

# Making Them Pay: A Proposal to Expand Employer Responsibility for Occupational Safety and Health

SAGE Open  
 July-September 2015: 1–10  
 © The Author(s) 2015  
 DOI: 10.1177/2158244015603891  
 sgo.sagepub.com  


Ugochukwu Orazulike<sup>1</sup>

## Abstract

This article looks at occupational safety and health (OSH) regulatory models by deconstructing the two prevailing business practices that shape the OSH right of workers. The two practices are: the introspective, and the extrospective OSH. The article further presents the legal, social, and economic factors driving the OSH standards adopted by enterprises, thereby exposing an increasingly challenging problem facing the two models. This challenge is the trans-territorial OSH problem - a scenario where occupational dangers caused by a given employer are transported to workers in other occupational environments—outside the employer's scope of legal liability. Three key methods are used for analyses: doctrinal approach, interdisciplinary approach, and comparative approach. The doctrinal analysis includes a descriptive overview of OSH so as to show how the right to OSH eludes some workers due to the trans-territorial OSH problem. It covers the overall approaches used, to deconstruct legal, institutional, and economic factors that shape OSH regulation. The interdisciplinary elements of the analysis concern: an analysis of OSH law; an analysis of the economic and social factors that drive corporate behaviors, including corporate views of OSH regulation; and the use of environmental factors to demonstrate the trans-territorial challenge. Drawing insights from the literature, the comparative method used concerns: an analysis of the OSH practices of some large enterprises in the United States, and the EU OSH perspective—particularly the OSH model practiced by enterprises in France. It is shown that while the American OSH model is introspective in character, the EU model is extrospective.

## Keywords

OSH regulation, introspective OSH, extrospective OSH, employer's OSH liability

## Introduction

Very few people will think of occupational safety and health (OSH) when environmental law is mentioned. This is not a startling observation because OSH is a human-centered concept, and its attributions to works are expressed in ways that put workers in focus. The doctrine of OSH seeks to promote the overall health and well-being of employees in the course of their employment services, and also in their working environments. This traditional notion of OSH justifies the tendency to think of OSH as exclusively relevant to rules concerning employees and employers (International Labour Office, 2009). The tendency to discount environmental law or eliminate eco-centric views from the discourse of OSH law would be surely mistaken for three reasons. First, the concept of OSH has developed beyond its traditional concern for the relationship between the employer and the employees. Second, there are many individuals around the world whose working environments are located in natural habitats (United Nations Environment Programme [UNEP], 2011). Third, what is toxic to the environment can impair human health, so in the context of sustainable development,

the correlation between environmental safety and OSH is increasingly being recognized (Goelzer, 1996; Kurukulasuriya & Robinson, 2006).

Apart from the long-standing knowledge about the dangers of hazardous chemicals or hazardous substances used in the manufacture of certain commodities, recent studies about nanotechnology show long-term negative effects that nanotechnology poses to the environment, and how they can potentially lead to human health problems or death (Song, Li, & Du, 2009). In support of that position, the dangers nanomaterials could pose to humans have so far been scientifically demonstrated by exposing the harms they cause to other living organisms and animals (Lam, James, McCluskey, & Hunter, 2004; Warheit et al., 2004). Controlled test about nanoparticles on mice caused pulmonary fibrosis, granulomas, inflammation,

<sup>1</sup>University of Manchester, UK

### Corresponding Author:

Ugochukwu Orazulike, School of Law, The University of Manchester, M13 9PL Manchester, UK.

Email: ugochukwu.orazulike@manchester.ac.uk



Creative Commons CC-BY: This article is distributed under the terms of the Creative Commons Attribution 3.0 License (<http://www.creativecommons.org/licenses/by/3.0/>) which permits any use, reproduction and distribution of

the work without further permission provided the original work is attributed as specified on the SAGE and Open Access pages (<https://us.sagepub.com/en-us/nam/open-access-at-sage>).  
Downloaded from by guest on September 9, 2015

lung cancer, effects similar to mesothelioma, and cardiovascular effects (Shvedova et al., 2005). These cases are primarily about the incidents acknowledged in the literature, regarding the impacts of environmentally harmful activities of employers to workers within the employers' occupational territories. A recent empirical research by UNEP (2011) about oil contaminations and environmental degradations in Ogoniland brings to light the fact that the doctrinal rules of OSH eludes some determinate (unprotected) workers that work in natural working environments. In this article, the discourse of OSH in regard to the UNEP Report indicates a conceptual problem for "a trans-territorial challenge" in the field of OSH law (Dau-Schmidt, 1995).

A trans-territorial OSH challenge is a situation where the actions of an employer create occupational dangers or harms in a different occupational territory, for workers other than the employees of that employer. The doctrinal rules of OSH, in terms of its relevance to sustainable environmental policies and natural working environment, will be the concern of the next part of this article. It is also shown in this part that (a) environmental protection or objectives are permeating OSH law and policy; (b) the economic prospects of nanoparticles, its technological benefits, and its biopersistence character are currently hotly debated topics of OSH law (Moore, 2012); and (c) the definition of OSH by some official bodies, including International Occupational Hygiene Association (IOHA), includes broader environment protection objectives (Goelzer, 1996; International Labour Office, 2009).

The following part will use prominent trends of OSH practices to examine why some workers may not be able to enjoy the right to OSH in their natural working environments. In this sense, I mean workers affected by the problem of trans-territorial OSH challenge. Presenting the trans-territorial challenge will require that my descriptive account of OSH regulation first provides a brief analysis of two different regulatory regimes, and afterward deconstructs the two prominent trends that shape OSH standards. These two trends or models of OSH standards are (a) an introspective perspective of OSH and (b) an extrospective perspective of OSH. The two trends are, respectively, expressed in the OSH practices of (a) some large business enterprises in the United States and (b) the EU model, particularly the OSH practices of business enterprises in France, through the rules of the French Labour Code (Suk, 2011).

The inherent features of these two views of OSH are linked to both the preventive philosophy of contemporary institutional OSH law and the responsive approaches of OSH regulatory behaviors practiced by some enterprises in the United States and across many other countries. An introspective trend responds to OSH issues by directing resources, schemes, and plans to the needs of workers through a business-focused consideration for judging OSH needs. The extrospective trend accounts for OSH needs of workers through a broader communitarian consideration of needs. The introspective view of OSH appears to be compatible

with a responsive approach to OSH regulation because it is susceptible to unpredictable instances of state interventions (Solomon & Russell, 1984). For the extrospective view of OSH, the preventive approach of eliminating potential occupational dangers or harms seems to be more suitable because the preventive paradigm of OSH aims to remove occupational harms before they affect workers (Suk, 2011).

In the "Conclusion" section, the deconstruction of these regulatory views and approaches helps highlight the gaps in OSH law concerning its non-application to some natural working environments. It also helps frame the proposition that the employers' responsibilities should be expanded to account for the trans-territorial challenges of OSH.

### **The Doctrinal Rule of OSH: OSH in Natural Working Environment**

The article provides a descriptive analysis of the doctrine of OSH by explaining the nature of its policy rules. This aspect is crucial because it places the so-called "vast category of unprotected and excluded workers" (International Labour Office, 2009)—located mainly within the informal economic sectors in developing countries, at the forefront of my proposition for an expanded view of the OSH responsibilities of certain employers. OSH policies emanate from two principal domains of policy enactment frameworks, namely, (a) the international institutional sources of OSH rules and (b) the national legal systems for the operationalization of OSH doctrinal rules. Apart from these two sources of OSH regulations, the doctrinal rules of OSH comprise both the conceptual and the positivistic dimensions of the institutional mission to guarantee workers' occupational or workplace protection. The concept of OSH advocates the view that OSH rules seek to provide protection from occupational dangers or harms, to all categories of workers. The principle of OSH, however, is confined to the formalistic rules of OSH, enforceable within a national labor law regime (International Labour Office, 2006). Thus, the concept of OSH includes all workers, while the principle of OSH excludes unprotected or excluded workers.

The account about the doctrine of OSH exposes the gap in the current international OSH regulatory system for protecting all workers from occupational hazards and harms in their working environments. The regulatory tools for OSH include both international laws and policies that define the meaning of OSH, national OSH legislations, and other policies supplementing those named primary OSH instruments. As a doctrine traditionally established to impose some obligations on employers to their employees, it seeks to offer health and safety protection to employees while in their employment services, and at workplace as well. OSH law has gradually evolved from a body of regulation that is confined to the relationship between an employer and the employer's employees, to a body of rules that regulates the obligations of employers to employees, and other third persons. The conceptual position about OSH law can be found in how the institutional definition of OSH was

constructed. The Joint International Labour Organization (ILO)/World Health Organization (WHO) Committee on Occupational Health at its 12th session in 1995 stated that

occupational health should aim 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; the placing and maintenance of the worker in an occupational environment adapted to his physiological and psychological capabilities; and, to summarize, the adaptation of work to man and of each man to his job. (Alli, 2008, p. 22)

From this definition, it is clear that the supreme target of OSH law is to protect workers in all occupations, from occupational dangers or harms which they are exposed to, by virtue of the nature of their occupations or the state of their working environments. The doctrine of OSH is hence hinged on the assumption that the employer has ultimate authority and control over the workers' working conditions or work spaces, and therefore has legal responsibility to ensure the safety and health of those workers. Some disparate regulatory improvements have been made about the principle of OSH which highlight OSH in terms of strict formalistic provisions because OSH laws are applied empirically according to legal rules established in various countries. A closer examination of the institutional definition of OSH cited above suggests affirmatively that it is conceived as a doctrine that should offer occupational protection to all workers, regardless of the nature of their occupations.

So far, it is widely recognized that the institutional efforts at the global level to promote OSH outcomes have not successfully facilitated full protection especially to a vast indeterminate category of workers predominantly working in the informal economic sectors in many developing countries. To demonstrate this point with a determinate category within the vast category of excluded workers, a recent empirical research reported by UNEP (2011) about oil contaminations in Ogoniland Niger Delta shows that some local workers are exposed to health threats in their natural working environments, due to occupational dangers or risks from environmental degradations sometimes caused by oil corporations operating in Nigeria. The Report suggested that local indigenes whose working environments are situated in natural habitats (the local river, farmlands, creeks, etc.) in Ogoniland are exposed to health dangers through air and dermal exposures to benzene-contaminated natural habitats. Those events in Ogoniland have therefore raised crucial theoretical questions about the doctrine of OSH because they clearly reveal that occupational harms traverse the occupational territory of a single employer whose decisions and actions may be responsible for the trans-territorial occupational hazards. As have been shown in scientific studies, that which poses health threats to other animals and living organisms will unlikely spare human health. Despite the potential dangers of

oil contaminations to communities, institutional OSH law has not clearly recognized the right of workers working in natural environments, in the context of trans-territorial OSH problems (Hanson, 2011; Schmidt, 2011).

Schmidt and Hanson account for the relationship between environmental pollution and the health rights of indigenous populations. According to Schmidt (2011), the native Alaskan tribe, the Inupiat Community of the Arctic Slope, faces potential health risks from offshore oil development. It is alleged that members of that tribe already have disproportionately higher rate of cardio-pulmonary ailments, although the reason for the higher rate of ailments has not been scientifically investigated. Hanson's (2011) comparative account of regulatory methods for oil exploitation describes the operational approaches (practices) used by oil corporations to deal with environmental, health, and safety standards. Importantly, the oil disaster at the Macondo rigs in the Deep Water Horizon Gulf of Mexico clears many skeptical views about the nexus between oil pollution, public health, and environmental protection. "The environmental damage from the spill, the single largest in the history of the petroleum industry, will take decades to fully assess—as will the damage to the Gulf Coast economy and health of its residents" (Hanson, 2011, p. 555). The account also describes the conflicting forces of policy targets that confront regulatory decisions concerning oil pollutions. Through the comparisons of environmental regulations made by Hanson, about approaches the U.S. regulators and Norwegian regulators use for regulating oil exploitation, some insights can be made about the extrospective views for protecting the trans-frontiers of occupational territories, in the oil exploitation sectors. The most elementary difference between the practices of oil corporations in the United States and oil corporations in Norway is the variation in perspectives the enterprises hold for dealing with the risks of oil pollution. However, OSH regulation in New Zealand considers the pursuit of environmental objectives to be coterminous with the pursuit of the health and safety of people and communities.

The difficulty of dealing with the impact environmental pollution has on workers both within and outside the occupational territory of the source of the pollution is constrained by the introspective and extrospective views of OSH practices. At the same time, the introspective and extrospective views of OSH determine the prospect of finding solutions for emerging trans-territorial OSH challenge, that is, for instance, the OSH problems of individuals whose working environments are situated in nature, and whose OSH problems are caused by entities not recognized as their employers, in the eyes of the law.

### **Regulatory Perspectives of the Doctrine of OSH: OSH Standards**

I shall consider OSH standards of business enterprises situated in two different regulatory regimes. The first form of OSH standard concerns non-formally mandated practices of providing

workplace clinics by some large business enterprises in the United States to promote the health and well-being of their workers. The second form of OSH standard relates to the practice of providing workers with workplace doctors, a practice formally mandated on business enterprises in France to guard workers from occupational harms, diseases, and deaths (Suk, 2011). The former category of standard indicates a voluntaristic practice OSH standard, but the latter category emanates from a statutory OSH standard. So why would some business organizations in the United States show what appears to be a form of professional accountability by adopting voluntaristic practices that benefit the occupational health, safety, and well-being of their workers? Before I put forward some answers to that question in my analysis of introspective perspectives of OSH, I will first set a background for OSH regulatory regime in France and the United States.

Let me mention three key factors that will set the foundation of the regulatory perspectives of the two regulatory regimes that I explore. These factors are as follows: (a) the historical context of their labor law regimes are different (Ahlering & Deakin, 2007), and (b) there was a strongly established notion of formal contractual equality of parties in employment relationships in the French labor regulatory regime since the late 18th century (Supiot, 1994). In contrast to that, the British notion of master–servant employment relationship was transplanted into American law during the early phases of industrialization (Tomlins, 2004) iii) there are legal, political, bureaucratic and professional accountability factors that determine whether the statutory goals of the two regimes, which indeed are not dissimilar, can be achieved in practice (May, 2007). To harmonize the two kernels of the discourse (statutory and practice standards), it must be pointed out that the legal, political, professional, institutional, and social contexts of the French and American regimes are necessary determinants of forms of OSH perspectives prevailing in those regimes.

The regulatory contexts of the two categories of OSH practice are marked by some differences that are perhaps unsurprising if references to a historical assessment of the two regulatory regimes are made in some ways. Historically speaking, the protection of the interests of enterprises and of French workers is given due consideration in formal French labor regulation since the era of industrial revolution in Europe. “The various ‘integrative’ conceptions of the enterprise that continue to influence civil law systems today have deep, historical roots . . .” (Ahlering & Deakin, 2007, p. 897). As Ahlering and Deakin (2007) further noted, the logic of *ordre public social*—a formally recognized minimum boundary and binding conditions governing employment relationship—is historically embedded in the French labor law system. This entails the power of the state to regulate among other issues, the working conditions of employees particularly, and the terms of employment relationships generally. The interpretation of an employment relationship by French courts aligns with the historical tradition of “contractual equality of parties” in France. The French Court of Cassation (2000) declared that

the existence of an employment relationship does not depend on the will of the parties however they have expressed it, nor on the label which they give their agreement, but on the factual matrix within which the relevant labour services are carried out.

The American labor law system, however, has an entirely different historical context. The master–servant model, originally a pre-industrial era British notion of employment relationship (Ahlering & Deakin, 2007), was transplanted into American employment law during the early periods of industrialization. According to experts as well as judicial pronouncements of American courts, the concept of master–servant remains part and parcel of the conception of employment relationship in modern U.S. employment law (Glynn, Arnow-Richman, & Sullivan, 2007; *Murray v. Principal Financial Group Inc.*, 2010; *Nationwide Mutual Insurance Company v. Darden*, 1992). The U.S. Supreme Court has this to say about employment relationships:

Although the Act nowhere defines “employee,” “employment,” or related terms, it must be inferred that Congress meant them in their common law sense, since nothing in the text of the hire provisions indicates that those terms are used to describe anything other than the conventional relation of employer and employee. (*Community for Creative Non-Violence et al. v. Reid*, 1989)

Above the still prevailing managerial logic for interpreting modern employment relationships in the United States, the massive power imbalance in that relationship between an employer and an employee is still discernible in the notion of employment at will—a notion that remains till today the cornerstone of U.S. employment law (*Guz v. Bechtel National Inc.*, 2000; Summers, 2000).

The third important foundational factor about the two regimes pertains to the crucial question of whether regulatory standards actually lead to the fulfillment of the goal of OSH law. The legal, political, institutional, professional, and social accountability factors influence the degree of protection standards, which are available to workers in any given OSH regulatory system. “It further follows that an understanding of more formal institutions, including the legal framework, must be complemented by an appreciation of how they interact with informal norms, social conventions, and tacit beliefs in shaping behaviour” (Ahlering & Deakin, 2007, p. 869). An evaluative undertaking about the legal accountability of the legislature in France requires assessment of the extent to which the obligations mandated on business enterprises in France lead to the promotion of OSH well-being for French workers pursuant to the French Labour Code. Such evaluative assessment includes a careful analysis about (a) how fair are the OSH rules enshrined in the Code by the legislature in France? This kind of evaluative account offers determinate view of legal accountability (May, 2007) (b) how reasonable are the mechanisms of the OSH rules or the labor rules that promote the OSH interests of French workers? The same forms of evaluative assessment can generally be made for the

U.S. OSH law, and OSH practice in the United States. For instance, the voluntaristic practice about OSH regulation in the United States befits a process that can be judged based on an evaluative view of professional accountability (May, 2007) (c) an evaluative account can be even provided to map a view of political accountability (May, 2007), in the sense of the type of regulatory climate supported within a regime or the responsiveness of State officials to regulatory shortfalls. The political factors such as deregulation policies, labor market policies, the roles of both employers unions and trade unions, and support for vocational education, altogether can help provide an evaluative view of political accountability in a regulatory regime (Thelen, 2014).

The United States is an outlier here: it has weak levels of regulation in each of the five categories. This is a reflection of the weakness of basic laws governing work time (derived from federal legislation of the 1930s which has not been effectively updated since); a rigid and (for several decades) unreformed system of industrial relations law neither provides for compulsory worker representation at workplace level in the manner of continental European codetermination . . . and the employment at will rule in individual employment law, which preserves the managerial power to discipline and more or less untouched by statute . . . (Deakin, Priya, & Siems, 2007, pp. 146-147)

The social evaluative account entails factors such as the social powers and roles of trade unions, for example, their alliances with political parties; the collective influence of unions in the instances of high union membership and representation or high trade union density in crucial sectors of the economy; and the overall public perception of the importance of unionization. We can provisionally think of this point as useful means for an evaluative view of social accountability in regulatory regimes iv) a further evaluative assessment of the two regimes can be undertaken to provide a view of institutional accountability in the two regulatory regimes of bureaucratic, political, legal, and professional levels of accountability (May, 2007). That form of institutional accountability concerns the characterization of the complementarities of the legal context, the political context, the structural context, and the social context, of OSH implementation and enforcement in the regimes. In other words, the institutional accountability involves a mix of legislative and administrative strategies that the executive may use to influence the bureaucratic policy and behavior of the formal State OSH agency. Outside the framework of the executive policies, has the legislative exercised due political accountability through the exercise of its power of statutory control, resource allocation, or approval powers for resources needed by the formal OSH implementation and enforcement agency, and in view of the nature of delegated powers it bestowed on the formal State OSH agency? Further from that, the issue of regulatory capture, the transparency of the regulatory system, and whether there are and if so what social or representational roles are played by trade union to counterbalance factors

working against the protection of workers from harm, diseases or death, at the working environment. Are the trade unions strong, competent, non-ideological, and united in their bid to promote the sovereign goal of OSH law?

A systematic analysis concerning the evaluative account of the differential regulatory gradients in the two regimes, of the French OSH regime on one hand, and the U.S. OSH regime on the other, is beyond the objective of this article. The central focus of this sub-part is rather to provide a descriptive account of business practices, that is, to, namely, distinguish the current features of OSH perspectives practiced by business enterprises in the two regulatory regimes (Suk, 2011).

As noted in the “Introduction” section, apart from a clear-cut nexus between environmental safety and OSH law, OSH regulation is driven by two key perspectives of OSH practices. The first is an introspective perspective of OSH, where OSH regulation is driven by its conventional notion regarding the concerns of employers, about their obligations to protect individuals within the confines of the employer’s business operations. This perspective may or may not extend to employees of agents, contingent workers, and other individuals directly associated with the operational activities of the employer. The second approach is an extrospective perspective of OSH, where OSH regulation is driven by the notion that an employer should consider the safety and health of his employees, the general public, and the natural environment. This perspective entails accounting for the consequences of the employer’s business activities, for the sake of human well-being particularly, and the environment more broadly. The features of these two cardinal OSH perspectives distinguish them from one another.

The four essential features of the introspective perspective are as follows: (a) It takes a strictly formalistic view of OSH, entailing a relationship between an employer and an employee. Employers tend to concern themselves with the strict explicit mandates of OSH rules. (b) It wields an endogenic orientation, that is, it prioritizes the sovereign objectives of an enterprise or organization (Gillespie, 1990). (c) It prefers self-regulation of OSH practices to preventive state interventions. It opposes formal institutional oversight or institutional control of the rules of OSH practices. (d) It supports economic progress and achievements in ergonomics. It helps organizations to manage and reduce the cost of private health insurance of their workers. On the contrary, the extrospective view of OSH acknowledges the relevant drivers of the introspective version of OSH but has features substantially different from those of the introspective view of OSH. I consider these four most essential: (a) It takes a realist view of OSH. In this case, the realist standpoint (Eto, 2000; Gillespie, 1990; Satoh, 2000; Taylor, 1982) recognizes the communitarian and eco-centric dimensions of OSH law. “If need for occupational hygiene practice is to be met, there must be developments in legislation and human resources and services, following appropriate and realistic approaches” (Goelzer, 1996, p. 987). (b) It entertains exogenic views of

OSH law and practices (Gillespie, 1990; Goelzer, 1996). (c) It considers preventive state intervention to be crucial in realizing the ultimate goal of providing the best possible occupational protection to all workers (Goelzer, 1996). (d) It promotes innovative methods for reducing the economic costs, particularly the cost of public health insurance (Suk, 2011). In view of the collectivist approach to health, the extrospective view of OSH seeks the enhancement of overall human welfare and well-being. I explain the introspective and extrospective traits of OSH enlisted above in the subparts that follow.

### *Introspective Perspective of OSH*

Although the history of OSH standards enforced by U.S. Occupational Safety and Health Act (OSHA) since the 1970s has shifted from some features of extrospective OSH standards, to a regulatory climate dominated by introspective standards, the current model of OSH regulation and practices by some large U.S. business enterprises is the archetype of an introspective view of OSH (Bisom-Rapp, 2009; Glynn et al., 2007; Huber, 2007; Vike, 2007). The introspective perspective of OSH puts the interest of an organization or a business enterprise at the center of its primary goal. It offers a view of OSH practice adapted to the endogenic priorities or interests of the organization.

In the United States, the law makes it relatively easier for employers to terminate employees based on health status, whether they have costly conditions or are medically unfit for their jobs. The doctrine of employment at will allows employers to fire employees with costly chronic conditions, as long as the condition is not a “disability” within the meaning of the ADA . . . (Suk, 2011, p. 1123)

In essence, many U.S. firms adopt OSH practices for optimal use of people resources, ergonomic reasons, or to save costs for private health care insurance (DeJoy & Wilson, 2003; Watson Wyatt, 2008). As noted by Suk (2011), “American employers are instituting company clinics to cut their own healthcare costs, not to promote the public health goal of reducing societal healthcare costs” (p. 1134). The introspective view of OSH is so dependent on the firm’s economic priorities that the practices of avoiding OSH obligations by U.S. toxic chemicals manufacturers are not unusual. Dau-Schmidt (1995) reported that some manufacturers seek cheaper subcontractors to clean spill. As noted earlier, OSH is regulated primarily by the domestic laws of various countries, in most cases as a principle of labor law concerning the relationship between an employer and an employee. The consequence of that leads to the rule-centric focus of many U.S. firms, about strictly formalistic view of OSH practices. Under the U.S. OSHA of 1970, a manufacturer of toxic chemicals will not owe OSH obligations to employees of subcontractors who are hired to clean up toxic spills in the plants of the manufacturer, if occupational accidents should occur (Dau-Schmidt, 1995).

The introspective perspective of OSH recognizes the relationship between OSH law and environmental pollution, although just in the introspective sense (Gillespie, 1990; Moore, 2012; Solomon & Russell, 1984).

When OSH rules mandate legal obligations for the employees’ working environment, business enterprises find incentives to comply with such rules, including aspects of the rules that concern occupational risks from hazardous working environments. In Gillespie’s (1990) account of lead poisoning in the beginning of the 20th century in Australia, the link made between hazardous occupational environments and the employer’s OSH obligations to its employees helps unveil introspective views of business OSH practices. Despite progress in combating the occupational dangers lead poses to workers in the west, lead poisoning remains a huge challenge among OSH rights issues of workers in many developing countries. The contemporary debates about the dangers nanotechnology pose to employees also point to the common introspective practices of many businesses, for businesses stay aloof over poorly regulated OSH issues affecting workers, when regulations fall behind the constantly dynamic realities of OSH needs of workers (Maynard & Kuempel, 2005; Moore, 2012). The view of commercial enterprises on OSH regulation and practices is often determined by the endogenic priorities of the business entity itself. Differing views for a recent pension reform in France in 2010 show the two competing forces of the introspective and extrospective perspectives of OSH at play. Employer organizations pushed for a form of regulation of OSH practices that puts more control or oversight of workplace doctors in the hands of business enterprises. “The most contested issue is employer control over the governance of workplace health services” (Suk, 2011, p. 1110).

From this account, we see that the introspective perspective seeks to reduce what it regards as unnecessary economic burden and poorly informed OSH solutions coming from state authorities. In view of the special significance they accord to their economic constraints and goals, business enterprises believe that the regulation of OSH practices should be voluntaristic (Suk, 2011). An organization is best positioned in virtue of its internal organic structures, to assess and make well-informed judgments about how to achieve the OSH needs of its employees. In any case, the business organization is realistically well positioned to understand how best to optimize the use of its limited resources, to sustain its short-term and long-term interests; interests that include, but are not limited to, the OSH targets of the enterprise for its workers.

The long-term interests of business organizations or *healthy companies* (Rosen & Berger, 1991) account for productivity management, profitability (Goetzel & Ozminkowski, 2000), and the competency of its special human resources. This means that the long-term goal of an organization should include ergonomic factors—the preventive occupational health considerations of the organization’s

workforce (Hendrick, 1995). A broader acceptance by business enterprises of the special significance of human capital opens organizational health promotion and OSH practices to emerging ergonomic issues about promoting and maintaining all essential aspects of the employees' well-being at work (Stokols, 1992). The ergonomic consideration of business enterprises can be framed either in the form of organizational health promotion or health promotive work environment (Shahnavaz, 2007). That proposition is due to my interpretation of Watson Wyatt's (2008) study of U.S. on-site health centers. That study concluded that the employer's primary motivation for establishing on-site health centers is related to the reduction of medical costs.

However, the study showed that 70% of employers claimed reduction in overall health care costs as a factor that caused them to establish on-site health clinics, whereas 30% of employers had a motivation to improve the quality of care for employees. The first category of employers (70%) offers an evaluative judgment of enterprise decisions for it expresses widespread enterprise actions to enhance their profitability, actions that save medical costs for the enterprises (Suk, 2011). It is a preventive and cost-effective approach to OSH practices, though in a truly introspective sense. The second category of employers (30%) offers an evaluative ergonomic judgment of enterprises in deciding to optimally tap the human resources capacity of the workforce (DeJoy & Wilson, 2003; Suk, 2011). It is as well a preventive approach to managing OSH obligation, and again in an introspective sense. It is unclear whether in the second category, the profitability and survival of the business enterprises depended on the special (scarce) competencies and skills of their human capitals. Either way, that is, whether employers introduce on-site health care clinics to reduce medical costs—not determined by employee-focused primary consideration—or they introduce the health care centers to optimize productivity and profitability through considerations fundamentally determined by the employees' health care needs, this introspective feature of OSH practice helps reduce the cost of the employer's private health care insurance or the employer's private health care budget.

The prevailing OSH standards oscillate between the introspective perspective and the extrospective perspective. I have presented the features of its introspective view, and now my analysis swings to the extrospective features of OSH practices.

### *Extrospective Perspective of OSH*

By its very nature, the extrospective version of OSH inspires a communitarian view of OSH regulation. The conceptual aim of OSH as equally expressed in the ILO's definition seeks to offer the best possible occupational protection to workers in all occupations. The OSH practices mandated under the European model show an extrospective perspective of OSH for it requires employers' responsibilities for the overall welfare of all their employees, mandates that the improvement of workers' safety hygiene and health should not be subordinated to purely economic considerations, and that the employers can

sometimes be responsible for other third parties who may be exposed to harm as a result of the activities of those employers. The European model has extrospective perspectives of health promotion and protection because it expresses exogenous views about human welfare, compared with the introspective views of economic concerns or goals of an enterprise. This means that the extrospective model looks beyond the organizational goals for protecting workers from occupational harms, by targeting to protect human persons from harms caused by the activities of an organization, regardless of the significance of the external individuals to that organization.

Member States have a responsibility to encourage improvements in the safety and health of workers on their territory; whereas taking measures to protect the health and safety of workers at work also helps, in certain cases, to preserve the health and possibly the safety of persons residing with them. (Council of the European Communities, 1989)

The exogenic orientation of the European model offers a communitarian view in two ways: (a) with regard to its effort to promote ergonomics through formal regulation. Employers are mandated to take steps to ensure that work is adapted to the individual and not the individual to his work, in that case, that the employee's duties, equipment, production methods, and the employment's downsides be designed or managed in manners that suit the worker, (b) with regard to its target to protect immediate relatives of employees from potential occupational illnesses, which their loved ones may bring home from work (Kar-Purkayastha et al., 2011; Roscoe, Gittleman, Deddens, Petersen, & Halperin, 1999; Whelan et al., 1997). The communitarian feature of the European model of OSH practices is elaborate in regard to how OSH was and is still regulated under the French Labour Code. "The 1946 statute, like the Vichy statute it replaced, ultimately required regular compulsory medical examinations for all employees, regardless of the size of the firm" (Suk, 2011, p. 1093).

The extrospective perspective of the French Labour Code is not solely concerned about the formalistic OSH obligations of the employer. It is truly communitarian in the following ways: (a) It seeks to protect the health of the worker through the statutory policy of regular medical assessment of the worker's health conditions in connection with the terms of his employment, (b) it aims to determine whether the employee poses a danger to any other workers, and (c) it imposes duty to record and report potential outbreak of illnesses through occupational harms. "The workplace doctor is obligated to declare and report toxic exposures and diseases to relevant authorities" (Suk, 2011, p. 1103). In view of duties imposed on workplace doctors under the Social Security Code, the OSH practices of enterprises in France help reduce the cost of public health insurance.

Although the occupational medical examination is not intended to replace primary preventive healthcare, it does include many essential elements of a routine preventive checkup with a primary

care physician. Consequently, in practice, it makes all employees learn new facts about their own health that they might not otherwise investigate through primary healthcare. (Suk, 2011, p. 1095)

Studies show that 40% of workers in Paris get regular medical checkups from their workplace doctors alone. The same study suggests that 35% of cancer cases in France were detected by workplace doctors, and that 73% of the cancer diagnosis were made at the very early stage of the conditions (Suk, 2011). The OSH practice of French business enterprises although emanating from a statutory standard is hence an archetype of OSH regulatory practices promoting the ultimate conceptual goal of OSH law, that is, the protection of the worker from occupational harms.

### **Extrospective Versus Introspective OSH Practices: Preventive or Responsive Approach to OSH Regulation?**

The EU OSH law includes a preventive approach due to its approach for regulating how workers are protected, so it mandates that the employer has a duty to prevent occupational risks (Suk, 2011). “To ensure that workers receive health surveillance appropriate to the health and safety risks they incur at work, measures shall be introduced in accordance with national law and/or practices” (Council of the European Communities, 1989). OSH practices whether in the extrospective or the introspective form are linked to more formal regulatory obligations of governments. Views of OSH practices may be preventive in the ways they fulfill OSH regulatory goals if the practices facilitate the protection of individuals from occupational dangers or illnesses: if it seeks the total elimination of occupational harms for individuals. OSH views will in this sense be extrospective-preventive OSH regulation. In view of the provision of Article 14 of Directive 89/391/European Economic Community (EEC) mandating OSH measures through national law and/or practices, the French Labour Code is a form of extrospective-preventive regulation. The practice of the French workplace doctors is therefore preventive in its extrospective aims of OSH because “[a]lthough the purpose of the checkups is to ensure that the employee’s health is compatible with her job, the examinations, in effect, delivers preventive healthcare to a significant portion of the French population” (Suk, 2011, p. 1108).

Outside certain exceptional responsive interventions, the regulatory approach of the U.S. OSHA by not mandating behavior that targets individuals outside the framework of employment contract, and the rule that the guarantee of OSH for workers should not be subordinated to purely economic considerations, is introspective in its approach to regulating OSH. The practice by some U.S. firms to provide workplace clinics manifests some OSH preventive features, whether with the aim of merely reducing the overall economic cost of private health insurance for an organization, or with the aim

of promoting ergonomic objectives of an organization, but in the introspective sense (Suk, 2011). Hence, the perspective of OSH practices in the United States through the provision of workplace doctors is a form of introspective-preventive approach to OSH regulation.

The practice of enterprises in the United States can also be explained through a responsive method of OSH regulation. A responsive approach to the regulation of OSH entails less stringent formal rules for regulating the conditions of workers working under potentially hazardous conditions or with potentially dangerous occupational activities. It is responsive in the sense that the government will be compelled to act if occupational disasters causing great human harm occur, that is, when endemic occupational harms affect the health of many workers, or when the danger of spreading diseases to the public emerges through occupational activities. The system of intervention under the introspective perspective of OSH reacts to imminent or widespread harms to humans, which is why it is considered to be a form of introspective-responsive approach to OSH regulation (Rainhorn, 2013). For instance, one account described how statutory improvements to state and local laws got a political boost in U.S. OSH debates in the aftermath of the Bhopal tragedy in India, by exposing the divides between the introspective and extrospective perspectives of OSH practices (Solomon & Russell, 1984). Although the palpable feel for the disaster in the public eyes energized the arguments of the proponents of the extrospective version, the opponents of that version sought to play down the significance of the Bhopal incident as a parameter for OSH regulation in the United States. “Business groups are arguing that the Bhopal accident shouldn’t be part of the debate over state and local disclosure rules, but they fear they aren’t being heard” (Solomon & Russell, 1984, p. 22).

The approach where business enterprises insist that organizational factors or concerns should determine the practice of OSH may be the most suitable explanatory tools for the extrospective-responsive form of OSH regulation. Due to its conceptual and statutory character, the extrospective-responsive approach to OSH will be predominantly demonstrated theoretically. Ultimately, the extrospective perspective of OSH is meant to fulfill communitarian objectives, but the media with which it is designated to fulfill that course determine whether it will in reality be preventive or responsive. If OSH mandates are overly expensive, if statutory rules ignore systemic factors or the economic concerns of businesses, then such OSH rules may never be completely implemented. Such OSH approach would undermine the conceptual objective of OSH law, which is, namely, to provide the best attainable protection to all workers, from occupational harms. A cost-ineffective OSH mandate renders OSH rules to dormant and non-implementable laws. In any case, the salient point is that OSH regulation under the conditions alluded to will in practice (in reality) becomes a form of extrospective-responsive OSH approach, because many organizations will be incapable of implementing unrealistic OSH rules, and the government

will usually be forced to intervene in the event of great occupational disasters, such as the lead poisoning of workers in Port Pirie Australia during the first half of the 20th century, or the Bhopal incident in India in December 1984.

## Conclusion

To guarantee the OSH of workers, employers have an implicit legal duty to keep the places that their employees work safe from occupational dangers and harms. The OSH duty of an employer is regulated on two domains: (a) the duty the employer owes to the employees or workers as individuals, by virtue of the employment contract; and (b) the duty the employer owes to the employees concerning the health and safety of the occupational territory or working environment. A breach of duty in the second domain could trigger legal sanctions by the invocation of the rights residing in the first domain.

The doctrine of OSH therefore concerns the rules about the employer's responsibilities to workers on one hand, and the responsibilities the employer owes concerning the workplace on the other hand. There is a tendency sometimes to confuse the OSH obligations of an employer within a given occupational territory, and the OSH obligation which an employer may owe to workers in occupational territory contiguous to that employer's occupational territory—at least from an extrospective perspective of OSH rights. In this part of the article, I am directing my analyses to the gap in OSH regulation in the trans-territorial context; that is, the obligation that an employer may incur for being in a position to guarantee the protection of workers from occupational harms, both within and outside the employer's occupational territory. Trans-territorial OSH involves the transportation of occupational danger or harm from one occupational environment to another occupational environment.

Not only are there conditions that affect workers' health status, thus aggravating the adverse effect of occupational exposures, but there also may be interaction between workplace hazards and the surrounding communities. This is particularly true of the informal sector (cottage industry) and agricultural work, where it is not unusual for the working and living environment to be the same. (Goelzer, 1996, p. 991)

To emphasize the point again, expanding an employer's responsibilities can take place in two ways: (a) expanding the responsibility of an employer to provide OSH guarantees to the contingent workforce, and employed or non-employed workers or third persons (individuals), whose health may be impaired by activities within the employer's occupational territory, including employment service (Dau-Schmidt, 1995; DeJoy & Wilson, 2003). In that light, expanding the employer's OSH responsibilities is accordingly an introspective perspective of OSH; and depending on how the regulatory systems are implemented, such expanded responsibility will be an introspective-preventive or an introspective-responsive approach to regulating OSH behaviors; (b) expanding the

responsibility of an employer to provide OSH guarantees to workers in occupational territories contiguous to the employer's occupational territory, whose health may be impaired by activities, although originating from a different occupational territory, affect the health of (those) workers outside the employer's occupational territory. In essence, this second case entails the transportation of occupational harm from one workplace to a different workplace, or from one workplace to different workplaces (Calvert et al., 2008). This is the context of trans-territorial OSH challenge alluded to in this article.

## Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

## Funding

The author(s) received no financial support for the research and/or authorship of this article.

## References

- Ahlering, B., & Deakin, S. (2007). Labour regulation, corporate governance and legal origin: A case of complementarity? *Law & Society Review*, 41, 865-908.
- Alli, O. B. (2008). *Fundamental principles of occupational health and safety*. Retrieved from [http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms\\_093550.pdf](http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_093550.pdf)
- Bisom-Rapp, S. (2009). What we learn in troubled times: Deregulation and safe work in the New Economy. *Wayne Law Review*, 55, 1198-1265.
- Calvert, G. M., Karnik, J., Mehler, L., Beckman, J., Morrissey, B., Sievert, J., . . . Moraga-McHaley, S. (2008). Acute pesticide poisoning among agricultural workers in the United States, 1998-2005. *American Journal of Industrial Medicine*, 51, 883-898.
- Community for Creative Non-Violence et al. v. Reid, 490 U.S. 730 (1989).
- Council of the European Communities. (1989). *Council directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work*. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31989L0391>
- Court of Cassation. (2000). Labour Chamber, Judgement No. 5371.
- Dau-Schmidt, K. G. (1995). The labor market transformed: Adapting labor and employment law to the rise of the contingent work force. *Washington and Lee Law Review*, 52, 879-888.
- Deakin, S., Priya, L., & Siems, M. (2007). The evolution of labor law: Calibrating and comparing regulatory regimes. *International Labour Review*, 146(3-4), 133-162.
- DeJoy, D. M., & Wilson, M. G. (2003). Organizational health promotion: Broadening the horizon of workplace health promotion. *American Journal of Health Promotion*, 17, 337-341.
- Eto, K. (2000). Minamata disease. *Neuropathology*, 20, S14-S19.
- Gillespie, R. (1990). Accounting for lead poisoning: The medical politics of occupational health. *Social History*, 15, 303-331.
- Glynn, P. T., Arnow-Richman, R., & Sullivan, C. A. (2007). *Employment law: Private ordering and its limitations*. Austin, TX: Wolters Kluwer.

- Goelzer, B. I. F. (1996). The harmonized development of occupational hygiene: A need in developing countries. *American Industrial Hygiene Association Journal*, 57, 984-995.
- Goetzel, R. Z., & Ozminkowski, R. J. (2000). Disease management as a part of total health and productivity management. *Disease Management and Health Outcomes*, 8(3), 121-128.
- Guz v. Bechtel National Inc., 100 Cal. Rptr. 2d 352 (2000).
- Hanson, A. L. (2011). Offshore drilling in the United States and Norway: A comparison of perspectives and performance approaches to safety and environment regulation. *Georgetown International Environmental Law Review*, 23, 555-575.
- Hendrick, H. W. (1995). Future directions in macroergonomics. *Ergonomics*, 38, 1617-1624.
- Huber, A. G. (2007). *The craft of bureaucratic neutrality: Interests and influence in governmental regulation of occupational safety*. Cambridge, UK: Cambridge University Press.
- International Labour Office. (2006). *The employment relationship*. Retrieved from <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf>
- International Labour Office. (2009). *ILO standards on occupational safety and health: Promoting a safe and healthy working environment*. Retrieved from [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_103485.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_103485.pdf)
- Kar-Purkayastha, I., Balasegaram, S., Sen, D., Rehman, A. J., Dargan, P. I., Johnston, D., . . . Cordery, R. (2011). Lead: Ongoing public and occupational health issues in vulnerable populations: A case study. *Journal of Public Health*, 34, 176-182.
- Kurukulasuriya, L., & Robinson, N. A. (Eds.). (2006). *Training manual on international environmental law*. Hertfordshire, UK: Earthprint.
- Lam, C. W., James, J. T., McCluskey, R., & Hunter, R. L. (2004). Pulmonary toxicity of single-wall carbon nanotubes in mice 7 and 90 days after intratracheal instillation. *Toxicological Sciences*, 77, 126-134.
- May, P. J. (2007). Regulatory regimes and accountability. *Regulation & Governance*, 1, 8-26.
- Maynard, A. D., & Kuempel, E. D. (2005). Airborne nanostructured particles and occupational health. *Journal of Nanoparticle Research*, 7, 584-614.
- Moore, J. (2012). An evaluation of whether New Zealand's Occupational Health and Safety Law adequately addresses the risks to workers exposed to nanotechnology and nanoparticles. *New Zealand Journal of Employment Relations*, 37, 100-117.
- Murray v. Principal Financial Group Inc., 613 F.3d 943 (2010).
- Nationwide Mutual Insurance Company v. Darden, 503 U.S. 318 (1992).
- Rainhorn, J. (2013). The banning of white lead: French and American experiences in a comparative perspective (early twentieth century). *European Review of History*, 20, 197-216.
- Roscoe, R. J., Gittleman, J. L., Deddens, J. A., Petersen, M. R., & Halperin, W. E. (1999). Blood levels among children of lead-exposed workers: A meta-analysis. *American Journal of Industrial Medicine*, 36, 475-481.
- Rosen, R. H., & Berger, L. (1991). *The healthy company: Eight strategies to develop people, productivity, and profits*. New York, NY: G.P. Putnam's and Sons.
- Satoh, H. (2000). Occupational and environmental toxicology of mercury and its compounds. *Industrial Health*, 38, 153-164.
- Schmidt, C. W. (2011). Arctic oil drilling plans raise environmental health concerns. *Environmental Health Perspectives*, 119, A116-A117.
- Shahnavaz, H. (2007). Making ergonomics a world-wide concept. *Ergonomics*, 39, 1391-1402.
- Shvedova, A., Kisin, E. R., Mercer, R., Murray, A. R., Johnson, V. J., Potapovich, A. I., . . . Baron, P. (2005). Unusual inflammatory and fibrogenic pulmonary responses to single-walled carbon nanotubes in mice. *American Journal of Physiology Lung Cellular and Molecular Physiology*, 289, L698-L708.
- Solomon, J. B., & Russell, M. (1984, December 14). U.S. chemical disclosure-law efforts getting boost from tragedy in Bhopal. *The Wall Street Journal*, p. 22.
- Song, Y., Li, X., & Du, X. (2009). Exposure to nanoparticles is related to pleural effusion, pulmonary fibrosis and granuloma. *European Respiratory Journal*, 34, 559-567.
- Stokols, D. (1992). Establishing and maintaining healthy environments: Toward a social ecology of health promotion. *American Psychologist*, 47, 6-22.
- Suk, J. C. (2011). Preventive health at work: A comparative approach. *American Journal of Comparative Law*, 59, 1089-1134.
- Summers, C. W. (2000). Employment at will in the United States: The divine right of employers. *University of Pennsylvania Journal of Labor and Employment Law*, 3, 65-86.
- Supiot, A. (1994). *Critique du droit du travail* [Critique of Labour Law]. Paris: Presses Universitaires de France.
- Taylor, D. (1982). Minamata disease. *Environmental Science and Technology*, 16(2), 81A.
- Thelen, K. (2014). *Varieties of liberalization and the new politics of social solidarity*. Cambridge, UK: Cambridge University Press.
- Tomlins, C. (2004). Early British America, 1585-1875: Freedom bound. In D. Hay & P. Craven (Eds.), *Masters, servants and magistrates in Britain and the Empire, 1562-1955* (pp. 117-152). Chapel Hill: University of North Carolina Press.
- United Nations Environment Programme. (2011). *Environmental assessment of Ogoniland*. Retrieved from [http://postconflict.unep.ch/publications/OEA/UNEP\\_OEA.pdf](http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf)
- Vike, J. (2007). The bureaucracy as a battleground: Contentious politics surrounding OSHA 1980-2004. *Politics & Policy*, 35, 570-607.
- Warheit, D. B., Laurence, B. R., Reed, K. L., Roach, D. H., Reynolds, G. A., & Webb, T. R. (2004). Comparative pulmonary toxicity assessment of single-wall carbon nanotubes in rats. *Toxicological Sciences*, 77, 117-125.
- Watson Wyatt. (2008). *Realizing the potential of onsite health centers*. Retrieved from [www.officemdsf.com/2008-US-0025\\_Watson\\_Wyatt\\_report.pdf](http://www.officemdsf.com/2008-US-0025_Watson_Wyatt_report.pdf)
- Whelan, E. A., Piacitelli, G. M., Gerwel, B., Schnorr, T. M., Mueller, C. A., Gittleman, J., & Matte, T. D. (1997). Elevated blood lead level in children of construction workers. *American Journal of Public Health*, 87, 1352-1355.

### Author Biography

**Ugochukwu Orazulike** is a doctoral candidate/teaching assistant at the School of Law, University of Manchester, UK. His research interest includes OSH law and policy, human rights law and environmental regulation.