3. Negotiating working time in fragmented labour markets: realizing the promise of “regulated flexibility”

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3.1 INTRODUCTION

This chapter examines one dimension of innovation in collective bargaining, in the area of working time, and reflects on its potential for developing countries. In the working time context, the notion of bargaining innovation tends to be ascribed to negotiations that both secure productivity improvements and extend to workers a degree of influence or control over their working hours. The type of regulatory structure that can most effectively realize this goal is also widely accepted to be one in which the potential for individual choice over working hours is embedded in a strongly protective regulatory framework (Lee and McCann 2006).

A question that remains unanswered, and one central to this chapter, is the degree to which innovative bargaining on working time is relevant or appropriate to regulatory frameworks in the fragmented labour markets that characterize developing countries. The portability of such strategies and the accompanying institutional frameworks has been the subject of growing interest in recent decades, as part of a heightened preoccupation with the role of labour market regulation in low-income setting (see Lee and McCann 2011). This chapter is intended to contribute to the debate and builds on the authors’ prior work on the role of working time norms with the role of labour market regulation in low-income setting (see Lee and McCann 2011). This chapter is intended to contribute to the debate and builds on the authors’ prior work on the role of working time norms in the context of the labour markets and legal environments of developing countries. In doing so, the chapter extends to low-income settings the concerns and preoccupations of a literature that has been developed primarily in the context of industrialized economies.

To pursue these objectives, the chapter examines an economy that bridges the gap between the industrialized and developing worlds, the Republic of Korea (henceforth Korea). Korea’s regulatory regime on
working time, as will be outlined in section 3.5, was reformed with the explicit aim of facilitating innovative bargaining. This chapter draws on survey data, to assess the outcomes of this regulatory reform, then uses this national case study to offer insights into future challenges and directions for regulation in developing countries.

The remainder of the chapter is structured as follows. Section 3.2 introduces a theoretical analysis of the rationales for working time regulations. A simple game-theoretic perspective is used to demonstrate that regulation is essential to ensuring adequate working time protection. Building on this analysis, section 3.3 outlines options for the institutional articulation of working time norms, examining frameworks that combine statutory regulation, collective bargaining and individual negotiation and assessing the differing outcomes of these regimes for working hours distribution. The implications and challenges for developing countries are discussed in this context. Section 3.4 explains the notion of “innovation” in bargaining on working time and its implications for institutional articulation, exploring the strategy of “regulated flexibility.” Section 3.5 points to the limitations of this approach in lower-income settings, based on recent experience of Korea. The chapter concludes in section 3.6 by assessing the implications of its findings for the role of collective negotiation on working time in developing countries.

3.2 MARKET FAILURES AND WORKING TIME REGULATION AS CO-ORDINATION: A BASIC CONCEPTUAL FRAMEWORK

Why should working time be regulated? This question has been fundamental to the work of mainstream economists, who generally analyse working hours within a framework of “free” negotiations and agreements between individual workers and employers. The perception that working time outcomes determined by market forces without any “artificial” interventions are superior remains influential and has been the basis of neo-liberal deregulatory policies (Lee and McCann 2008; Lee, McCann and Torm 2008). However, working time is an area in which the market typically fails due to the presence of a range of externalities, such as those from long hours. These externalities need to be internalized, which inevitably requires coordination between governments, workers and employers. Yet this coordination process can be undertaken in different ways and in different institutional settings.

In order to illustrate the raison d’être of working time regulations and the possible mechanisms of coordination, let us consider the health impacts
of long hours.\textsuperscript{2} The detrimental impacts of long hours on workers’ health are well known (see Spurgeon 2003 for a review), but tend to be revealed gradually over a long period of time. For this reason, these impacts are often ignored by both employers and workers in making decisions on working hours. These health impacts eventually translate into production losses for employers (White 1987). As a result, the observed level of working hours in the labour market is inefficiently long. Therefore, action is needed to internalize these health impacts, thereby reducing hours below the current market level; yet individual initiatives to cut down working hours are insufficient, since firms that do not engage in such initiatives will make short-term gains. Collective action, then, is essential.

It is worthwhile analysing this scenario in terms of “the prisoners’ dilemma” device that has been extensively used in game theory. Let us assume that two companies with the same characteristics, $X$ and $Y$, compete with each other in the product market. It can also be assumed that there are only two options for working hours: eight hours and ten hours per day. Eight-hour days are known to be “optimal”, considering the negative (but not immediate) consequences of ten-hour days on health and productivity. Adopting an eight-hour workday, companies will receive a profit of 10 dollars. If company $X$ adopts a ten-hour workday while company $Y$ remains committed to an eight-hour day, the former will be able to increase its profit to 13 dollars. This is because company $X$ will enjoy cost-advantages in the product market. By contrast, for company $Y$, profits will fall to 5 dollars (note that the total size of profits is not reduced, at 18 dollars). If company $Y$ also acts to increase working hours to recover this profit loss, it is assumed that it will make a moderate recovery, to 8 dollars. At the same time, due to this action on the part of company $Y$, profits will fall to 8 dollars for company $X$. Note that in this case, the total profit will be even smaller, at 16 dollars.

The outcomes generated by the different actions of the two companies are summarized in Table 3.1. Clearly, the socially superior outcome is that both companies adopt an eight-hour workday, while the worst is that both require ten-hour days. Will these companies adopt the socially superior outcome? It is clear that if the firms take action independently, both will adopt long hours resulting in the socially inferior outcome. For instance, for company $X$ the best strategy would be a ten-hour workday, if company $Y$ adopts an eight-hour workday (13 dollars compared to 10 dollars). This strategy will remain preferable even if company $Y$ adopts a ten-hour workday (8 dollars compared to 5 dollars). Therefore, the ten-hour workday is the dominant strategy for company $X$. This is also the case for company $Y$. The final result will be the socially least acceptable outcome (a similar logic can be applied to individual workers who are willing to
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work longer hours and are thereby faced with falling hourly wage rates and deteriorating health).

The question, then, is how to encourage or compel companies to move to socially more acceptable strategies. As Table 3.1 shows, individual determination will not pay off unless other firms follow suit. What is needed is for all companies to act together; and the game-theoretic analysis implies that there need to be “non-market” arrangements to induce collective action and therefore better outcomes. These mechanisms can include statutory interventions, collective bargaining, and individual bargaining. For instance, as Rae (1894) noted, “the first systematic movement for a general eight-hours day of labour in England . . . was an employers’ movement for eight hours work and twelve hours pay” (p. 244), which only materialized when the Factory Act was enacted to impose a statutory limitation on working hours. In other cases, including the movement for an eight-hour workday in Australia, trade unions were the main force in driving companies to take collective action towards shorter hours. These two methods, which are often interlinked, were instrumental in ensuring coordination at three primary levels: (a) between employers; (b) between workers; and (c) between workers and employers. Finally, individual contracts are sometimes seen as an important tool, albeit only for certain occupational categories such as white-collar professionals.

The discussion so far, based on a simple game-theoretic framework, has significant implications. First, the real issue is not whether working hours regulations are needed. In fact, these institutions should be understood as indispensable to determining working time. Secondly, working time outcomes will depend greatly on how the range of different “non-market” arrangements (or, more precisely, institutional arrangements) are deployed and combined within a country. This question is pursued in the following section.

Table 3.1 The dilemma of working-hour reductions: an illustration

<table>
<thead>
<tr>
<th></th>
<th>Company Y</th>
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<th>Company X</th>
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<tr>
<td></td>
<td>8 hours</td>
<td>10 hours</td>
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<tr>
<td>Company Y</td>
<td>(10,10)</td>
<td>(5, 13)</td>
<td></td>
</tr>
<tr>
<td>Company X</td>
<td>(13,5)</td>
<td>(8,8)</td>
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Note: Figures refer to levels of profits in each situation.

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3.3 INSTITUTIONAL ARTICULATION: STATUTORY REGULATION, COLLECTIVE BARGAINING AND INDIVIDUAL NEGOTIATION

Actual working time, in both its duration and organization, is determined by a complex set of forces that can broadly be categorized as market or institutional. While the role of institutional forces tends to be considered in mainstream economics as a “distorting” factor, in section 3.2 it has been suggested that institutional forces are essential (rather than external) to the determination of working time. Indeed, most empirical studies on working time have highlighted the importance of institutional factors in shaping working hours, particularly when comparisons are made between countries. Even a brief review of the historical trends in working hours shows that the champions of long working hours at the turn of the 20th century (such as Germany and France) became pioneers of short hours a century later due to well-developed collective bargaining or statutory intervention during the post-war period (see Figure 3.1).

As noted earlier, however, institutional settings vary considerably across countries, reflecting the diversity of industrial relations traditions and differences in the mechanisms and coverage of collective bargaining. In the case of industrialized countries, it has been suggested that working time outcomes in a given country depend primarily on the way in which the following four levels of “regulation” are articulated (which may be termed the “working time regime”) (Anxo and O’Reilly 2000; Anxo 2004; Lee 2004; McCann 2004): (1) statutory legislation of universal application; (2) branch or industry level regulation through collective bargaining that covers a range of firms or sectors; (3) plant or company level regulation through collective agreements; (4) individual bargaining reflected in employment contracts.

While all four levels of regulation are present in most industrialized countries their relative strengths vary. In a given regime, working time regulation tends to be articulated so that one of these three regulatory levels plays a dominant role. In countries in which collective bargaining is weak or fragmented, for instance, statutory intervention can assume the primary role (for example, France). In this case, the distribution of working hours is highly concentrated around the statutory standard (see Panel A in Figure 3.2). In contrast, in countries such as Germany and Austria collective agreements play the key role while the statutory standards provide a safeguard for unorganized workers. As would be expected, the distribution of working hours in these regimes may have multiple peaks where collective agreements embody different standards. Panel B
Figure 3.1  A centennial reversal: historical trends in annual working hours in selected countries

Source:  Lee, McCann and Messenger 2007 (Figure 3.12).
is an illustrative example taken from the German case. In contrast, where national agreements establish a single universal standard for all workers (for example, Denmark), the working hour distribution is similar to that generated by strong statutory standards. In such cases it can be suggested that a national collective agreement is the functional equivalent of statutory regulation of working hours.

In countries in which both statutory regulation and collective bargaining are weak or ineffective (such as the US), the fourth level of regulation – individual bargaining – takes a prominent role. These regimes are often grounded in beliefs that consider the efficiency of free individual market transactions as reflecting the needs of both workers and employers. Assuming the heterogeneity of these needs, then, working hours would be expected to vary rather than to demonstrate a single peak, as indicated in Panel D.

Focusing more firmly on collective bargaining, a few additional observations can be made. First, the role of bargaining is not necessarily confined to generating collective agreements. The inclusion of unions and employers in negotiations on legislative measures is critical, and has arguably become more significant, and collective agreements often establish the framework within which individual bargaining is conducted, a point that will be returned to in section 3.4. Secondly, collective agreements can also play an important “monitoring” role, by bolstering compliance with statutory standards. Moreover, while trade unions can influence statutory regulations and individual bargaining, there has been a growth in the types of working time arrangements that tend either to be beyond the coverage of collective agreements or are yet to be addressed effectively by them. Part-time work is a case in point. Generating a working time distribution illustrated in Panels C and D of Figure 3.2, part-time work has become an important element of working hour distribution in a number of industrialized countries, most notably the Netherlands and Japan.

With respect to industrialized countries then, it can be said that institutional settings have significant impacts on working time, and especially on the distribution of working hours between individuals. In other words, institutions matter considerably in the area of working time. While this typology is helpful in understanding the dynamics of working time in the industrialized world, however, its extension to developing countries is not straightforward, for at least three reasons. First, in these settings collective bargaining is relatively weak and its coverage very limited, even in comparison to the “market-based” regimes of the industrialized world, thus undermining its explanatory role in the overall working time patterns in these countries. Statutory regulation tends to be accorded the dominant regulatory function. Secondly, however, even statutory norms are of limited
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**Figure 3.2** Institutional settings and the distribution of working hours: an illustrative typology

*Source:* Lee, McCann and Messenger (2007), Figure 3.3.
Figure 3.2 (continued)
effect in low-income settings: the extent of non-observance, defined as the proportion of employees who are working longer hours than the primary statutory standard, has been estimated to be high (Lee and McCann 2008). At the same time, there is often a very substantial presence of time-related underemployment, or “involuntary” part-time employment, due to the shortage of work. As a result, Panels E and F typically characterize the distribution of working hours in developing countries.

These features of developing economies raise questions for the contribution of legal regulation to efforts to achieve acceptable working hours (for an initial attempt to identify these questions, see Lee, McCann and Messenger 2007). Research on labour market regulation in developing countries is at an early stage, and central issues, such as the influence of statutory regulations, are currently unclear. However, as mentioned earlier, Korea represents a useful case study for an examination of the influence of statutory norms in an industrializing economy, given the nature of its labour market and the concerted efforts that have been made to reduce working hours through statutory adjustments. Before examining these initiatives in more detail, however, it is necessary to consider the role that has evolved in industrialized countries for “innovation” in collective bargaining, and in particular its implications for the relationships between the various regulatory levels we have identified: statutory, collectively bargained, and individual.

3.4 WORKING-TIME FLEXIBILITY AND INNOVATIVE BARGAINING: “REGULATED FLEXIBILITY” IN INDUSTRIALIZED ECONOMIES

In industrialized economies, the evolution of working time regulation over the last decade has embraced a number of striking trends, which have both novel regulatory objectives and innovative frameworks and techniques. Working time laws have been tied to the policy aspiration of enabling workers to integrate paid work with their domestic obligations, most forcefully in policy discourses, but also, if more cautiously, in concrete legal measures. Moreover, new regulatory techniques have emerged, including those designed to advance the “individualization” of working time by allowing to individual employees a greater degree of influence over the duration and scheduling of their working hours.

These trends in working time regulation are the subject of this section. The aim is, first, to analyse these developments with a focus on the role for collective bargaining harboured by each, and in particular to assess the
significance of bargaining among the range of regulatory techniques that were outlined in section 3.3. Secondly, these trends are examined in the recognition that they may raise questions relevant to the role of working time regulation in developing economies, in particular where legal frameworks have evolved through the “transplantation” of regulatory frameworks designed in the industrialized world.

Trends in Working Time Regulation in Industrialized Countries: Evolutions, Tensions and the Role of Collective Bargaining

As outlined in section 3.3, although one of the available regulatory techniques tends to play a dominant role in a given working time regime, the articulation of legal norms is generally dispersed among the different regulatory levels. This insight is crucial to understanding the regulatory models for working time that have evolved in recent years that ascribe different roles to each of the mechanisms (statutory regulation, collective bargaining and individual agreement), and in particular for recognizing the significance and potential of innovative forms of bargaining within broader regulatory terrains.

Since the 1980s, a central trend in bargaining on working time in industrialized countries has been the shift in the primary bargaining objective from the reduction of working hours to the “flexibilization” of working time (Supiot 1999; Anxo et al. 2004). As part of this process, the “standard” model of the 9–5/five-day workweek has been to a degree displaced through the liberalization of work during evenings and weekends and the introduction of variable working hours. Unions were initially hostile to working time flexibility as a bargaining agenda, given that its primary orientation at the outset was towards the improvement of “productive efficiency” (often characterized as “employer-oriented flexibility”). Early negotiations on working time flexibility concentrated on hours-averaging (or “annualized hours”) schemes – arrangements that permit variations in weekly hours to allow employers to align working hours with their production needs and which are therefore often associated with unpredictability in working hours and reductions in overtime premiums.

The subsequent change in attitude of unions towards working time flexibilization in part represents a recognition of the usefulness of such strategies to companies under pressure from the forces of globalization. It also, however, reflects efforts on the part of unions to bargain for “employee-oriented” forms of flexibility. These, in contrast to the earlier models, accord workers a degree of influence over the duration and scheduling of their working hours (Ozaki 1999; McCann 2004; Keune and Gagoczi 2006).
This shift to employee-oriented forms of flexibility has been strongly associated with a new rationale for the regulation of working time, of shaping the nexus of paid and unpaid work. Historically, as hinted at in section 3.2, working time regulation was regarded as advancing a set of objectives that were both protective and economic, and which were reflected in regulatory and policy settings at both the domestic and international levels (on the international and EU standards see Murray 2001). These objectives embraced the preservation of workers’ health and safety from the impact of long hours or damaging schedules such as shift- and night-work. Hours limits were also deployed to carve out a period of “leisure time” for workers during which they would not be called on to work or would be entitled to additional compensation for their labour, and bolstered the “standard” workweek by mandating that these rest times be communal and taken during evenings and at weekends. These protective purposes were accompanied by an economic objective, of averting the productivity losses associated with long working hours (White 1987).

In recent years, these longstanding goals for working time regulation have been accompanied by the work/family rationale, which has featured in policy debates across Europe (for example, European Commission 2005), Australia (see Murray 2005), Canada (Arthurs 2006) and also at the international level (ILO 2005). Beyond industrialized countries, this new objective, while not widespread, has begun to exercise some degree of influence in shaping working time policies and regulatory measures (see, for example, University of Mauritius Centre for Applied Social Research 2002).

The recognition that the intersection of paid work and family life can be shaped by working time regulations does not presuppose a particular regulatory framework or techniques. The traditional mechanism of the collective reduction of working hours, for example, can be deployed to expand the time available to workers for domestic responsibilities and obligations (Fagan 2004). A more prominent conduit for the regulatory pursuit of work/family reconciliation, however, has been measures that, like those associated with the broader shift towards “employee-oriented” flexibility, facilitate a degree of choice for individual workers (Lee and McCann 2006).

The trend towards employee-oriented flexibility is reflected in a range of mechanisms. Flexi-time schemes, for example, permit employees to determine the start and end of their working days, while “working time accounts” facilitate a broader influence over working hours, allowing individuals to build up credits towards potentially substantial leave periods. Perhaps most significantly, this approach has also emerged in the form of statutory rights for individual workers to adjust their working hours, initially in the Swedish parental leave legislation in the 1970s and now as an
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Element of care policies in a number of industrialized countries. In its most advanced form, this adjustment technique entitles all employees, irrespective of family status, to influence their working time arrangements, in an approach that was pioneered in Dutch collective agreements and subsequently embodied in legislation in both the Netherlands\(^4\) and Germany\(^5\) (see Schmidt 2001; Burri et al. 2003; Fouarge and Baajens 2006). The individual-choice approach also features at the EU level, where the legal instrument on part-time work, in the Part-Time Work Directive, encourages employers to consider requests from workers to transfer between full-time and part-time jobs\(^6\); and at the international level, the ILO’s Part-time Work Recommendation, 1994 (No. 182) suggests that workers should be able to transfer to part-time work in specified circumstances, including during pregnancy and where they are caring for young children or disabled or sick family members.\(^7\)

Employee-oriented forms of flexibility appear to be fairly widespread, at least in Europe. A recent establishment survey conducted across the European Union, for example, has shown flexible working time arrangements such as flexi-time and working-time account to be fairly common, especially in large enterprises (Panel A, Figure 3.3). Moreover, managers and employee representatives share similar views on the rationales for such arrangements: the predominant reason given for their introduction was “to enable employees to better combine work and family or personal life” (68% of managers and 74% of employee representatives), followed by “to make working hours more adaptable to the variations in workload” (47% and 56% respectively). Given that the first of these responses refers to employee-oriented flexibility, and the latter to flexibility in the interests of employers, the survey results can be interpreted as indicating a mutual interest in working-time flexibility.

What, then, is the role of collective bargaining in this trend towards employee-oriented flexibility and the regulated individualization of working time? Superficially, it may appear that the capacity of individual workers to control their working hours would be a function primarily of the individual and statutory levels of regulation. However, this regulatory objective has entailed a prominent role for collective bargaining, which is examined in the following section.

Flexible Working Time: The Role of Collective Bargaining

The turn towards flexible working time arrangements has been accompanied by, and contributed to, a widespread decentralization of collective bargaining towards the company- or workplace-level (Supiot 1999; Marginson and Sissons 2004; OECD 2004). This development has had
complex and conflicting implications for the regulation of working time. On the one hand, it is clear that flexibilization and individualization require a tailored approach that reflects company-specific circumstances and cannot therefore be undertaken at a higher level. Indeed, collective negotiation has been a primary site of innovation. As has been mentioned, the mechanism of individual-choice rights first emerged in collective agreements in the Netherlands as part of a wider consensus between the social partners on the need for decentralized decision-making on working time (Fajertag 1999; Visser 2003).

In the most sophisticated regulatory systems, such as those of the
Netherlands and Germany, a recognition of the need for both individualization and collective supports has ushered in complex regulatory frameworks in which each level is assigned a specific role (Marginson and Sissons 2004; Supiot 1999). In these regimes, for example, statutory standards permit the collective partners to determine certain specified aspects of working time schemes. A comparable role is played by sectoral-level agreements that facilitate firm-level bargaining through the use of “opening” or “opt-out” clauses or by establishing “framework” provisions. These kinds of regimes, by loosening the regulatory constraints on working time, permit a range of arrangements including annualized hours, night work, weekend shifts that bypass prohibitions on Sunday work, and individualized working hours. Such networks of regulations that embody strong coordination between multiple layers of regulation have come to be

**Figure 3.3** (continued)
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termed “regulated flexibility” (Lehndorff 2007; Seifert 2008); “negotiated flexibilization” (Supiot 1999); or “organized decentralization” (Marginson and Sissons 2004).

The profile of the regulated flexibility approach was raised when it was embodied in the EU Working Time Directive (WTD) in 1993. The Directive offers a particularly striking illustration of this kind of regulatory model, to the extent that it has been characterized as “a regulation from which it is nearly always possible to derogate by agreement” (Supiot 1999, p. 84). The Directive establishes a 48-hour week that can be averaged over a four-month reference period but permits this reference period to be extended to six or even twelve months by collective agreement. Other of the Directive’s protections harbour an even more expansive capacity for collective derogation, including those on rest breaks, which permit the details of these breaks, including their duration, to be laid down in collective agreements, and on the eight-hour daily limit on night work, which can be averaged over a reference period determined by collective negotiation.

Decentralization towards the enterprise level within a strong regulatory framework has been suggested to support and inspire innovation (Lee and McCann 2006; ETUC 2006). Thus the ETUC has suggested that “the most innovative approaches are . . . those that have been developed with the broad parameters of a regulatory framework on the length of working hours and flexibility in working time” (2006, p. 12). Certainly, trade unions have had a reduced impact in less regulated regimes (Keune and Gagoczi 2006; Gregory and Milner 2009). Gregory and Milner (2009), for instance, have found the role of trade unions in promoting employee-friendly flexibility to be rather limited in France and the UK: the reforms that have been achieved have been the result of a mixture of management practice and, more significantly, legislative initiatives that have created a space for innovative bargaining between unions and employers.

The primary concern about the individualized regulation of working time is that it may harbour damaging decentralizing tendencies that could threaten to erode union influence (Haipeter and Lehndorff 2005; Chapter 2 in this volume). Recent studies on the German experience indicate that working time flexibilization has been undertaken in a coordinated manner including by extending a significant role to work councils, which have successfully introduced procedural rules for the flexibilization of working time. Although concerns remain, Haipeter and Lehndorff (2005), for example, have been able to identify “no widespread trend towards the ‘internal’ erosion of collective regulation” (p. 154); and a recent econometric study by Burgoon and Raess (2008) found pressures towards longer hours caused by globalization to have been addressed successfully in Germany through the efforts of trade unions and works councils to flexibilize working time.
Regulated flexibility models, then, have generated much success in Europe as regimes that both sustain effective working time standards and support innovation in collective negotiation. The enquiry that animates this chapter, however, is whether this kind of model can be successfully seeded in industrializing economies. Highly regulated regimes like Germany and the Netherlands, with long-standing traditions of collective negotiation and strong representative institutions, are relatively unusual in the global context and strikingly distinct from the regulatory systems that characterize low-income economies. To what extent, then, can such frameworks be effective when “transplanted” to an institutional context in which industrial relations systems are highly under-developed? The risk is that a regulatory system developed for a highly regulated regime may be adopted into a lower-grade order to which it is only questionably suited, with perverse effects. To address this question we consider the case of Korea, where European models were recently drawn on in a redesign of working time regulations. To examine the operation of this model in a vastly different context from the European regimes in which it was pioneered and reflect on the lessons that can be drawn for low-income countries, we examine whether the Korean initiative has been successful in merging the twin goals of protecting workers through effective prevention of long and unsocial hours and inspiring innovation in collective bargaining.

3.5 REGULATED FLEXIBILITY IN A FRAGMENTED LABOUR MARKET: THE CASE OF KOREA

The previous discussion has highlighted one of the central dimensions of modern working time regulation: the assumption that “flexible” statutory norms will leave regulatory space for collectively bargained arrangements that balance flexibility with worker protection. This approach is embedded in high-profile policy discourses and “flexible” legislated standards are frequently advocated as a model for the future development of working time regimes (for example World Bank 2009). While it appears to have gained global popularity, however, the application of the regulated flexibility model to less-developed settings is not entirely clear. Given the characteristics of working-time regimes in developing countries outlined in section 3.3, and in particular the status of statutory norms as the dominant regulatory level and the poor observance of these norms, it can be predicted that this approach may widen “working time gaps” between different labour market groups. Especially when changes in statutory hours are coupled with “flexibility” provisions, this approach could be predicted
to result in a small island of “regulated flexibility” confined to highly unionized settings while introducing only very gradual or minor changes for the majority of workers. Moreover, the risk of such differential impacts could be worsened in the context of labour market fragmentation and the expansive presence of non-standard forms of work.

The Korean case provides a good empirical ground for evaluating these risks. Its working time laws have been designed in line with the regulated flexibility model developed in industrialized countries. It is well known that Korea has among the longest working hours of countries from which reliable statistics are available; indeed, the practice of long working hours has often been cited as the primary engine of the country’s “economic miracle” of the 1970s and 1980s (ILO 2008; OECD 2008). Historically, both the government and employers were reluctant to address working hours, fearing that to do so might compromise Korea’s competitiveness in the global export market. Significantly, the breakthrough brokered in the context of the financial crisis of the late 1990s involved the establishment of Korea’s first national tripartite body, which was charged with negotiating national-level “social pacts” (Lee 2003; Lee and Yoo 2008). As Kong has observed,

Possessing a socio-economic profile approaching the standards of advanced countries (high per-capita incomes, relatively low inequality, OECD status, and consolidated democratic rules), Korea makes a highly suitable case study for extending our knowledge about the origins, limitations and potentials of transplanting competitive corporatism or neo-liberal incorporation into developing-country settings. (2004, p. 23)

This chapter pursues the line of enquiry by examining the dimensions of the Korean social pact that determined the regulation of working time. A key element of this pact was a reduction in statutory standard working time from 44 to 40 hours, in the expectation that this reform would help to protect and create jobs. It took almost five years to reach tripartite agreement on the reduction of working hours and the new statutory standards, introduced through amendments to the Labour Standards Act, were not enacted until 2003. During this process, aspects of the labour market context in which these negotiations took place influenced the resulting legal framework. This section reviews the context of the negotiations and draws on survey data to assess their outcomes.

**Context of the Negotiations**

In line with the themes developed in section 3.4 on the articulation of regulation in domestic labour law regimes, the following observations can be made on the negotiation that generated the Korean social pact on working
time. First, they took place in a context in which union density was low and had been declining (to 10–11% of employees: KLI 2008). In addition, the existing unions were enterprise-based, with sectoral unions as the exception, and the Korean industrial relations regime did not encompass a mechanism that would extend the reach of bargained norms to unorganized workers. Since increasing proportions of workers were excluded from the coverage of collective agreements, it was felt that the reduction of statutory working hours should have universal applicability and therefore be introduced in statutory form.

A second key dimension of this process was the fragmentation of the workforce along the axis of firm-size. The negotiations exposed the weak coordinating capabilities of the national unions and employers’ associations, which rendered the negotiations more complex. This limitation in part reflects the fact that the parties involved in the negotiations represented only a certain segment of the Korean workforce, typically those employed in large manufacturing enterprises. It was ultimately agreed that there should be a phased reduction of working hours according to firm size, with the reduction extended to small enterprises five years after the enactment of the legislation (in 2008). This phased approach had the potential to widen the gaps between large enterprises (typically unionized) and small and medium-sized firms (with much lower union density).

Thirdly, and most relevant to the earlier discussion of the transplantation of regulatory frameworks, having “benchmarked” the negotiation patterns observed in Europe, the national negotiators sought as an ideal a “win-win” trade-off between shorter hours and enhanced flexibility in the organization of working time. Flexibility provisions subsequently embodied in the amendments to the Labour Standards Act, like their European counterparts, included the possibility of introducing hours-averaging schemes and of extending overtime limits by collective agreement. The underlying assumption was that trade unions and employers could gain mutual benefits from bargaining over tradeoffs between shorter and flexible hours. In short, then, the new law was expected to encourage innovative bargaining through a regulated flexibility framework. Little consideration was given, however, to how these envisioned tradeoffs would be negotiated in the overwhelming majority of non-unionized enterprises.

Finally, the introduction of the 40-hour workweek in Korea coincided with a series of legal changes that liberalized the use of non-standard forms of employment such as fixed-term work and temporary agency (“dispatched”) work. These changes precipitated a significant expansion in the extent of precarious work in Korea: even at a conservative estimate, the proportion of non-standard workers in the Korean labour force increased from 26.8% in 2001 to 35.5% in 2006 (Lee and Lee 2007). This group of
workers are typically unorganized and employed in small enterprises. In other words, the statutory changes in working time took place within the context of an accelerated fragmentation of the labour market in Korea.

The Working-Time Divide

Drawing on data from labour force and establishment surveys carried out by the Korean Labour Institute (KLI 2008), it can be discerned that the tensions inherent in the tripartite agreement and subsequent legal reforms unfolded in two primary ways. First, there has been an overall reduction of working hours. In Korea, average working hours have reduced significantly: average hours among establishments with 10 employees or more (non-agricultural), for example, decreased from 45.9 hours in 2003 to 43.5 hours in 2007 (KLI 2008). It is worth noting that this reduction is attributable mainly to a drop in normal hours, while overtime hours remained largely unchanged (about 4.5 hours per week).

Secondly, however, this overall reduction of working hours was accompanied by substantial “working time gaps” between unionized and non-unionized workplaces. To demonstrate this trend, monthly working hours were estimated from establishment surveys separately according to union status. As Figure 3.4A demonstrates, average working hours prior to the introduction of the 40-hour workweek in 2003 did not show any clear pattern relating to union status, although unionized establishments tended to have shorter normal hours and to rely more on overtime hours (Panel B). This outcome reflects the dominant strategy of trade unions to use overtime hours to increase wage earnings for their members (which is also observed in Anglo-Saxon countries: for example, Trejo 1993). Also significant is that until 2003, the extent of reliance on overtime had been fluctuating according to a similar pattern in both unionized and non-unionized establishments.

This pattern changed dramatically, however, with the introduction of the new statutory standard hours in that working hours in unionized establishments fell faster than in non-unionized settings. Differences between unionized and non-unionized firms are most pronounced in the extent of overtime use. Unionized establishments have increased the proportion of overtime since the new working time provisions were enacted. This implies that these companies agreed to shorter hours in return for more flexible or more extensive use of overtime hours, presumably partly in response to union demands for shorter hours without reductions in wage earnings. Understandably, this bargaining strategy could not be widely adopted in non-unionized companies.

This contrasting development can be observed at the level of individual workers. In fact, as Figure 3.5A demonstrates, differences in working
Monthly working hours by unionization

<table>
<thead>
<tr>
<th>Year</th>
<th>Union</th>
<th>Non-union</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>175.0</td>
<td>180.0</td>
</tr>
<tr>
<td>1996</td>
<td>185.0</td>
<td>190.0</td>
</tr>
<tr>
<td>1997</td>
<td>190.0</td>
<td>195.0</td>
</tr>
<tr>
<td>1998</td>
<td>200.0</td>
<td>205.0</td>
</tr>
<tr>
<td>1999</td>
<td>210.0</td>
<td>215.0</td>
</tr>
<tr>
<td>2000</td>
<td>220.0</td>
<td>225.0</td>
</tr>
</tbody>
</table>

Year

Reliance on overtime (% of total working hours)

<table>
<thead>
<tr>
<th>Year</th>
<th>Union</th>
<th>Non-union</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>0.0</td>
<td>2.0</td>
</tr>
<tr>
<td>1996</td>
<td>2.0</td>
<td>4.0</td>
</tr>
<tr>
<td>1997</td>
<td>4.0</td>
<td>6.0</td>
</tr>
<tr>
<td>1998</td>
<td>6.0</td>
<td>8.0</td>
</tr>
<tr>
<td>1999</td>
<td>8.0</td>
<td>10.0</td>
</tr>
<tr>
<td>2000</td>
<td>10.0</td>
<td>12.0</td>
</tr>
<tr>
<td>2001</td>
<td>12.0</td>
<td>14.0</td>
</tr>
<tr>
<td>2002</td>
<td>14.0</td>
<td>16.0</td>
</tr>
<tr>
<td>2003</td>
<td>16.0</td>
<td>18.0</td>
</tr>
<tr>
<td>2004</td>
<td>18.0</td>
<td>20.0</td>
</tr>
<tr>
<td>2005</td>
<td>20.0</td>
<td>22.0</td>
</tr>
<tr>
<td>2006</td>
<td>22.0</td>
<td>24.0</td>
</tr>
<tr>
<td>2007</td>
<td>24.0</td>
<td>26.0</td>
</tr>
</tbody>
</table>

Source: Establishment survey on labour cost structure.

Figure 3.4 Working hours and overtime hours by union status in Korea (monthly hours, establishment with 10 or more employees)
The role of collective bargaining in the global economy

Panel A

Weekly working hours by employment status and union membership

<table>
<thead>
<tr>
<th>Year</th>
<th>Weekly working hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>52.0</td>
</tr>
<tr>
<td>2004</td>
<td>50.0</td>
</tr>
<tr>
<td>2005</td>
<td>48.0</td>
</tr>
<tr>
<td>2006</td>
<td>46.0</td>
</tr>
<tr>
<td>2007</td>
<td>44.0</td>
</tr>
<tr>
<td>2008</td>
<td>42.0</td>
</tr>
</tbody>
</table>

Legend:
- Standard workers (union member)
- Standard workers (non-union member)
- Contingent workers

Panel B

The incidence of 40-hour workweek by union membership

<table>
<thead>
<tr>
<th>Year</th>
<th>Weekly working hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>0.000</td>
</tr>
<tr>
<td>2006</td>
<td>0.100</td>
</tr>
<tr>
<td>2007</td>
<td>0.200</td>
</tr>
<tr>
<td>2008</td>
<td>0.300</td>
</tr>
</tbody>
</table>

Legend:
- No union
- Union presence but not a member
- Union presence and union member

Source: Supplementary survey on economically active population.

Figure 3.5 Working hours by employment status and union membership in Korea
hours between union and non-union have been widening since the new working time standards were introduced. Panel B also suggests that the benefit of the 40-hour workweek is largely confined to union members.

The developments in the regulation of working time in Korea, then, highlight a central dilemma for working-time regulation in developing countries. The relative weakness of collective bargaining associated with low coverage rates renders national-level negotiations over statutory working-time measures critical. However, given the narrow membership base of trade unions and employers’ associations, negotiations often fail to take into account the needs of unorganized workers, with the risk of widening gaps between union members and other workers. In these circumstances, the claim that unions are merely “insiders” negotiating in their own interests may gain ground. This potential difficulty can be compounded by attempts to introduce flexibility provisions that leave substantive decisions to negotiation between workers and employers at the enterprise level. In non-unionized workplaces, flexibility may prevail without much impact on working hours. These findings confirm assumptions that have been made about the regulation of working time in lower-income settings. The implications are examined in the following section.

3.6 CONCLUSIONS: LESSONS FOR REGULATING WORKING TIME IN LOW-INCOME COUNTRIES

Both theory and historical evidence point to the centrality of institutional settings to the determination of working time. In particular, collective bargaining is crucial to realizing desirable working time outcomes. In recent years, the role of collective negotiation has been challenged on many fronts as part of a broader weakening in the influence of trade unions. This chapter, however, has highlighted one of bargaining’s recent successes: the emergence of novel regulatory techniques that advance the flexibilization of working time, including in “employee-oriented” forms that are designed to tailor working time to the needs of individual workers.

The regulated flexibility approach is increasingly reflected in national legislative frameworks across industrialized and transition economies and is extending its influence into developing countries, where it is implicitly being expanded by the international financial institutions. It has been suggested in this chapter, however, that a degree of caution should be exercised when assessing the trend. In particular, a central concern has been that notions of working time flexibility devised in the context of highly regulated labour markets are being transplanted to less-regulated settings in which collective bargaining is under-developed. This expansion has
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certain implications for evaluating the potential of regulatory reform of working time in industrializing economies.

First, the minimalist approach to statutory regulation characteristic of regulated flexibility models, which assumes that the details of working time will be determined through collective bargaining, would appear to be largely unworkable in less-developed settings. As has been demonstrated in the analysis of the Korean experiment, the wholesale adoption of such an unmodified regulated flexibility model risks creating a “working-time divide” between union and non-union members that has particularly serious consequences in the context of labour market segmentation. It can be argued, then, that in low-income settings – and perhaps more broadly – working time laws should offer a reasonable degree of detail on the duration and arrangement of working hours, including on matters frequently consigned to collective negotiation, such as reference periods for the averaging of hours limits. This point echoes Supiot’s caution that the legislative function not be conflated with bargaining on specific interests (1999, p. 91). Instead, in conjunction with establishing frameworks for collective bargaining, the role of legislation is to establish principles for the organization of working time that are not derogable. To elaborate on this analysis, it can be suggested that statutory design is in part a function of the subject that is assumed for labour law’s protection. It can be argued that, just as minimum wages laws are intended to protect the most vulnerable groups of workers, working time laws should be designed to ensure adequate protection of workers who are not organized or covered by collective agreements.

A further conclusion that can be drawn from the Korean experience is that it is essential to “scale up” social dialogue, in the sense of placing more weight on negotiation at the national level. This point is crucial for institutional arrangements in developing countries, although it can also be applied to industrialized countries in which union coverage is in decline and/or the individualization of working time is underway in the absence of an effective regulatory framework. The Korean experience suggests, however, that social dialogue at the national level must be inclusive. There is a need for national social dialogue institutions in which the interests of all workers can be voiced. An expansion of the actors involved in bargaining processes could be considered. In any event, representatives of workers and employers must avoid the trap of becoming “insiders,” or pursuing vested interests, and instead reach beyond the immediate concerns of their members to voice the regulatory needs of non-unionized workers. The Korean case illustrates that inclusive bargaining is not a straightforward task in countries in which union membership is limited, but that the cost of failure to embark on it is substantial.
Finally, it should be noted that this emphasis on national negotiations does not imply that the role for collective bargaining at lower levels should be reduced. Rather, it highlights the strategic need to develop positive interactions between collective bargaining and statutory regulation in changing environments. As noted earlier, legislative change can open up new spaces for collective bargaining (ETUI 2006; Gregory and Milner 2009); while, as the experience of individual temporal flexibility rights indicates, innovations in collective bargaining can play the role of a “testing ground” for subsequent statutory mechanisms (Lee and McCann 2006). Further, collective bargaining can also play the “monitoring” role alluded to earlier, in which compliance with statutory rules is ensured by collective agreements. For such functions to be effectively realized, however, social dialogue on working time, especially in developing countries, needs also to be reliable, in the sense of being tied to effective enforcement mechanisms. This aspect of regulation seldom attracts serious attention in the field of working time, risking that relevant laws and collective agreements will become little more than “paper tigers.” It is therefore an essential subject for future research and policy intervention.

NOTES

1. An earlier version of this paper was presented at the ILO Technical Workshop on “Negotiating Decent Work” (30–31 March 2009, Geneva). The authors are grateful to Iyan Islam and other participants for their insightful comments and, thanks are due also to Susan Hayter for her support and helpful feedback, and to Byung-Hee Lee for data on working time in Korea.

2. Market failure in working time is not limited to worker health. Recent studies show a much broader range of market failures, including the disruption of family life (see Owen 1989; Lee and McCann 2007). Recent economic studies also show that when there is asymmetric information about workers’ productivity and employers use working hours as a proxy, the result will be inefficiently long working hours (Landers et al. 1996; Sousa-Poza and Ziegler 2003).

3. Based on a data set from 48 countries for 2005–06 it was estimated that about 27% of employees were working more than the statutory normal hours. The incidence of this “non-observance” is correlated with neither the statutory standard nor the level of economic development (Lee and McCann 2008).


7. The ILO’s Committee of Experts on the Application of Conventions and Recommendations considered the possibility of a new international instrument on working time in 2005 (ILO 2005). The Committee suggested that any such standard should recognize the need for individual workers to exercise some choice over their working hours.

8. Murray has argued that the WTD extended a pattern of layered regulation that had been established by the ILO’s working time instruments (Murray 2001, pp. 185–97).
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10. Articles 18, 19.
11. A rest break is required where the working day is longer than six hours, Article 4.
13. Article 8(a).
14. Article 16(c).
15. When the economy recovered earlier than expected, the goal of work sharing was abandoned and replaced with the new objective of improving the quality of working life (Lee 2003).

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