

Protection for Migrant Workers under Evolving Occupational Health and Safety Regimes in China

La protection des travailleurs migrants sous les divers régimes publics de santé et sécurité au travail en Chine

Protección de trabajadores migrantes bajo los regímenes cambiantes de salud y seguridad ocupacional (SSO) en China

Mankui Li

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Résumé de l'article

Les travailleurs migrants en Chine constituent un groupe distinctif à cause de l'existence du système *Hukou* en vertu duquel ils font face à des restrictions en matière de logement, d'éducation et de soins de santé dans les centres urbains. En comparaison de leurs homologues urbains, les travailleurs migrants sont plus vulnérables, tant en terme de précarité d'emploi qu'en termes de risques professionnels auxquels ils sont exposés, et, de ce fait, ils auraient un plus grand besoin de protection en matière de santé et sécurité au travail. En effet, toute défaillance dans ce type de protection est susceptible d'avoir des effets nocifs disproportionnés sur ces travailleurs.

Le système public de protection en matière de santé et sécurité au travail (SST) en Chine a connu une certaine évolution. L'ancienne structure de prévention, laquelle créait une distinction entre santé au travail et sécurité au travail, s'est avérée moins efficace dans la protection des travailleurs migrants. Reconnaisant ces lacunes, la législature d'État a procédé à plusieurs modifications légales du système de SST, en adoptant et mettant à jour une série de lois. La nouvelle structure de prévention qui en est résulté, en unifiant les deux administrations (santé professionnelle et sécurité au travail), a constitué une avancée en termes de santé et sécurité au travail pour les travailleurs migrants.

En vertu de la théorie de la citoyenneté du travailleur, le régime chinois de SST peut être catégorisé de modèle de régulation directe de l'État. À ce titre, il comporte les forces et les faiblesses de ce type de modèle. En ce qui a trait aux droits de participation, l'absence de comités conjoints consultatifs en matière de SST, de même que l'absence d'un régime de négociation collective efficace, excluent en pratique les travailleurs migrants du processus de décision en matière de SST. Quant aux droits sociaux, l'approche basée sur des distinctions de genre et d'âge constitue également un obstacle aux femmes et aux jeunes migrants. De plus, le degré d'application de la loi varie considérablement dans le temps et entre régions, un processus par ailleurs soumis aux changements constants de l'agenda des priorités gouvernementales. Aussi, les travailleurs migrants rencontrent-ils d'immenses obstacles et défis dans leur quête d'obtenir un accès à une protection adéquate sous le régime actuel de SST en Chine. En conséquence, les réformes à venir devraient mettre l'accent sur la couverture d'une protection pour les travailleurs migrants dans le secteur informel, le renforcement de la participation et la centralisation de l'administration du régime SST, surtout aux fins de son application.

Protection for Migrant Workers under Evolving Occupational Health and Safety Regimes in China

Mankui Li

This paper reports on research into protection for migrant workers under evolving occupational health and safety (OHS) regimes in China. China has made huge efforts in modernizing its OHS regime by unifying occupational health and safety administration. Its current OHS regime can be categorized as a direct state regulation model based on worker citizenship theory. The lack of effective collective bargaining mechanisms on the participation rights dimension and the gendered and aged-based approach on the social rights dimension render current OHS regimes less effective in protecting migrant workers. As a regime of direct state regulation, its performance will hinge on the level of enforcement, which has to compete with economic initiatives on the government's agenda. These weaknesses will produce disproportionately adverse impacts on migrant workers.

KEYWORDS: migrant workers, protection, OHS regimes, participation rights, social rights.

Introduction

In the early 1980s, in order to revitalize the economy, China took reform measures by attracting foreign-investment enterprises (FIEs) externally, and by phasing in market elements to economic sectors internally. These measures created “new labour markets” previously unseen in the command economy era (Howson, 2010). The emergence of “new labour markets” produced the need for migration and mobility of the labour force. The peasants, freed by the rural economic reform, were able to fill vacant employment opportunities in urban sectors, especially for those so-called “Three-D jobs” (dirty, dangerous and demeaning; see Nielsen and Smyth, 2008).

In recent years, China has adopted an ambitious urbanization strategy under which the urbanization rate reached 56.1% in 2015 (National Statistics Bureau,

Mankui Li, Associate Professor, Southwest University of Political Science and Law (SWUPL), Chongqing, China (limankui316@aliyun.com).

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2016), a new peak in China's history. "Rural-urban migration has been one of the important forces accelerating the pace of urbanization in China" (Wang, 2008b: 51). The total population of migrant workers in 2014 reached 274 million, an increase of 1.9% from 2013 (National Statistics Bureau, 2015a). Migrant workers have become an integral part of China's labour force, powering its economic growth in the past several decades.

It is apparent that rural migrant workers are young. In 2014, 56.5% were under 40 years old, 26.4% were between 41 to 50 years old, and the remaining 17.1% were above 50 years old (National Statistics Bureau, 2015b). There is a huge difference in the level of education between different age groups: among those born before 1980, accounting for 53.4% of the total population, 40% have at least a middle-school education, while the rate is 94% for migrant workers born since 1980 (National Statistics Bureau, 2014). The majority of the young rural migrants have never engaged in agricultural work (Fan, 2014); due to the existence of the household registration system ("*hukou* system")¹, they share deep concerns over employment and frustrations about their future that are a product of being permanently locked into minimum wage jobs with few benefits or rights (Chan and Ngai, 2010).

Migration is heavily influenced by human capital endowment (Wang, 2008a). Based on a survey conducted in 2014, migrants moving out of their original locality had a higher level of educational attainment than migrants staying within their original locality. Among the former category, 87.6% had middle-school education and above, while the rate of the latter category was 80.3% (National Statistics Bureau, 2015b). Compared with their urban counterparts (non-migrants with non-agricultural employment), the level of educational attainment for migrant workers is lower (Roberts, 2001).

This means that they are not on an equal footing with their urban counterparts in the labour market in terms of employability and competence. As a result, 65% of migrants were working in the so-called "Three-D jobs". In 2014, 56.6% of migrant workers worked in manufacturing and construction, 11.4% in wholesale and retail, 6.3% in transportation, warehousing and postal services, and 5.9% in catering (National Statistics Bureau, 2015b). It is the existence of the *hukou* system that has forced rural migrants to enter the urban competitive sectors such as construction, manufacturing, and prevented them from entering the urban protected sectors such as the public sector (Wang, 2008a).

Though the government has in place an equal employment opportunity legislative framework, i.e., the *Employment Promotion Law (2007)*, which is designed to eliminate discrimination against migrant workers, such workers are still heavily discriminated against in the urban labour market and are regarded socially as "second class" citizens in urban society (Li, 2008). Many of them

are either employed in the informal sectors, largely off the radar of workplace regulation, or employed by temporary agencies or in other forms of precarious employment. Those employed in the informal sector actually fall outside the scope of the labour regulatory regime and protection because they are not considered to be in an employment relationship (Shi and Wang, 2007). Those employed by temporary agencies, or in other forms of precarious employment, can easily be exploited by their employers through a cascade of subcontractors. In many cases, those workers will be identified as independent contractors under general service agreements, lease agreements for equipment, or construction service agreements (Brown, 2010), and, thus, don't have access to protection afforded by labour and employment law.

Even in the formal sector, their employers will be disinclined to enter into written employment contracts, which is effectively the only proof of an employment relationship for many migrant workers: only 38% of migrant workers entered into written employment contracts with their employers in 2014 (National Statistics Bureau, 2015b). The informality and precarity of employment will produce an adverse impact on migrant workers' access to labour protection, which is attached to employment status. Employed in "urban competitive sectors", migrant workers have to work longer hours, under harsh working conditions, and are more prone to occupational diseases and fatalities (Zhu, 2009). "Confronted with a city of strangers, often physically demanding jobs and few comforts, migrants often experience 'psychological poverty' due to isolation, loneliness and social exclusion" (Nielsen and Smyth, 2008: 3-4). This partially explains why 18 young migrant workers committed or attempted suicide² in the Foxconn factory in Shenzhen in 2010 (Ngai and Chan, 2012).

In addition, due to the restriction of the *hukou* system upon access to social services in urban areas, few migrants move with their family (Wang, 2008a). This creates a generation of 61 million "left-behind children", who grow up without one or both of their parents, which represents one in five nationwide (ACWF and RUC, 2012). It not only leads to the problem of generational transmission of poverty in the sense that these left-behind children, with a lower level of education, will probably seek employment in urban areas, but also it is a source of higher risk of being injured. According to a study (CCR CSR, 2013), 38% of migrant workers said they made errors at work due to worrying about their children who they have left behind.

In terms of health, migrant workers are still the disadvantaged group. They are predominately engaged in tedious, physically demanding and high-risk employment with heavy workloads and long working hours. Lack of access to necessary protection, difficulty in cultural adaptation, and the unavailability of a social support system, all expose migrant workers to greater physical and

psychological health risks (Luo, 2010). What is the legal framework regulating health and safety at work for migrant workers? Do they have access to the legal protection provided to their urban counterparts? What are the weaknesses in the current legal regime that result in the overall poor health and safety for migrant workers? These are the research questions to be addressed in this paper.

To address the above-mentioned research questions, this paper is structured and informed by two parallel analytical frameworks. The first is based on International Labour Organization (ILO) criteria on the effectiveness and performance of OHS systems. According to the ILO:

Systems for coordination and cooperation between the different authorities and bodies involved in the administration of the national OHS system are necessary to ensure coherence of action at all levels and to facilitate the flow of and access to information. The assignment of this function to a central body is an effective way to enhance the performance of such systems. (International Labour Conference, 2009: 27)

The discussion in the first part is organized along this analytical framework. China's legislative efforts in assigning OHS administration to different authorities will be closely examined.

The second analytical framework will be Tucker's conceptual map of OHS citizenship. This conceptual map focuses on two dimensions of citizenship rights for the purpose of OHS regulation: social rights, such as state-enforced guarantees of healthy and safe working conditions, and participation rights, broadly referring to the legal entitlement and ability of workers to influence employers' health and safety practices directly. Accordingly, there are different types of OHS regimes in relation to citizenship rights, depending on the strength of different dimensions (Tucker, 2007). Thus, the map is very instrumental in characterizing China's OHS regime from a comparative perspective. The discussion in the second part mainly focuses on participation rights and social rights to illustrate the weaknesses and strengths, if there are any, of China's OHS regime.

Finally, main conclusions are summarized and possible solutions are offered to tackle the challenges in order to deliver better OHS protection for migrant workers.

Evolving OHS legal regimes

For a long time after the founding of the People's Republic of China, OHS was not among the priorities on the government agenda. There was no national OHS legislation except that the State Council (the equivalent of the Cabinet) promulgated three pieces of OHS-related regulation, i.e., *Regulations on Safety and Health in Factories (1956)*, *Regulations on Safety in Construction and*

Installation Works (1956), *Regulations on Prevention of Dust Hazards in Factories and Mines (1956)*. They established the long tradition and practice of relegating OHS administration and enforcement to the Ministry of Labour.

In the 1980s, the market-oriented economic reform was kick-started. The top legislature enacted the *Labour Law (1994)* as an attempt to modernize the labour and employment law regime by phasing in contract employment mechanisms to replace life-time employment. There was almost no OHS-related legislation except *Regulations on Labour Protection for Women Workers (1988)*, and *Provisional Regulations on Work-injury Insurance for Workers in Enterprises (1996)*. Enterprises took advantage of the lack of OHS legislation and regulation by reducing OHS-related investment in order to keep production costs low. This led to a deterioration of safety. In this period, especially after 1990, the number of work accidents and the frequency of severe accidents had increased on a continuing basis (Guo, 2010). Tragic accidents like the Muchonggou mine blast in 2000, which caused 162 fatalities (Hu and Liu, 2009), were not uncommon.

Nascent prevention structure came into being

The severity of the problem prompted the government to attach more importance to OHS issues in an effort to maintain social stability. Against this backdrop, the top legislature enacted the *Law on Preventing and Treating Occupational Diseases (2001)* (*Law on Occupational Diseases*), which was intended to protect occupational health for workers. This *Law* stipulated procedures to eliminate, contain, and monitor occupational hazards; it also introduced the employers' obligation to conduct occupational health surveillance and health examinations, and to provide protective devices and facilities. Finally, it stipulated procedures for the diagnosis of occupational diseases and workers' access to remedy. Under this *Law*, occupational health administration fell under the jurisdiction of various levels of health departments, which were also in charge of public health issues. In order to protect workers' health at work, health departments were equipped with several levers, including regulation, training/education, and prevention (through awareness-raising and promotion), while stripping away enforcement. Health departments became responsible for the diagnosis of occupational diseases, which was the prerequisite for access to workers' compensation, a deviation from past practice whereby the labour departments took charge of OHS administration.

At the same time, work accidents and fatalities were steadily on the rise, and perhaps at an all-time high with the death toll at 12,554 in 2001, 46% of which occurred in the coal mining sector (State Administration of Work Safety, 2012). In order to tackle this problem and reverse the trend of deterioration, the central government set up a specialized agency, i.e., the State Administration of Work

Safety (SAWS), which also housed the State Administration of Coal Mine Safety, with the aim of reducing work accidents, especially fatalities in the coal mining sector. The top legislature also stepped up its legislative efforts by enacting the *Work Safety Law (2002)*, which was designed to prevent work accidents and promote workplace safety. This *Law* stipulated procedures and standards to eliminate hazards to safety in manufacturing, selling, transporting, storing, and using hazardous materials; it also introduced the employers' obligation to invest in safety technology, set up safety management units or designate safety personnel, provide safety training and protective devices, etc. Under this *Law*, occupational safety administration would fall under the jurisdiction of various levels of work safety administrations. In order to protect workers' safety at work, work safety administrations were equipped with several levers including regulation, enforcement, training/education, and prevention. Interestingly, the enforcement mandate of work safety administrations was very broad, not only covering occupational safety inspection, but also occupational health inspection. Again, labour departments were "sidelined" in the sense that the occupational safety administration was handed over to work safety administrations.

One year later, the State Council promulgated *Regulations on Work Injury Insurance (2003)*, which formalized and institutionalized China's workers' compensation system as a form of social insurance. As made clear in the *Regulations*, workers' compensation was not only concerned with compensation, but also took aim at preventing work accidents and occupational diseases from happening. The *Regulations* set up a nascent premium-adjusting mechanism that was reflective of the record and cost of injuries in each firm. This rudimentary experience rating enabled workers' compensation to influence OHS. As public insurance, workers' compensation in China was operated by labour departments. In addition, "special protection" for women workers formed an integral part of China's OHS regime. Special legislative mandates dealt with the safety and health of women workers (Brown, 2010). According to the *Regulations on Labour Protection for Women Workers (1988)*, protective measures included a list of prohibited employment (physically demanding or hazardous) for women workers, special protection for women during periods of menstruation, pregnancy, maternity and breastfeeding, etc. (Li, 2014). Labour departments were mandated to enforce the *Regulations* and ensure that employers adopted protective measures.

It is fair to say that a nascent OHS regime had come into being at the turn of the century. This regime attempted to separate occupational health from occupational safety and keep them on two parallel tracks. It represented a departure and breakaway from past tradition that intended to solve OHS problems through coordinated strategy, under the heading of labour protection. Under this prevention structure ("old prevention structure"), there were three

key pillars/components: occupational safety administration, occupational health administration, and workers' compensation. Three different government departments were in charge of administering different components, i.e., work safety administrations in charge of occupational safety, health departments in charge of occupational health, and labour departments in charge of workers' compensation. This structure was different from that of the vast majority of both developed and developing countries that integrate occupational *health* and *safety* by putting them under one roof (Liu and Geng, 2000).

The premise on which the old prevention structure was based was that occupational health and safety could be effectively split and regulated separately. This perception was especially popular in China in the sense that people would refer to work accident injury as a "red injury", which would bleed, while occupational disease was referred to as a "white injury", which would not bleed. This premise and perception were not supported and corroborated by any scientific evidence. They depart from the definition of "health" in the *ILO Convention concerning Occupational Safety and Health and the Working Environment (C 155)*: "the term health, in relation to work [...] includes the physical and mental elements affecting health which are directly related to safety and hygiene at work."

A main 'crack' arising from the separation of the two legal regimes related to their rule-making and administration structure (Zou, 2016). Migrant workers were hurt most by the crack in the structure due to the fact that they were disproportionately exposed to occupational hazards. The old prevention structure inevitably resulted in "uneven implementation and enforcement" due to an observable prioritization of the control and management of work safety-related accidents over occupational health prevention and protection by policymakers in practice (Zou, 2016: 20). Occupational health suffered because work safety administrations, despite their mandate, could not effectively conduct occupational health inspection due to the disjuncture between regulation, education, training and enforcement. In addition, labour departments which were in charge of workers' compensation couldn't effectively influence strategy and tactics due to the lack of access to valuable information with respect to prevention activities (WorkSafe BC, 2014). In this sense, the old structure fell short of the best practice promoted by WorkSafeBC. It has been proved to be ineffective in reversing the trend of rising occupational diseases. This conclusion can be reached by reference to the official statistics on accidents and occupational diseases.³

New prevention structure

In the face of the flaws of the old prevention structure about which the working population was increasingly aggrieved, the government was under pressure to respond. The pressure mounted when the news on high-profile tragic

TABLE 1
Number of work accidents and occupational diseases from 2005 to 2011

Year	Work Accidents	Occupational Diseases
2005	127,052	12,212
2006	112,822	11,519
2007	101,480	14,296
2008	91,172	13,744
2009	83,196	18,128
2010	79,552	27,240
2011	79,549	26,401

Source: China Statistics Bureau, Ministry of Health.

cases gained nationwide attention. Among these tragic cases is one headlined as *Opening Chest to Test Pneumoconiosis*, in which a young migrant workers named Zhang Haichao, had to, out of desperation, open his own chest to prove the disease he suffered was indeed pneumoconiosis (Dong, 2009); the other one is known as the *Liu Hanhuang Stabbing Taiwanese Employers Case*, in which a young migrant worker in a Taiwanese-owned factory in Guangdong Province who had injured his right palm on the seventh day after taking the job, finally stabbed Taiwanese employers and caused two fatalities because his employers were taking advantage of loopholes in the law to contest his claim (Luo, 2009). Though these two cases were mainly concerned with injured workers' difficulties in accessing workers' compensation benefits, they did reveal the worrying realities of bad OHS practice. These tragic cases served as catalysts for legislative changes.

In order to address workers' concerns, the top legislature enacted the *Social Insurance Law (2010)* in an attempt to provide better social protection for workers. This *Law* reiterates the basic principles and rules on existing social insurance mechanisms and devotes a chapter to workers' compensation. The legal rules are designed to remove obstacles for workers in access to workers' compensation benefits. Later in the same year, the State Council amended its *Regulations on Work Injury Insurance (2003)* to better implement the *Social Insurance Law*, and released *Regulations on Work Injury Insurance (2010)*. The new *Regulations* provide that a certain percentage of the revenue collected by workers' compensation funds be earmarked for prevention purposes. The *Social Insurance Law* and the new *Regulations* maintain that, to influence OHS, workers' compensation be operated by labour departments, which are also in charge of prevention.

In order to tackle the growing challenges of occupational diseases, the top legislature amended the *Occupational Diseases Law* in 2011. The new *Law*

stresses the employers' duty to cooperate with workers by facilitating access to the diagnosis of occupational diseases with an aim to ease the burden for workers. This can be seen as a direct response to the tragic case of "Opening Chest to Test Pneumoconiosis". Another highlight of the *Law* is to put work safety administrations in charge of occupational health, adding regulation, education/training, and prevention to its portfolios with existing enforcement. Health departments are still relevant to occupational health in the sense that they are still responsible for the diagnosis of occupational diseases.

The next year, the State Council promulgated *Regulations on Special Protection for Women Workers (2012)* to replace the previous *1988 Regulations*. The *2012 Regulations* renewed and updated the protective measures for women workers. For the first time in history, the new *Regulations* stipulated the employers' obligation to prevent sexual harassment against women workers. More importantly, the new *Regulations* stripped labour departments of their enforcement power regarding OHS-related protective measures, and handed it over to work safety administrations.

In 2014, the top legislature amended the *Work Safety Law*, enacting the *Work Safety Law (2014)*. The new *Law* specifically provides protection for temporary agency workers in recognition of their vulnerability against the backdrop of widespread use of temporary agency workers, mainly migrant workers, in recent years. It provides that work safety administrations be in charge of regulation, enforcement, education/training, and prevention regarding occupational safety. Under the new *Law*, work safety administrations will have more power and tools for occupational safety enforcement to ensure compliance, to make stop work orders, and to levy more severe penalties on employers in case of violation.

Though these legislative changes maintain the tradition of separate legislation in fields of occupational *health* and *safety*, they do transform the old failed prevention structure into a new one. Under the new prevention structure, occupational health administration and occupational safety administration are merged into one: work safety administrations' mandate has been broadened to include occupational health administration and special protection for women workers, in addition to existing occupational safety administration. According to the ILO, assignment of functions regarding OHS administration to a central body is an effective way to enhance the performance of OHS systems (International Labour Conference, 2009). With these legislative adjustments, China effectively adopts the practice of the vast majority of countries by having a single government agency, i.e., work safety administration(s), to take charge of OHS regulation, enforcement, education/consultation, and prevention. The new prevention structure can effectively eliminate the discrepancies between the occupational *health* and *safety* administrations created by the old structure. The claim that the

labyrinth of (new) OHS laws designates a large number of different government authorities with unclear and overlapping regulatory mandates (Zou, 2016), seems to be a misinterpretation of the above-mentioned laws.

Though the new prevention structure differs from the old structure in many ways, two features are “inherited” from the old structure and left unchanged. Firstly, the protection afforded in the new prevention structure is still attached to employment status. Only those workers in an employment relationship will have access to such protection. Both *Occupational Diseases Law (2011)* and *Work Safety Law (2014)* make the existence of an employment relationship a condition for protection. If we take occupational health as an example, a worker will have to prove the existence of an employment relationship before any diagnosis can take place. This feature is especially disadvantageous to migrant workers who are engaged predominantly in informal sectors. Proof of an employment relationship is a daunting task for many migrant workers. This amounts to “legal exclusion” under which many migrant workers are excluded from the protection of the new prevention structure.

Secondly, the new structure still separates OHS from workers’ compensation, i.e., OHS is the responsibility of work safety administrations, while workers’ compensation is in the hands of labour departments. Though it may be that “having responsibility for workers’ compensation and OHS rest with one organization is a key element of a world class OHS regime” (WorkSafe BC, 2014: 55), this type of regime is built on the premise that OHS and compensation can be complementary to each other. It will only make sense when a high proportion of the working population is covered by workers’ compensation, as the data or information collected in workers’ compensation can then be used to inform and influence prevention and inspection strategy. Taking Canada as a reference, for the six jurisdictions putting OHS and compensation under one roof, the percentage of the working population covered by workers’ compensation exceeds 91.4%.⁴ Currently in China, based on the official statistics, there are 206.4 million workers covered by workers’ compensation out of 540 million workers.⁵ The percentage of coverage is 38%, much lower than that of Canadian jurisdictions. Given that the coverage is so limited, it is reasonable for China to keep the systems separate.

Characterization based on worker citizenship theory

Under Tucker’s two-dimension approach, there are different types of OHS regimes in relation to citizenship rights, depending on the strength of different dimensions, i.e., market regulation, direct state regulation, mandated partial self-regulation, etc. Taking Canada as an example, a market regulation regime emerged in the 19th century in which workers were written into the regime as market citizens with weak social rights and weak participation rights; in the late 19th

century, a direct state regulation regime emerged in which workers were written into the regime as public citizens with strong social rights and weak participation rights; the early 1960s saw the emergence of a regime of mandated partial self-regulation⁶ in which workers were written into the regime as public industrial citizens with strong participatory and social protection rights (Tucker, 2007).

Using the two-dimension approach to examine China's OHS regime, we find that workers enjoy strong social rights while participation rights, if they exist at all, are weak. In OHS laws, there are many minimum standards and mandatory requirements for employers, such as threshold exposure limits, regular physical examinations for workers, mandatory occupational health surveillance, and prohibition from certain hazardous employment, etc. These all amount to government-enforced guarantees of healthy and safe working conditions. Conversely, workers in China can do little to directly influence employers' OHS practices. Though the laws provide that workers have the right to information regarding hazards, preventive measures and emergency response measures in the workplace, and the right to put forward suggestions on OHS issues, there is no effective mechanism to facilitate the exercise of such rights. There is no mechanism such as joint OHS committees or representatives through which workers can participate in the decision-making process, a problem made worse because of the lack of effective representation by trade unions. In other words, current OHS laws adopt a government-dominated approach to protect health and safety at work (Huang, 2003). This puts China's OHS regime into the category of direct state regulation, which can hardly provide adequate protection for migrant workers.

Lack of participation rights

On the participation rights dimension, there is no consultative joint OHS committee or representative that can give workers a say on OHS matters. The lack of effective collective bargaining mechanisms makes the situation even worse.

In China, the *Trade Unions Law (2001)* provides that workers shall have the right to establish and to join trade unions regardless of their ethnicity, race, gender, occupation, faith, and educational attainment. However, China established a pre-approval procedure before any trade unions can be established. The *Trade Unions Law* mandates that any trade unions other than the All-China Federation of Trade Unions (ACFTU) must obtain the approval from upper-level trade unions before they can be established. This effectively means that there is only one trade union in China, that is the ACFTU, and all other unions are its affiliates (Brown, 2010). It is the pre-approval procedure that distinguishes China's trade union system from systems in many other countries. It greatly departs from the *ILO Freedom of Association and Protection of the Right to Organise Convention (Convention 87)*, which specifically precludes any previous authorization in establishing and joining

trade unions. Such a difference explains why China hasn't ratified *Convention 87* and the *Right to Organise and Collective Bargaining Convention (Convention 98)*, which are part of core labour standards.

In China, trade unions are de facto government organizations (Chen, 2009); or quasi-government social organizations with multiple functions (Brown, 2010). Given that independent trade unions are not allowed in China, union organizing actually means establishing ACFTU branches bureaucratically at various levels (Liu, 2010), i.e., provincial federations of trade unions, municipal federations of trade unions, county federation of trade unions, and enterprise-level trade unions. Except for the grassroots trade unions at the enterprise level, China's union has a vertical organizational structure paralleling that of the government (Chen, 2009). This structure mirrors the dual-track institutional incorporation of China's trade unions: various levels of federations of trade unions have been incorporated in parallel with levels of government, while the grassroots trade unions have been incorporated in workplace management (Chen, 2009). The former situation leads to unions' high dependence on the State, while the latter situation results in grassroots unions' high dependence on employers and management (Liu, 2010). The current union structure has contributed to the weakness of enterprise-level unions, which are highly dependent on, if not subject to, the complete control of management (Chen, 2009).

Traditionally, labour protection activities were regarded as a legitimate function of trade unions, as long as they did not meet with opposition from management and government (Morris, 1985). Enterprise-level trade unions can collectively bargain on a wide range of issues with the employer on behalf of the workers they are representing, including wage levels, working time, health and safety, fringe benefits, etc. However, given that these trade unions are highly dependent on management and employers, the result is almost predictable, with no meaningful agreement for workers. The collective bargaining agreements, though counted in millions according to authorities (MOHRSS, 2015), are no more than duplications of provisions in laws and regulations. Employers remain reluctant to incorporate any substantive details in the collective agreement so that it adds little or nothing to the existing legal regulation of the terms and conditions of employment (Clarke *et al.*, 2004).

The situation is even bleaker for migrant workers. Since many migrant workers are engaged in informal sectors with very high turnover rates, it is very difficult for trade unions to mobilize and organize them (Shen *et al.*, 2008). For migrant workers themselves, the hukou system had long been an obstacle in exercising freedom of association. Their registered status as "peasants" cast doubt on whether they could exercise freedom of association as "workers" (Wu, 2010). The lack of identity as workers and awareness of solidarity adversely affect migrant

workers' attitudes toward trade unions (Yang, 2012). Even though ACFTU revised its Constitution in 2008 to clear the path for migrant workers to join trade unions, it will not help much. Dissatisfied by the lack of participation rights and the trade unions' inability to defend their rights, many migrant workers resort to "wildcat" worker protests and the continuing formation of informal worker organizations (Liu, 2010; Duan and Li, 2014).

Uneven protection caused by the social rights dimension

Strikingly similar to the Canadian OHS regime in late 19th century, the social rights dimension of worker citizenship rights in China is also deeply gendered and age-based, so that demands for protection are not always for the equal protection of all (Tucker, 2007). China has gender specific laws and regulations allegedly accommodating women's special physiological conditions and redressing the inequalities in practice (Zhang, 1996). Built on the premise that women are vulnerable, these laws and regulations offer "special protection" by excluding them from certain types of employment. The "List of Prohibited Employment for Women Workers" annexed to *Regulations on Special Protection for Women Workers (2012)* specifies certain types of employment that are not open to women workers. Though the exclusion is intended to protect women workers from exposure to certain hazards, it does deprive women of employment opportunities, even to the best paid jobs in heavy industry (Havelková, 2010). China also has special protection regulations for young workers who meet the minimum working age of 16 years old, yet haven't reached the age of majority, i.e., 18 years old. *Regulations on Special Protection for Underage Workers (1994)*, which is still in force, elaborate 17 types of employment not open to underage workers. Without doubt, these special protection laws and regulations are government-enforced guarantees of safe and healthy working conditions, yet the gendered and age-based approach creates an obstacle for female migrant workers and young migrant workers in accessing employment opportunities.

A regime of direct state regulation is very promising, just by the mere fact that a government-enforced guarantee of safe and healthy working conditions exists. However, "the level of protection provided by direct regulation [is] hinged on the strength of the law and, more important, its level of enforcement" (Tucker, 2007: 150). When the level of enforcement is high, OHS protection can be guaranteed; while when the government relaxes its enforcement efforts, the level of protection will suffer.

There are two examples in China that can be used as illustrations. One example is the prevention of occupational diseases. Though China has unified the OHS regulation and enforcement in work safety administrations, the regulatory authorities still pay differentiated attention to the prevention of work accidents

and occupational diseases. The prevention of work accidents, especially severe accidents, is high up on the government agenda due to the fact that work accidents and casualties are more visible and acute. The Chinese government always uses the reduction of numbers of work accidents as an indicator of better OHS protection (National Statistics Bureau, 2015a). On the contrary, the latency period and their invisibility earn occupational diseases almost no place on the competing agenda of government. It is estimated that there are 6 million migrant workers suffering from pneumoconiosis (Editorial Board of *China Workers*, 2014), among some 200 million workers who are exposed to different levels of hazards at work (Yan and Fang, 2015). The prevalence of workplace hazards and occupational diseases bitterly reveals the broken promise of protection, which is obviously the result of relaxed enforcement.

The other example is OHS protection in the coal mining sector in China, which was notoriously bad a couple of decades ago. Taking the year of 2002 as an example, catastrophic accidents killed more than 7,000 coalminers, and the casualties per million tons of coal produced were 4.64. In order to reverse the trend of a worsening OHS record, the government changed the coalmining OHS regulatory system into a nationally centralized system by establishing the State Administration of Coal Mine Safety. This system allows the government to step up its enforcement efforts nationwide in a top-down manner, immune from regional variations. As a result of this effective regulatory regime and enhanced enforcement efforts, the number of accidents and casualties in coalmining has been reduced dramatically: 931 coalminers killed in 2014 with 0.255 casualties per million tons of coal produced (National Statistics Bureau, 2015a). However, in contrast with the centralized OHS regime in coal mining, the OHS regulatory system in other fields is largely decentralized. In other words, it is up to provinces and municipalities to carry out their enforcement activities. The level of enforcement varies considerably in different regions, which are under pressure to keep their comparative advantage in terms of labour cost by relaxing enforcement efforts.

Due to the weaknesses on the social rights dimension, the protection promised by China's OHS regime is very uneven. The gendered and age-based approach reduces the appeal of special protection by discriminating against women and underage workers. The prioritization of prevention of work accidents in OHS enforcement means occupational health protection is compromised. The varying level of enforcement under the overall decentralized OHS regulatory regime will inevitably lead to an uneven level of OHS protection for workers in different regions, further reducing the promise of protection to an unreliable and unpredictable one. Again, the uneven protection hurts migrant workers most, as they are the ones who are more likely to contract occupational diseases and badly need OHS protection (Zhao, 2012).

Conclusions

China's OHS regime is constantly evolving. Under the old regime, the long-held tradition of separating occupational health from occupational safety resulted in the "structural weakness of its fragmented legal infrastructure" (Zou, 2016: 5). The new regime unites the occupational health administration and occupational safety administration, and puts itself one step closer to the OHS regime in many advanced economies. However, the requirement of an employment relationship as the precondition of OHS protection both under the old regime and under the new regime excludes more migrant workers, as many of them are either engaged in the informal sectors or have difficulties in proving an employment relationship.

Under Tucker's two-dimension approach of worker citizenship rights theory (Tucker, 2007), China's OHS regime, as a regime of direct state regulation, often failed to deliver the protection promised in laws and regulations. The lack of participation rights means workers have no way to influence employers' decision-making on OHS matters. On the social rights dimension, the focus and attention on OHS law enforcement could easily be deflected by the appeal of economic development. In practice, workers are commonly left to fend for themselves as market actors dependent on the exercise of their legal right to contract. This poses even greater challenges for migrant workers who are more vulnerable due to lower levels of education, lack of skill, etc. With very limited bargaining power, migrant workers cannot effectively defend their OHS rights by exercising their rights to contract.

Accordingly, China needs to further improve its OHS regime in order to provide adequate protection for migrant workers. Firstly, it needs to solve the "legal exclusion" problem caused by the requirement of an employment relationship. This can be done by further expanding the scope and broadening the definition of the employment relationship to cover migrant workers in informal sectors. It also has to look for innovative ways to eliminate obstacles faced by migrant workers in proving the existence of an employment relationship, especially in the absence of written contracts. Secondly, the future OHS regime needs to solve the problem caused by the lack of participation rights. This can be done by institutionalizing joint OHS committees and strengthening collective bargaining mechanisms via reformed trade unions. Thirdly, the future OHS regime needs to address the problem of uneven protection caused by social rights dimensions. China needs to re-examine its gender-based and age-based approach with an aim to protect, not exclude migrant workers. In addition, it should move further towards a centralized OHS regime so that enforcement efforts can be coordinated on a national level and thus be immune from regional variation, as it has already done in coal mining.

Notes

- 1 Under the hukou system, the households in the urban areas are registered as urban households, with access to employment opportunities and social security benefits; while the households in the rural areas are registered as rural households, which are supposed to engage in agricultural work. The explicit motivation underlying the hukou system was to discourage rural-to-urban migration. Though the hukou system has been reformed in recent years to allow rural residents to seek employment in urban areas, rural migrants are still facing huge challenges in having equal access to employment opportunities and social protection (Li, 2014).
- 2 Since suicide is excluded from the scope of workers' compensation, few people in China will link these tragedies to the lack of OHS protection. A common narrative for the company is to blame young migrant workers for being emotionally fragile and lacking resilience.
- 3 It is understood that the official statistics were highly unreliable due to serious problems of under-reporting and claim-suppression. However, assuming that the rates of under-reporting and claim suppression stay the same, the statistics did show that the number of occupational diseases were on the rise from 2005 to 2011.
- 4 According to the Association of Workers' Compensation Boards of Canada (AWCBC), the latest available statistics with respect to the percentages of coverage for the six jurisdictions are: British Columbia, 97.34% (2014); Quebec, 93.17% (2014); New Brunswick, 91.40% (2014); Northwest Territory and Nunavut, 100% (2014); Prince Edward Island, 97.06% (2014); Yukon Territory, 99.76% (2013). Available at: <www.awcbc.org>.
- 5 There are no official statistics regarding the percentage of the workforce covered by workers' compensation. In 2014, the workforce in China was 773 million, including 29.5% in the primary sector, 29.9% in secondary industries and 40.6% in tertiary industries. According to China's system, only workers in secondary and tertiary industries can be covered by workers' compensation, with agricultural workers excluded. Combined together, there are 540 million workers who should be covered by workers' compensation. However, the actual coverage is very limited (MOHRSS, 2015).
- 6 Regimes of mandated partial self-regulation varied considerably in the strength of worker citizenship rights in other countries (Tucker, 2007).

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SUMMARY

Protection for Migrant Workers under Evolving OHS Regimes in China

Migrant workers in China are a distinctive group due to the existence of the *hukou* system under which they continue to face restrictions on housing, education, and health care in urban areas. The equal employment legislation does not solve the discrimination problems. Compared with their urban counterparts, migrant workers are more vulnerable, in terms of both precarity of employment and the occupational hazards that they are exposed to, and badly need OHS protection. Any weakness of OHS regime will have a disproportionately adverse effect on migrant workers.

China's OHS regime has been through constant evolution. The old prevention structure, which separated occupational health from occupational safety, was proved to be less effective in protecting migrant workers. In recognition of its deficiencies, China's top legislature made adjustments to the OHS legal framework by enacting and updating a series of laws. The new prevention structure, unifying the occupational health administration and the occupational safety administration, represents a step forward in terms of OHS protection for migrant workers.

According to worker citizenship theory, China's OHS regime can be categorized as a direct state regulation model. It carries with it both the strengths and weaknesses of direct state regulation models. On the participation rights dimension, the lack of consultative joint OHS committees and the lack of effective collective bargaining shut migrant workers out from the decision-making process on OHS matters. On the social rights dimension, the gendered and aged-based approach becomes a hindrance for female migrant workers and young migrant workers. Furthermore, levels of enforcement vary considerably across different periods and areas, subject to the ever-changing priorities on the government's agenda. Migrant workers are still facing tremendous obstacles and challenges in obtaining access to adequate protection under the current OHS regime in China. Future reform measures should focus on delivering OHS protection for migrant workers in the informal sector, strengthening participation, and centralizing OHS administration, especially enforcement.

KEYWORDS: migrant workers, protection, OHS regime, participation rights, social rights.

RÉSUMÉ

La protection des travailleurs migrants sous les divers régimes publics de santé et sécurité au travail en Chine

Les travailleurs migrants en Chine constituent un groupe distinctif à cause de l'existence du système *Hukou* en vertu duquel ils font face à des restrictions en

matière de logement, d'éducation et de soins de santé dans les centres urbains. En comparaison de leurs homologues urbains, les travailleurs migrants sont plus vulnérables, tant en terme de précarité d'emploi qu'en termes de risques professionnels auxquels ils sont exposés, et, de ce fait, ils auraient un plus grand besoin de protection en matière de santé et sécurité au travail. En effet, toute défaillance dans ce type de protection est susceptible d'avoir des effets nocifs disproportionnés sur ces travailleurs.

Le système public de protection en matière de santé et sécurité au travail (SST) en Chine a connu une certaine évolution. L'ancienne structure de prévention, laquelle créait une distinction entre santé au travail et sécurité au travail, s'est avérée moins efficace dans la protection des travailleurs migrants. Reconnaisant ces lacunes, la législature d'État a procédé à plusieurs modifications légales du système de SST, en adoptant et mettant à jour une série de lois. La nouvelle structure de prévention qui en est résulté, en unifiant les deux administrations (santé professionnelle et sécurité au travail), a constitué une avancée en termes de santé et sécurité au travail pour les travailleurs migrants.

En vertu de la théorie de la citoyenneté du travailleur, le régime chinois de SST peut être catégorisé de modèle de régulation directe de l'État. À ce titre, il comporte les forces et les faiblesses de ce type de modèle. En ce qui a trait aux droits de participation, l'absence de comités conjoints consultatifs en matière de SST, de même que l'absence d'un régime de négociation collective efficace, excluent en pratique les travailleurs migrants du processus de décision en matière de SST. Quant aux droits sociaux, l'approche basée sur des distinctions de genre et d'âge constitue également un obstacle aux femmes et aux jeunes migrants. De plus, le degré d'application de la loi varie considérablement dans le temps et entre régions, un processus par ailleurs soumis aux changements constants de l'agenda des priorités gouvernementales. Aussi, les travailleurs migrants rencontrent-ils d'immenses obstacles et défis dans leur quête d'obtenir un accès à une protection adéquate sous le régime actuel de SST en Chine. En conséquence, les réformes à venir devraient mettre l'accent sur la couverture d'une protection pour les travailleurs migrants dans le secteur informel, le renforcement de la participation et la centralisation de l'administration du régime SST, surtout aux fins de son application.

MOTS-CLÉS : travailleurs migrants, protection, régime de santé et sécurité au travail (SST), droits de participation, droits sociaux.

RESUMEN

Protección de trabajadores migrantes bajo los regímenes cambiantes de salud y seguridad ocupacional (SSO) en China

Los trabajadores migrantes en China constituyen un grupo distinto a causa de la existencia del sistema *Hukou* que les impone restricciones en materia de alojamiento, educación y servicios de salud en los centros urbanos. Comparativamente

a sus homólogos urbanos, los trabajadores migrantes son más vulnerables, tanto en términos de precariedad del empleo como en términos de riesgos ocupacionales a los cuales son expuestos, y por ende, ellos tendrían gran necesidad de protección en lo que respecta la salud y la seguridad ocupacional. En efecto, toda falla en este tipo de protección es susceptible de tener efectos nocivos desproporcionados sobre estos trabajadores.

El sistema público de protección respecto a la salud y seguridad ocupacional (SSO) en China ha conocido cierta evolución. La antigua estructura de prevención que creaba una distinción entre salud en el trabajo y seguridad ocupacional, se mostró menos eficaz en la protección de los trabajadores migrantes. Reconociendo estas lagunas, la legislación del Estado ha procedido a varias modificaciones legales del sistema de SSO, adoptando y poniendo al día una serie de leyes. La nueva estructura de prevención que resulta de la unificación de las dos administraciones (salud ocupacional y seguridad del trabajo) ha constituido un avance en términos de salud y seguridad ocupacional para los trabajadores migrantes.

Según la teoría de la ciudadanía del trabajador, el régimen chino de SSO puede ser categorizado como un modelo de regulación directa del Estado. A este título, conlleva fuerzas y debilidades de este tipo de modelo. En lo que concierne los derechos de participación, la ausencia de comités conjuntos consultativos en materia de SSO, así como la ausencia de un régimen de negociación colectiva eficaz, excluyen en la práctica los trabajadores migrantes del proceso de decisión en materia de SSO. En cuanto a los derechos sociales, el enfoque basado en las distinciones de género y edad constituye igualmente un obstáculo para las mujeres y los jóvenes migrantes. Además, los niveles de aplicación de la ley varían considerablemente según los periodos y ámbitos, un proceso que está sometido a los cambios constantes de prioridades gubernamentales. Así, los trabajadores migrantes siguen enfrentando enormes obstáculos y desafíos en su búsqueda de acceso a una protección adecuada bajo el régimen actual de SSO en China. Por consecuencia, las reformas a venir deberían centrarse en la cobertura de protección para los trabajadores migrantes en el sector informal, el refuerzo de la participación y la centralización de la administración del régimen de SSO, sobre todo con miras a su aplicación.

PALABRAS CLAVES: trabajadores migrantes, protección, régimen de salud y seguridad ocupacional (SSO), derechos de participación, derechos sociales.