

CHAPTER 9

Occupational Health and Safety Rights and Legal Protection at Work

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9.1 THE RIGHT OF WORKERS TO OCCUPATIONAL HEALTH AND SAFETY

The “right to occupational health and safety” refers to securing the health and safety of persons at work by protecting them against risks to their health and safety arising from work-related activities. Chinese scholars often make use of other terms to indicate such rights, including “occupational health and safety rights”, “occupational health protection rights” and “labour protection rights”.

The concept of occupational safety, from the perspective of the relevant ILO Conventions and Recommendations, aims at “the promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations; the prevention amongst workers of departures from health caused by their working conditions; the protection of workers in their employment from risks resulting from factors adverse to health”.¹ Those ILO Conventions and Recommendations also point out that the term “work-related health” not only refers to physical health but also physiological conditions influenced by the work-related safety and health environment.

The underlying foundation of occupational health and safety rights is the right to life and health, which, therefore, indicates that this constitutes a fundamental human right. The norm of “occupational health and safety” has

1. A definition adopted by the Joint ILO/WHO Committee on Occupational Health at its First Session (1950).

undergone a process from its initial form to a much more advanced state of sophistication.

This right to occupational health and safety can be traced back to the birth of labour law in the nineteenth century, and can be construed as a major part of it. However, labour rights legislation has largely been confined to the protection of basic working conditions, such as child labour, women workers, and maximum working time. In consequence, therefore, the terms of occupational health and safety have been rudimentary and non-comprehensive, as their underlying rationale was based on the notion of democratic centralism. Indeed, this very point is embodied in the rules on shared liability for workers at work. Thus, following the industrial revolution, compensation liability, both in theory and practice, was primarily tested through the principle of liability for negligence – a mechanism which, self-evidently, is inconsistent with its right remedial and contemporary social law function in relation to occupational health and safety.

Towards the end of the nineteenth century, in part due to the radical and long-term rise of the labour movement and the emergence of the theory of social law (social interests in law), the approach to protecting occupational health and safety rights underwent a process of transformation in Western countries, which led to further developments in occupational health and safety rights theory. Based on the notion that workers' social rights should be centrally protected, since they are "the weaker party" in modern industrial relations, Germany passed an Accident Insurance Law in 1884, and England repealed the restrictive Employer's Liability Act with the adoption of the Workmen's Compensation Act in 1897. Both of these initiatives established the principle of employer's liability and no-fault liability, thereby reinforcing the absoluteness of the liability owed by the employer in relation to their workers' health and safety at work.

Since the turn of the twentieth century, the theory of occupational health and safety rights has become more mature, such that its protection achieved a new level by the end of the century. Occupational health and safety rights are not only State-imposed liabilities owed by employers *vis-à-vis* their workers, but also include workers' positive rights articulated by occupational health and safety laws. The rights to occupational health and safety were previously geared up to the conflicts between capital and labour, within which protection possessed strong public law (interventionist) characteristics. In the face of a diminution of industrial conflicts and the advent of co-operative relations between capital and labour, employment conflicts shifted away from wage bargaining to the discourse on the promotion of working conditions. States operating under a market economy have moved their occupational health and safety legislation to a new stage, where they underpin such issues from the perspective of "human rights" protection, mainly legislate for occupational health and safety standards, and even globalise such benchmarks by reference to the ILO's legislative activities.

From the 1970s onwards, Western industrialised countries engaged in systematically organising their occupational health and safety laws. They transformed and merged the collection of occupational health and safety regulations,

which had previously only dealt with particular industrial sectors, into a single comprehensive national law with a broad range of application.

It marks a substantial change that the protection of occupational health and safety rights has become more humanistic by moving the tenet of occupational health and safety rights away from focusing narrowly on injury prevention and remedies, in favour of occupational safety, comfort (decency), and health. Amongst the market economy countries, Switzerland was the first to legislate for a comprehensive occupational health and safety law, with an Ordinance of 1969.² Shortly after that, the United States of America, Japan, France, and Norway – along with many others – enacted their own occupational health and safety laws, as, for instance, with the American Occupational Safety and Health Act (OSHA) in 1970, or the Japanese Industrial Safety and Health Law in 1972.

The ILO has also globalised occupational health and safety standards through its own legislation, in the form of Conventions and Recommendations. Thus, in 1981, the ILO enacted Convention No.155 on Occupational Safety and Health, and, at the same time, issued Recommendation No.164 to supplement that instrument. The enactment of these Conventions and Recommendations indicated not only a transformation of occupational health and safety regulations from a fragmented to a comprehensive treatment, but also established a co-operative framework between government, employer, and worker. In 1985, the ILO also issued Recommendation No.171 (Occupational Health Services) as a further supplement to Convention No.155 and Recommendation No.164. Subsequently, in 2002, the ILO adopted an instrument to provide further details and amendments for Convention No.155 regarding occupational accidents, occupational disease registration and reporting – the List of Occupational Diseases Recommendation (No.194). In this way, a complete system for occupational health and safety has been established.

Under the new approach to occupational health and safety rights, a number of significant changes can be discerned by comparison with the position under the previous approach. First, the approach is comprehensive and systematic – so that the new legal regulatory framework encompasses all forms of prevention and remedy for occupational injuries (including occupational accidents, occupational disease controls, check-ups and medical treatment, *etc.*). Second, this approach has adopted the centralist approach of workers' rights – with the modern articulation of workers' rights in the working environment transforming those labour rights from matters of “passive remedy” to “active protection”. Third, there is an emphasis upon co-operation between employer and worker – evident in terms of improving working conditions and enhancing the potential for policy-making participation and power on the parts of workers as regards their occupational health and safety. Fourth, the regulatory framework for

2. Ordinance III of 26 Mar. 1969 relating to the Labour Act (Occupational health and the prevention of accidents in industrial undertakings).

labour rights has become much more sophisticated – so that now there is a package of rights enjoyed by occupational health and safety representatives in relation to such matters as rights to participation, entitlement to the disclosure of information, the right to emergency treatment, the right to refuse to be placed in a situation of danger, as well as rights to training and the like. Finally, the scope of the group who are entitled to benefit under the occupational injury insurance scheme has been enlarged, thereby providing more effective material support for those injured workers.

The new ideology for occupational health and safety rights illustrates how “human rights” have been established as the central value for modern Chinese labour law. The function of labour law not only helps to adjust and balance the labour relationship, but also serves to promote a value for workers against utilitarianism. Thus, these occupational health and safety rights started “from scratch”, and thereafter developed through a property-protection-dominated value into their modern human-protection-oriented value.

It is not the case that the protection of the worker has to give way to property rights where labour rights need to be subordinated to commercial interests. The life and dignity of workers can actually be lost when there is an attempt to emphasise an “equality” between labour and property rights. The progress of private contractual relationships may inevitably lead to the growth of workers’ organisation, an increase in “collective” activities, a socialist movement, and the development of employment rights – all of which can drag the labour relationship back in the direction of employment rights protection. However, under the approach of protecting rights, it is inevitable that there will be something of a return to a “human-centric” legal value. As a consequence, workers become the “rights-bearers” for occupational health and safety protection. At the same time, the government emerges as the initiator and provider of occupational health and safety protection, taking on responsibility for protecting the occupational health and safety rights of workers through legislative and administrative means. Meanwhile, workers are able to make recommendations and put forward suggestions through their trade union, as well as to reduce workplace risks through collective action designed to protect health and safety at work.

This concentration of employment rights protection will not give rise to any conflicts within the labour relationship, but, rather, is capable of promoting harmonious labour relationships. Thus, from an empirical viewpoint, one of the aims of having laws is to regulate the distribution of interests amongst parties so that the activities of those parties can be placed within a rational framework designed to reduce the chance of disputes. Protecting occupational health and safety rights is not to take away any of the rights of employers, but serves to encourage employers and enterprises to show concern for the rights of their workers through a “human-centric” approach. In a nutshell, “safety encourages

the inclination towards co-operation, and that spirit of co-operation can, in return, promote safety". Thus, "safety relies upon a balance between co-operation and self-interest". In consequence, therefore, the development of occupational health and safety rights represents not only an internal adjustment of labour relations, but also constitutes the key method for regulating labour relationships.

Since its inception, the State government has undergone a transition from the previous "State centralism" of occupational health and safety protection to a "labour centralism" protective approach. From the 1950s onwards, the government enacted a number of laws and regulations to deal with the area of occupational health and safety. Those laws included the relevant occupational health and safety chapter in the Constitution of the PRC, the Labour Law of 1994, and other regulatory instruments introduced at various levels.

However, the legislative ideology and content during the 1950s suffered from a variety of shortcomings. These included, first, an over-emphasis upon the utility of public law to realise the protection of rights by exercising the power of the State through occupational health and safety inspection and, thereby, undermining the role of workers' self-protection. Second, it can be seen that the notion of rights was too abstract – with a consequent absence of detailed content and realistic remedial mechanisms. Third, there was a lack of any unified, comprehensive occupational health and safety protection law, coupled with a low priority given to occupational health and safety regulations and poor implementation of these.

From the end of the twentieth Century, in combination with the development of the socialist market economy, the ideology of occupational health and safety rights launched a significant modern revolution. Two important Laws – the Law on the Prevention and Control of Occupational Diseases³ and the Law on Work Safety⁴ – dramatically illustrate these changes. In particular, the Law on Work Safety includes a special chapter setting out the worker's rights and obligations. It directly introduces the subject and conceptual content of occupational health and safety rights, and transforms the worker from a "rights receiver" into a "rights owner". By so doing, this modern instrument overcame a significant shortcoming in the previous legislative model, which had only regulated the obligations and rights owed by employers and enterprises towards their workers. Subsequently, the principle of protecting workers was further realised by the Law on Work Safety, which also reflected the dimension of "humanity" within the legislative process, at the same time as manifesting the spirit of the "harmonious society".

3. Adopted at the 24th Meeting of the Standing Committee of the Ninth National People's Congress on 27 Oct. 2001.

4. Adopted at the 28th Meeting of the Standing Committee of the Ninth National People's Congress on 29 Jun. 2002.

9.2 THE FOCUS UPON OCCUPATIONAL HEALTH AND SAFETY FOR WORKERS IN CHINESE LEGISLATION

Although the PRC has not ratified the 1981 ILO Convention (No.155) concerning Occupational Safety and Health and the Working Environment,⁵ China has consistently placed great emphasis on occupational health and safety legislation. Ever since the 1950s, the State has enacted a myriad of occupational health and safety laws and regulations, and, indeed, something like 30% of the labour laws introduced after 1990 have been concerned with occupational health and safety protection. In this way, a legal framework, facilitated by multi-level legislative integration, has been preliminarily established.

Thus, the Constitution declares that: “The State shall utilise various mechanisms to promote employment conditions, to enforce labour protection and to overhaul working conditions.”

Criminal statutes passed in 1979 and, later, in 1997, criminalise behaviour which leads to serious injury or death due to violation of product codes and negligence on the part of management. A series of Laws enacted during and after the 1990s – including the Law on Safety in Mines 1992, the Trade Union Law 1992 (modified in 2001), the Labour Law 1994, the Law on the Prevention and Control of Occupational Diseases 2001, and the Work Safety Law 2002 – along with a range of other rules and regulations issued by the State Council and the labour administrative authorities at different levels, have served to codify the content of occupational health and safety and its application in China. In addition to this, the State has also enacted something in the order of one hundred national occupational health and safety standards – such as, for example, the provisions in the Industrial Design Hygienic Standards, which came into effect in June 2002, and those establishing a safe standard for industrial noise, from 2007. Amongst the laws and regulations mentioned here, the Labour Law, the Law on the Prevention and Control of Occupational Diseases and the Work Safety Law contain detailed stipulations on the specific content of the occupational health and safety rights enjoyed by workers.

More specifically, sub-Article (2) of Article 42 of the PRC Constitution stipulates that:

Using various channels, the State shall create conditions for employment, strengthen employment protection, improve working conditions and, on the basis of expanded production, increase remuneration for work and social benefits.

Meanwhile, the 1994 Labour Law includes a special chapter on “Labour Safety and Hygiene” (Chapter 6), to clarify and emphasise the employer’s obligations towards the State and workers in respect of occupational health and safety protection. Included amongst the provisions to be found there are, for instance,

5. Adopted at the 67th International Labour Conference session in Geneva on 22 Jun. 1981. That Convention entered into force on 11 Aug. 1983.

the requirements that “Employing units must establish and develop a system for occupational safety and hygiene” (Article 52); “Labour safety and hygiene facilities must conform to the standards set by the State” (Article 53); “Employing units must provide their workers with occupational safety and hygiene conditions and necessary work protection items that conform with State regulations. Employing units shall conduct regular physical examinations for workers engaged in operations that pose occupational hazards.” (Article 54); and “Workers engaged in specialised operations must undergo special training and obtain qualifications for those specialised operations” (Article 55). It is also noteworthy that, although this chapter of the Labour Law indicates that “In the course of their work, workers must strictly abide by the operational safety procedures” (Article 56(1)), it also emphasises that “Workers shall have the right to refuse to perform risky operations unlawfully instructed or ordered by the employing unit’s management personnel. Workers shall have the right to criticise acts endangering life and health and to report or complain about such acts to the authorities” (Article 56(2)).

The 2001 Law on the Prevention and Control of Occupational Diseases changes the traditional occupational health and safety legislative ideology that the State, employer and worker are, respectively, “rights-subject”, “obligation-subject”, and “benefit-subject”, in favour of enumerating the various rights-owning entitlements of workers at work. In doing so, this has given rise to a clear clash of rights and obligations between workers and employers, and can, by and large, be characterised as establishing a duty to protect workers’ occupational health and safety rights (albeit that there is no special chapter under that heading to be found in the Law). There is, thus, direct stipulation of some eight areas of workers’ rights – covering the right to access information; training; special protection; the right to criticise, whistle-blow, and complain; the right to refuse to work in a hazardous environment; participation rights; the right to occupational health; and entitlement to injury compensation. This creates a strong framework of legal protection for workers’ legitimate occupational health and safety rights and the duty to eliminate occupational injuries. Meanwhile, the Work Safety Law of 2002 provides that, “Workers in production and business units shall have the right to work safety in accordance with law” (Article 6). That Law also includes a special chapter entitled “Rights and Obligations of Workers”, which clarifies *inter alia* the workers’ rights of access to information, to make suggestions, to criticise, report and appeal, not to be subjected to dangers to their personal safety in the event of an emergency, to refuse to undertake such work, to access occupational injury insurance, and to claim civil compensation. Taken in the round, it can be seen that China’s modern occupational health and safety legislation is consistent with the relevant ILO Conventions.⁶

6. Chang Kai, *Labour Rights Theory* (China’s Labour and Social Security Press, 2004), p. 196.

It may also be noted that, in December 2006, the Standing Committee of the NPC approved ILO Convention No.155. The eventual ratification of this international Convention has the potential further to contribute to improving the level of occupational health and safety protection in the PRC.

9.3 SHORTCOMINGS IN CHINA'S OCCUPATIONAL HEALTH AND SAFETY LEGAL INSTITUTIONS AND ONGOING DEVELOPMENTS

As has already been observed, against a background of China's development of a socialist market economy and the development of rule of law within the PRC, the trend towards legal protection for workers' occupational health and safety has been emerging strongly. Thus, over a number of years, the legal framework has been firmly established. However, risks to workers' occupational health still exist, serious industrial accidents occur all too frequently, and the rate of infection from occupational diseases remains high. Key reasons for this can be found in the dynamic economic interests and the subordination of labour rights by capital. At the same time, the imperfect state of the law, an absence of effective administrative inspection, and the problem of corruption amongst officials also contribute to this continuing problem. In what follows, some analysis and discussion of the perceived shortcomings is offered.

9.3.1 The Lack of a Comprehensive Legal Modification Mechanism

Currently, the State legislates, respectively, in relation to occupational safety protection and the prevention of occupational diseases, which leads to a juxtaposition of occupational disease prevention law and work safety law. This situation is not really suitable for the establishment of a comprehensive nationwide management institution to prevent occupational disease. There is a dispensable relation between occupational health and safety, which serves to address the worker's physical safety, and physiological and physical health. The Work Safety Law targets working safety protection, whereas the Occupational Disease Prevention Law institutionalises industrial hygiene and occupational disease prevention. These twofold Laws have their own legislative systems, which are not coherent with each other. The ideology within these two Laws over-emphasises their economic feature, rather than their social interest character. In consequence, they seek to promote economic development through mere safe conduct, with a consequent lack of in-depth care for the human being.⁷

So far as any occupational health and safety administrative management institution is concerned, there is no nation-wide department which assumes responsibility for this. Instead, the Labour Law states clearly that, "The labour

7. Tang Lanrui & Qiu Shongfeng (OHS Association of North Taiwan): *The Preliminary Analysis on OHS Legal Institution of Two-Shores* (Construction Safety, Vol. 12, 2003).

administrative department within the State Council should be responsible for national labour-related affairs.” In consequence, the labour administrative department is in charge of occupational health and safety affairs, since occupational health and safety constitutes a key component of labour law.

However, the subsequent Law on the Prevention and Control of Occupational Diseases provided that, “The health administrative department within the State Council shall be responsible for occupational disease prevention and monitoring.” Although the Work Safety Law does not indicate the department which is to be responsible for its operation, in practice the management role *vis-à-vis* occupational safety has been transferred from the labour administrative department to the work safety bureau, which is positioned directly under the State Council. In relation to the inspection of hazardous machinery, the management role here is undertaken exclusively by way of national quality checks and inspection bureaux. In addition, the mining safety inspection authority, the public security bureaux, business and industrial administrative departments, and even party internal disciplinary departments have their own specific specialised roles to play. All of these, each within the scope of their own particular administrative powers, undertake inspection and monitoring activity in relation to the enforcement of national occupational health and safety laws. Very often, however, there is an absence of coherence or co-operation between these departments – which can lead to a lack of ability to deal with accidents, particularly if enterprises are able to circumvent their responsibility or where they are free to abuse their power. In consequence, therefore, so far as issues such as those mentioned here are concerned, arrangements for the associated occupational health and safety protection need, in the long run, to be brought together within a single entity – arguably by drawing upon models from countries such as the USA, Japan, or the United Kingdom.

In relation to current legislative practice, the State Council, the State Administration of Work Safety, the Health Ministry and the Ministry of Labour and Social Security (subsequently, the Ministry of Human Resources and Social Security), have issued hundreds of occupational health and safety related laws and regulations. However, there is an absence of coherence evident during the process of issuing and implementing those instruments. The Work Safety Law and the Law on the Prevention and Control of Occupational Diseases only target the obvious and most common examples of occupational accidents and basic work-related diseases – which leaves them a long way short of the requirements indicated by ILO Convention No.155 for comprehensively and systematically dealing with work-related accidents and disease.

Given this shortfall, it is suggested that, by drawing upon experiences in countries such as the USA, Japan, and the United Kingdom, the comprehensive quality of the PRC’s occupational health and safety protection laws should be improved. Furthermore, thoroughgoing review of the current occupational health and safety related laws and regulations should be emphasised. In the meantime, an independent occupational health and safety protection system, combined with coherent laws and regulations, is urgently required.

9.3.2 The Low Coverage of Occupational Health and Safety Protection Laws

Currently, the coverage of the Work Safety Law and the Law on the Prevention and Control of Occupational Diseases is, in reality, very low. The scope of coverage of law does not depend upon its scope of application. Rather, according to research by the ILO, the coverage of a national occupational health and safety law can be judged by looking at the participation rate in work-related injury insurance programmes. The participation rate here refers to the percentage of insured workers as against the total workforce. According to the *2005 Yearbook of Labour and Social Security Statistics* produced by the MoHRSS and the PRC's National Statistical Bureau, the participation rate for the work-related injury insurance scheme in China remained at a level of only 11.3%. Although that rate has been increasing over recent years, there is still a long way to go – particularly when compared with a figure in the order of 98% in countries such as Japan and Germany. Most recently, in August 2008, the State Council issued its plan for the period 2009–2015, which declared a target of achieving a 90% participation rate by the year 2015.

9.3.3 The Content of the Legal System Is Not Systematic or Complete

Although the Law on the Prevention and Control of Occupational Diseases and the Work Safety Law represent the highest quality of occupational health and safety laws and have given rise to overwhelmingly positive feedback, they still demonstrate important shortcomings.

Thus, they suffer from over-technicality in relation to their occupational health and safety rights protection, as well as a lack of specificity and ineffective protection and occupational injury prevention mechanisms. There is an absence of stipulations in relation to the relevant occupational health and safety tripartite management institution and its monitoring activities. Furthermore, it is unclear to what extent the trade union enjoys any rights in its bargaining role, and an absence of a combined institution, thereby giving rise to inefficiency in protecting employment rights. Added to these are the low coverage of occupational injury insurance, and an absence of an effective fee collection mechanism. The lack of a defined right to conduct and to access occupational health and safety training on the parts of workers' safety representatives is also pointed out as problematic. As if these were not enough to give cause for concern, there are manifest imperfections in the occupational disaster compensation mechanism and an absence of any notion of work recovery and rehabilitation – for example, in the context of the modern trend towards work rehabilitation as an element of occupational disaster compensation, as with the promotion of the employability of disabled persons through the provision of employment services such as occupational consultation, training, and specialised personal advice. Perhaps most importantly, however, the call for “the encouraging of employers to

transfer workers whose working capacity has undergone a change as a result of a physical impairment to suitable jobs within their undertakings”,⁸ demonstrates an expectation that employers should provide occupational accident compensation to their workers by way of vocational rehabilitation – yet the legal framework established in China as described above artificially gives rise to difficulties in fully realising workers’ subsistence and health rights.⁹

9.3.4 Tort Liability within the Context of Occupational Injury Compensation and Civil Liability Compensation

China’s labour Laws – and especially the Law on the Prevention and Control of Occupational Diseases and the Work Safety Law – enshrine detailed stipulations on the liabilities arising in the event of violations of occupational health and safety regulations. These embrace civil, administrative, and criminal liabilities, while the subjects of those liabilities include governmental departments and their officials, employers, and senior managers. Apart from this, the Work Safety Law articulates the principle of agency and the liability of staff within industrial enterprises. Meanwhile, the Law on the Prevention and Control of Occupational Diseases integrates the legal responsibilities of construction enterprises, industrial materials and facilities providers and sellers, and the members of Occupational Disease Certification Committees. In brief terms, therefore, a species of tort liability structure has been established, although, in the course of day to day judicial practice, there are arguments over the applicability of different Laws. In particular, when dealing with occupational injury arrangements, the relationship between occupational health and safety and tort liability has emerged as the key point of conflict between the fields of theory and practice.

Article 52 of the Law on the Prevention and Control of Occupational Diseases provides that, “Apart from valid occupational injury insurance enjoyed by a patient suffering from an occupational disease, where the patient still has a right to compensation in accordance with the Civil Code, he shall be eligible to make a request for compensation against his employer”. Meanwhile, Article 48 of the Work Safety Law states that, “Apart from valid occupational injury insurance to which an injured worker who has suffered a work-related accident may be entitled, where the patient still has a right to compensation in accordance with the Civil Code, he shall be eligible to make a request for compensation against his employer.” These clauses show that these two Laws have introduced a dual compensation system which is governed by both work-related injury insurance and civil liability. The fact that this has come about also reflects the social law principle of emphasising the protection of workers through enforcing

8. Article 30(d) of the ILO’s Vocational Rehabilitation (Disabled) Recommendation 1955 (No.99).

9. Yuan Yifeng & Yang Nailian, *View China’s OHS Legislation through ILO Convention No.155 on OHS and Working Environment, Verification of China’s OHS Management System* (Vol. 3, 2003).

the employer's liability. However, the dual compensation system is too abstract to apply, with the result that there are differing views amongst scholars and legal practitioners over its interpretation and application. Some insist that there exists an "optional model". Others maintain that there is a "juxtaposing model". There is also a "back-up model" – one judge even wrote an article suggesting that civil compensation should be eliminated as a head of physiological compensation under the principle of liability for negligence.

The present author is of the view that the "back-up model" is both feasible and sensible, for the following main reasons: (1) First, the "back-up model" is consistent with the original goal of setting up a work-related injury insurance institution. There are two purposes in establishing such an institution – one is to diminish the risk of employers by replacing employers' civil liability, while another is to maximise the worker's interest in compensation where he suffers an occupational injury. As a result, only the work-related injury insurance compensation backed by a tort remedy can embody the spirit of the work-related injury insurance institution; (2) Second, the "back-up model" makes it possible for the worker to achieve full compensation and utilises the "penalty and prevention" function of the civil tort compensation mechanism. As the social insurance characteristic of work-related insurance comes to the fore, the penalty and prevention function in relation to wrongdoing becomes diluted. Thus, "full compensation" for workers is not the key purpose of work-related insurance. By contrast, the tort compensation mechanism – grounded in the principles of justice and morality – is put to use in order to provide full compensation and to penalise wrongdoing. Hence, what a claimant can expect will range from damages for physical and property loss to physiological damage. In this way, the arrangements operate for injured workers, in order to enable them to obtain full compensation, and then, once they have received work-related injury insurance compensation, they will still be eligible for civil tort compensation; (3) Third, from the viewpoint of social resource allocation efficiency, under the "back-up model" workers who have suffered work-related injuries will be eligible to be compensated through both the insurance premium arrangement and through civil tort compensation – although the amount recovered cannot exceed the real loss, which should not lead to over-compensation that would give rise to unfair social resource allocation.

9.4 COMMENT

In summary, there are a number of important issues which need to be discussed further in terms of the right to occupational health and safety and its protection. The presentation here has focused primarily upon analysing three key aspects: (1) what are the correct tenets for the worker's occupational health and safety right; (2) the Chinese legislative meaning of the worker's right to occupational health and safety; and (3) issues relating to China's current occupational health and safety legal institution.

However, identifying and justifying the correct tenets and developing the right legislation do not necessarily ensure the realisation of labour rights, which are actually grounded in implementation and compliance with the relevant laws and regulations. The enforcement of the Labour Law, the Law on the Prevention and Control of Occupational Diseases and the Work Safety Law depends upon dealing duly with issues which are the responsibility of the labour administrative department: “Failure to adopt the laws, to fully comply with the laws, and to punish illegal activities.” Bearing in mind the current situation in China, the major priority should be given to enforcing occupational health and safety through inspection. The inspection institutions should deploy their inspection mechanisms and power effectively to monitor compliance by enterprises and to ensure proper implementation of labour protection and occupational injury accident prevention laws and regulations. A further priority should be to secure channels for workers to obtain an effective legal remedy for their occupational health and safety rights, while at the same time strictly penalising wrongdoing, so that negligent enterprises and occupational health and safety authorities can expect proper punishment. It is suggested that the legal governance of these issues now represents a key need for further exploration and development in the years to come.

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