify where they disagree within the assessment methodology.⁴³ In the end, the goal is not a technical debate over decent work monitoring but a wider debate about how to involve all sectors of society toward progressively achieving decent work for all.

The diagnostic assessment involves three inter-related steps. First, evidence of work-time limits and constraints on obligatory overtime is analyzed in relation to institutional outcomes and arrangements—formal institutional components, social norms and social conventions and institutions from other realms of social and economic life. Second, the institutional outcomes and components are compared to compliance criteria derived from international legal norms such as ILO Convention 29. This allows for the identification of at least some of complex and often multiple interactions and combinations of conditions and causal paths to observance and non-observance of work-time limits.⁴⁴ Third, using Koh’s compliance theory framework, it is possible to link institutional deficits with compliance interventions, or alternatively, to potential gaps in the compliance criteria.

⁴³ Moran, T.H. (2005) ‘Monitoring Compliance with International Labor Standards: How Can the Process Be Improved, and What Are the Implications for Inserting Labor Standards into the WTO?’, *Journal of Business Ethics* 59:147-153.

⁴⁴ Ragin, C.C. (1987) *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies*, Berkeley California: University of California Press; Rihoux, B. (2006) ‘Qualitative Comparative Analysis (QCA) and Related Systematic Comparative Methods: Recent Advances and Remaining Challenges for Social Science Research’, *International Sociology* 21(5) pp. 679-706.

Work-Time Limits and Constraints on Obligatory Overtime

The imposition of extra hours outside of normal daily working hours, or “obligatory overtime,” is the subject of numerous complaints by Central American unions.⁴⁵ Work hours have historically been considered a matter of working conditions under numerous ILO Conventions, including the Hours of Work (Industry) Convention, 1919 (No. 1), and the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30).⁴⁶ In 1997, Turkey and Canada asked the CEACR whether obligatory overtime violates Convention 29 on forced labour.⁴⁷ The CEACR clarified that obligatory overtime does not violate Convention 29 as long as it remains within nationally legislated limits or collectively bargained agreements.⁴⁸ When obligatory overtime remains within these limits, it amounts to “bad working conditions” rather than forced labour.⁴⁹

According to the CEACR, when obligatory overtime extends beyond legislatively or collectively bargained limits, further inquiry is needed to determine whether or not it violates Convention 29.⁵⁰ Specifically, the CEACR identified two conditions in which obligatory overtime violates the Convention. First, forced labour violations exist when workers work in excess of nationally established limits because they fear dismissal from their job. Second, when pay systems are based on productivity rather than time spent working, they violate Convention 29 if workers are obligated to work in excess of nationally established limits in order to earn the minimum wage. In these two circumstances, obligatory overtime is not merely a matter of poor working conditions; it is forced labour in violation of Convention 29.⁵¹ Thus, the forced labour inquiry on obligatory overtime has two steps: (1) whether the time worked exceeds nationally established limits, and (2) whether the excessive hours resulted from fear of dismissal or out of necessity to earn the minimum wage.

Based on this two-step definition, this section of the paper examines the empirical evidence of forced obligatory overtime in Honduras. The evidence is presented according to the three institutional dimensions discussed in Part II: the effectiveness of formal institutions, the interactions between formal and informal institutions and the interactions between institutions in different spheres of economic and social life. Through this examination, institutional patterns emerge that are matched with compliance interventions. Compliance interventions may be *legislative* based on problems with rules or *judicial* based on problems with interpretation and enforcement. *Social* compliance interventions are necessary when informal institutions interfere with the

⁴⁵ (ILO) (2007), supra note 40: para 132, footnotes 314-316.

⁴⁶ ILO (2007), supra note 40.

⁴⁷ International Labour Organisation (ILO) (1998) ‘General Report of the Committee of Experts on the Application of Conventions and Recommendations,’ Geneva: International Labour Office.

⁴⁸ Ibid.

⁴⁹ ILO, supra note 40 para 134.

⁵⁰ ILO, supra note 40.

⁵¹ Ibid.

effectiveness of the formal rules. *Political* compliance interventions are necessary when political elites have not accepted the international norms and have not incorporated them into their domestic policy.

Maquilas in Honduras

Honduran law establishes a regular or normal daily work-time limit of 8 hours and weekly hours limit of 44 hours.⁵² The workday, including overtime hours, may not be longer than 12 hours.⁵³ According to the U.S. State Department Human Rights Reports, there are prohibitions against excessive compulsory overtime.⁵⁴ Despite these rules, employers in Honduras are broadly depicted by both the U.S. State Department and ITUC as ignoring nationally established work-time limits.

The discussion of institutional arrangements in these reports, relate specifically to the textile (maquila) sector rather than the economy as a whole. Obligatory overtime is among the working conditions that maquila workers complain about in Honduras and employers frequently ignore maximum work-week limits and prohibitions against compulsory overtime.⁵⁵ Honduran workers who refuse to work extra hours are fired immediately. The ITUC provides an example of a group of maquila workers fired in a textile factory for having complained about working conditions including compulsory overtime.⁵⁶ There is no evidence of obligatory overtime being used as a means to earn the minimum wage in Honduras.

The Effectiveness of Formal Institutions

Obligatory overtime in Honduras results from multiple mechanisms associated with the formal institutional arrangements. Substantive rules establish “normal” weekly hour limits but these do not function as a limit on overtime. Overtime is subject to separate rules and by definition is work performed in excess of the normal hours of work and in any event in excess of the statutory “maximum.”⁵⁷ In fact, there are no explicit rules limiting weekly work hours. Instead, limits on weekly work time, including overtime, have to be derived from calculations based on daily maximum work-time limits (12

⁵² International Labour Organisation (ILO) Work-time Database: <http://www.ilo.org/travaildatabase/servlet/workingtime>; also International Labour Organisation (ILO) (2008) ‘Working Conditions Laws 2006-2007: A Global Review,’ Geneva: International Labour Office, p. 37.

⁵³ ILO Work-time Database, supra note 52; ILO Working Conditions Laws, supra note 52 p. 37.

⁵⁴ U.S. State Department Human Rights Report (2006) Honduras p. 11.

⁵⁵ International Confederation of Free Trade Unions (ICFTU) (2005) Reports on Core Labour Standards in the Countries Applying for the GSP-Plus’, pp. 1-2; US State Department, supra note 54, p. 11.

⁵⁶ Asociación Servicios de Promoción Laboral (ASEPROLA) (2004) ‘An Examination of Six Basic Labor Rights in Honduras’ Number 3, San Jose Costa Rica, p. 25; ICFTU, supra Note 55 p. 1

⁵⁷ ILO Work-time Database, supra note 52.

hours) and a statutory maximum work-week (6 days) for a national work-time limit of 72 hours.⁵⁸

The rules establish categories of workers for whom the 'normal,' 'regular' work-time limits do not apply. These exemptions are based on job titles such as manager, supervisor, domestic worker, driver and private chauffeur.⁵⁹ Another exemption is established based on qualities of the job such as "intermittent work" like hairdresser and hotel staff.⁶⁰ Finally, there is a more vaguely articulated category, which is work that "by its nature cannot be subject to the hours limits" such as agriculture and stockbreeding.⁶¹ Maquila workers are not listed in any of the exempt categories. Still it is unclear whether the government considers them exempt from work-time limits.⁶² It is not clear whether maquila workers are subject to the 'normal,' 'regular,' 44 hour national weekly limit or are exempt from it and subject to the 72 hour maximum weekly limit.

The lack of clarity in the rules is further aggravated by complaint procedures established within the rules that are slow and often fail to result in any action by the Ministry of Labour.⁶³ In addition, even if an employer is found to be in violation, the substantive rules lack specific sanctions for violations.⁶⁴ Not surprisingly, 'regular' work-time limits are not often enforced. In sum, what looks like a restrictive labour market regulation, namely the 44 hour work week does not actually limit work time.

Interactions with Informal Institutions

Informal and formal institutions also interact and contribute to obligatory overtime practices. In Honduras, harsh social conventions supplement ineffective rules and nonenforcement. Employers fire workers for joining unions and complaining about working conditions, as well as for refusing to work overtime. Maquila employees, who are mostly women, are victims of physical and verbal abuse as well as mandatory pregnancy testing. Employers set extremely high volumes of work on strict deadlines and use production quotas. If the quota is not reached, the bonus is not paid, even if the employee worked overtime in an effort to meet the quota. Employers offer time off in lieu of overtime pay and work schedules are based on employer needs and the ups and downs of supply and demand. Social norms also interact with formal institutions and reinforce obligatory overtime practices in Honduras. There is a culture of tolerance for labour rights violations and the Ministry of Labour promotes acceptance of obligatory overtime.⁶⁵

⁵⁸ ILO Working Conditions Laws, supra note 52, p. 37, 39; also Honduras has ratified Convention 14

⁵⁹ ILO Work-time Database, supra note 52.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² ILO Working Conditions Laws, supra note 52 p. 37 (lists the national maximum work-week in Honduras as 72 hours).

⁶³ ILO Work Time Database, supra note 52; US State Department, supra note 54, p.11; ASEPROLA, supra note 56, p. 25; ICFTU, supra note 56 p. 1.

⁶⁴ ASEPROLA, supra note 56, p. 25.

⁶⁵ ICFTU, supra note 56, pp. 1-2; ASEPROLA, supra note 56, p. 25.

Institutions in other realms of social and economic life

In Honduras, wage-setting institutions directly contribute to workers' low pay relative to the costs of basic needs. As a result, basic needs, such as food, cost three times more than what workers earn for salaries. Institutions governing fiscal, monetary and trade policy also affect worker pay relative to basic needs especially when they combine to lower the value of currency workers earn. The U.S. State Department attributes the Honduran employers' behaviour of ignoring overtime limits to high levels of unemployment and underemployment. The government's economic development policy is based on making concessions to foreign investors in order to attract foreign investment. Among the concessions is tolerance for labour rights violations.⁶⁶

The patterns of interactions between these distinct sets of institutions raise the possibility that structural adjustment policy institutions are hierarchically superior to labour market regulation institutions. Institutions governing fiscal, monetary and trade policy arising from structural adjustment policy prescriptions increase worker poverty relative to basic needs especially when they combine to lower the value of currency workers earn. Similarly government policy to attract foreign direct investment hierarchically displaces labour rights institutions simply by conceding to employers that the government tolerates labour rights violations. Notably, it is not necessary to reform laws to make structural adjustment policies hierarchically superior to labour rights because formal and informal institutions provide ample mechanisms to accomplish it.⁶⁷

Compliance

The evidence indicates that Honduran maquila workers are forced by their employers to work beyond the nationally established 44-hour normal work week and do so under the threat of loss of their jobs should they refuse. Further, there is evidence that employees are indeed fired for refusing to work obligatory overtime hours. In this case, maquila employers do not appear to be constrained by labour market regulations despite the existence of the 44-hour normal work-week. This situation can not be characterized as decent work. Whether it is also forced labour requires further analysis.

Obligatory overtime practices in Honduran maquilas violate CEACR norms prohibiting forced labour if the imposed work hours extend beyond national work-time limits. If the "regular" 44-hour weekly work-time limit is considered such a "national work-time limit," then employer threats and actual dismissals of workers for refusing to work beyond 44 hours rises to the level of forced labour. If, on the other hand, the national work-time limit is 72 hours, then compliance would depend on whether the obligatory overtime and dismissal threats for refusing to work it are within or beyond the 72-hour limit. Inescapably, the fundamental right to be free from forced labour depends on the establishment of national work-time limits.

⁶⁶ ASEPROLA, supra note 56, p. 25; US State Department, supra note 54, p.11.

⁶⁷ ASEPROLA, supra note 56 p. 25.

In the case of Honduras, formal institutions establishing national work-time limits and constraints on obligatory overtime are problematic for preventing forced labour and encouraging decent work. First, *legislative* interventions are necessary to clarify whether the 44- or 72-hour weekly limit is the relevant national work-time limit for maquila workers. Second, dissuasive sanctions, perhaps in combination with persuasive incentives, need to be incorporated into the substantive rules establishing work-time limits. Third, procedures need to be incorporated into the substantive rules that increase the likelihood of potential rewards or penalties for employers based on their observance of the substantive rules. Fourth, substantive rules, procedures and sanctions/rewards are necessary to address the dismissal of workers who lawfully refuse to work obligatory overtime beyond nationally-established limits. Finally, *legislative* interventions are also necessary to create or enhance rules that challenge other social conventions, such as physical or verbal abuse and production-quota systems that enable employers to avoid overtime rules.

Judicial interventions are necessary to effectively implement these new substantive and procedural rules and sanctions through judicial interpretation and enforcement. *Social* interventions are necessary to enhance the norms underlying the legitimacy of work-time and overtime limits and to challenge and replace tolerance for labour rights violations with norms consistent with respect for labour rights. *Political internalization* can usefully be debated in relation to the efficacy of actual *legislative*, *judicial* and *social* interventions rather than debating articulated commitments to align domestic institutions with international legal norms. *Political internalization* is also evidenced by government activities to champion or undermine the normative legitimacy of work-time and overtime limits, as well as in its own observance of work-time limits in its role as employer. Lastly, *political internalization* is demonstrated by a government's commitment to and effectiveness in confronting obstacles to observance of work-time limits that arise in other areas of social and economic life.

The analysis of obligatory overtime in Honduran maquilas demonstrates the tangle of multiple institutional interactions that support forced obligatory overtime. In this light, it is questionable whether compliance interventions narrowly aimed at work-time and overtime institutions alone can bring about institutions more fully compliant with Convention 29. Instead, compliance intervention strategies must also challenge institutional influences from other spheres of social life that undermine compliance, including minimum-wage setting and economic development institutions. As Koh argues, in these circumstances, multiple and mutually reinforcing compliance interventions are necessary. Moreover, compliance interventions must enhance negative and positive incentives across institutions.

Discussion of compliance of Honduran work-time and obligatory overtime institutions with international legal norms also helps to frame some of the shortcomings, ambiguities and gaps in the international legal norms. First, it is disturbing that a 72-hour weekly work-time limit could be considered consistent with the enjoyment of life and providing "protection against undue

fatigue and ensuring reasonable leisure and opportunities for recreation and social life” as well as promoting health and safety.⁶⁸ In its report on Guatemala, the CEACR maintains that States,

do not have unlimited discretion in regard to the establishment of specific limits to the total number of additional hours, and that such limits must be "reasonable" and they must be prescribed in line with the general goal of the instruments, namely to establish the eight-hour day as a legal standard of hours of work in order to provide protection against undue fatigue. The Committee further indicates that the regulation of hours of work is also necessary from the "human rights" perspective of limiting the maximum length of working hours. In addition, it underlines the importance of consultations with the organization of workers and employers to determine the permanent and temporary exceptions to the principle of the eight-hour day.⁶⁹

The CEACR has also criticized the national work-time limits that result from exemptions of categories of employees in Guatemala.⁷⁰

V. Conclusion

The diagnostic methodology presented in this paper aims to enhance the assessment of the obstacles to achieving observance of labour market regulations essential to decent work and fundamental human rights. The examination of work-time limits and constraints on obligatory overtime as institutions helps to guide analysis of the influence of formal institutional arrangements such as rules, their enforcement and interpretation. At the same time, it acknowledges that formal institutions alone cannot explain observance of work-time limits and constraints on obligatory overtime. Observance of work-time limits also depends on informal social norms and social conventions as well as institutional influences from other realms of social and economic life. Finally, in addition to the necessity of considering all the three dimensions of institutions to understand institutional outcomes, we need to be mindful that power is necessary to establish and maintain institutions.

Institutional patterns associated with non-observance of work-time limits can, in turn, be matched to Koh's compliance interventions. Critically, this compliance assessment is anchored in authoritative interpretations of international legal norms, not policy goals. Compliance problems may include rules, interpretation and enforcement of rules, social conventions and social norms, as well as the combined effects of multiple institutions. It is true that compliance deficits, once identified, do not identify specific reforms but they can create an agenda for consensus building among social partners towards institutional interventions. In addition, the failure of governments to observe and to address incongruities between domestic institutions and international

⁶⁸ ILO *Hours of Work: Fixed or Flexible?*, supra note 1: FN 25; para 24.

⁶⁹ Ibid.

⁷⁰ ILO (2005) CEACR C29 Individual Observation Guatemala para 3.

legal norms raise questions about whether a government has politically internalized them.

The examination also brings to the fore a number of problems with the CEACR compliance criteria. First, the narrow CEACR definition of forced obligatory overtime creates perverse outcomes. Within nationally-established work-time limits, threats of dismissal and overtime as means to earn the minimum wage are permitted. These rules do not appear to violate the norms established by the CEACR. There is considerable ambiguity about what constitutes reasonable national work-time limits and to whom they apply. Moreover, domestic workers, who have the longest work hours, are exempt from work-time limits altogether.

The institutional and compliance analysis presented here is based on ILO, U.S. State Department and NGO documents. They are imperfect, incomplete and invariably political and controversial. Under the circumstances it is advisable to intentionally incorporate multiple perspectives in the assessment. For example, despite the lack of evidence, it is possible that obligatory overtime occurs in Honduras as a means of earning the minimum wage. In this light, the findings presented, based on the evidence, are intentionally offered to provoke correction and amendment in an iterative process. This is precisely the kind of engagement that the CEACR seeks with governments and social partners in dialogue over how to improve compliance with ILO Conventions. Koh's approach to internalized obedience to international norms also involves an iterative process between the different actors involved at international, domestic and local levels. These interactions comparing and justifying institutions with international legal norms are necessary to bring about real and lasting protection of labour rights.