

## MENDING VIOLENCE AGAINST WORKERS IN THE BANGLADESH GARMENT INDUSTRY: AN ANTI-CAPITALIST PERSPECTIVE ON FABRICATIONS OF “IMPROVING” LABOR CONDITIONS

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*“The concern then is not merely that ‘spectacles’ increasingly dominate the news, distracting the public from ‘real’ social issues; but that even when representing ‘gruesome realities’ these forms tend to privilege the visual aesthetics of the imagine at the expense of ethical content, undermining the role of tragedy as a cause for moral action,”<sup>1</sup> Douglas Kellner cautioned.*

*The 2013 Rana Plaza Collapse, which killed 1,134 garment workers and injured over 2,000 more, generated significant media attention in the West. The Collapse, along with several other major recent garment factory tragedies in Global South, raised ethical concerns among U.S. consumers who desire to “consume responsibly.” However, these good intentions spawned neoliberal reforms that exacerbate rather than resolve the dire labor conditions: capitalism. Contemporary leftist scholars theorize that the garment factories conditions have not improved with either formal*

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<sup>1</sup> Stephanie Alice Baker, *Social Tragedy: The Power of Myth, Ritual, and Emotion in the New Media Ecology* 11 (2014); *see* Douglas Kellner, *Media Spectacle and the Crisis of Democracy: Terrorism, War, and Election Battles* (2005).

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legislation or soft-law approaches,<sup>2</sup> but were merely shifted from the once-existent factories of the Global North to the Global South<sup>3</sup> by outsourcing.

*As Western consumers who purchase clothing from retail giants that source from Bangladesh, like H&M, Target, Nike, Zara, The Children's Place, and even Ivanka Trump,<sup>4</sup> what is our role in these garment factory fires? To whom do we assign fault? To whom do we grant the power to change? The struggle for justice continues.*

*Participants were aware that the situation was unusual, as they had been given unscheduled time off the day prior to the collapse, yet they were told to continue working on the day of the collapse, as this participant graphically explains:*

*"Early morning of the day of the collapse, I contacted the production manager (PM) sir of my factory via mobile phone to know whether I should go to join in work. He told me to go there. He further added, 'if we remain alive, we will survive unitedly; and if we die, we will die unitedly.'"*<sup>5</sup>

– I (sewing operator)

*The news media play[s] a dual role in crisis discourse: convey and contribute. Most importantly, they shape the crisis discourse, using "nuanced language and labels... to both facilitate and to limit knowledge about social phenomena" while maintaining "[the] pretense of neutrality". These nuanced language and labels structure public perceptions about crisis events, discursively constructing, in other words, the phenomena on the one hand and the identities of those involved. Such discursive constructions of*

<sup>2</sup> Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 *BROOK. J. INT'L. L.* 42, 44–46 (2010) (defining "soft law" as "voluntary civil regulations [that] will prove an important alternative to governmental authority in the era of globalization"). Soft law generally refers to non-binding agreements or voluntary regulatory schemes, such international or transnational agreements that do not fall under the category of treaties.

<sup>3</sup> While there are several different definitions of "Global North" and "Global South," the meaning of those terms is best illustrated by the following: Global North refers to Europe, the United States of America, and other territories and peoples that benefit from the imposition of policies to the detriment of communities of the Global South in the era of neoliberal globalization. See Anne Garland Mahler, *What/Where is the Global South?* GLOBAL SOUTH STUDIES <https://globalsouthstudies.as.virginia.edu/what-is-global-south> ("However, in recent years and within a variety of fields, the Global South is employed in a post-national sense to address spaces and peoples negatively impacted by contemporary capitalist globalization.") (last visited Mar. 20, 2020).

<sup>4</sup> Nadra Nittle, *What the Rana Plaza Disaster Changed About Worker Safety: Ivanka Trump's Company is One of the Many Western Brands That Use Bangladeshi Labor*, RACKED (Apr. 13, 2018), <https://www.racked.com/2018/4/13/17230770/rana-plaza-collapse-anniversary-garment-workers-safety>.

<sup>5</sup> Humayun Kabir, *The Current Health and Wellbeing of the Survivors of the Rana Plaza Building Collapse in Bangladesh: A Qualitative Study*, 16 *INT'L J. OF ENVTL. RES. & PUB. HEALTH* (Jul. 2, 2019).

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*phenomena (e.g., “tragedy” or “disaster”) and identities (e.g., “victims” or “survivors”) are seldom neutral or natural but almost always political.*<sup>6</sup>

– Mir Ashfaquzzaman

*The master’s tools will never dismantle the master’s house.*<sup>7</sup>

– Audre Lorde

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<sup>6</sup> Mir Ashfaquzzaman, *Analyzing Rana Plaza Crisis Discourse from a Postcolonial Perspective: Implications for Identity and Crisis Communication Studies*, 2017 UNI SCHOLARWORKS i, 18–19 (2017) (citations omitted).

<sup>7</sup> Audre Lorde, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* (Crossing Press ed., 2007) (1984).

## I. INTRODUCTION

Rabeya, a sewing machine operator paid \$114 per month by a clothing supplier for H&M, marched in the streets of Dhaka<sup>8</sup> for nearly a month to demand a living wage for her lower-paid co-workers.<sup>9</sup> One month later, she was fired.<sup>10</sup>

Rabeya's situation is not an anomaly. Since February 2019, over 11,600 garment workers in Bangladesh have also been fired following protests for higher wages.<sup>11</sup> One of the workers' proposals called for a basic wage increase to be applied equally to all workers.<sup>12</sup> During week-long demonstrations in December 2018 and January 2019, fifty thousand workers who demanded living wages were tear-gassed, shot with rubber bullets, blinded by water cannons, and detained.<sup>13</sup> Sumon Mia, a twenty-two year-old worker, was shot through the chest and killed while walking home to eat lunch with his family.<sup>14</sup> Before Mia died, he told the police he was not involved with the demonstrations.<sup>15</sup> The police deny that they fired the bullet that killed Mia.<sup>16</sup> Akhi Begum, a diabetic homemaker who lives in the vicinity of the demonstrations, was severely shot while sitting in her bedroom.<sup>17</sup> Police tear-gassed over a dozen children in the ground floor day-care center of a garment factory following a walkout.<sup>18</sup> The supervisor then proceeded to fire all the working mothers who had children so that they could

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<sup>8</sup> Dhaka is the capital city of Bangladesh. Out of the 7,000 known garment factories in Bangladesh, over 4,500 of them are either located in or around Dhaka. *Bangladesh's Garment Workers*, THE ASIA FOUND., <https://asiafoundation.org/slideshow/bangladeshs-garment-workers/> (last visited Feb. 12, 2019).

<sup>9</sup> See, e.g., Arun Devnath & Iain Marlow, *Thousands Fired From \$30 Billion Bangladesh Garment Sector*, BLOOMBERG LP (Feb. 15, 2019, 9:21 PM), <https://www.bloomberg.com/news/articles/2019-02-16/thousands-fired-from-30-billion-bangladesh-garment-sector>.

<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., *Over 11,600 Bangladesh Garment Workers Lose Jobs and Face Repression*, INDUSTRIALL (Nov. 2, 2018), <http://www.industrialunion.org/over-11600-bangladesh-garment-workers-lose-jobs-and-face-repression>.

<sup>12</sup> See, e.g., Tula Connell, *Bangladesh Workers Targeted with Gender-Based Violence*, SOLIDARITY CTR. (Feb. 4, 2019), <https://www.solidaritycenter.org/bangladesh-workers-targeted-with-gender-based-violence/>.

<sup>13</sup> See, e.g., *Bangladesh Police, Garment Workers Clash in Protests*, ASSOCIATED PRESS (Jan. 18, 2019), <https://www.voanews.com/a/bangladesh-police-garment-workers-clash-in-protests/4735636.html>.

<sup>14</sup> Sushmita S. Preetha, *Post-Mortem of a Worker's Death*, THE DAILY STAR (Jan. 18, 2019), <https://www.thedailystar.net/star-weekend/spotlight/news/dispensable-demands-disposable-lives-1688998>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Connell, *supra* note 12.

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shut down the day-care with little interference.<sup>19</sup> Thirty protestors were wounded as they fought armed police officers.<sup>20</sup> In response to these protests, private factories and the government filed charges against several thousand workers.<sup>21</sup>

Several years prior to these week-long strikes, garment workers were verbally threatened with violence, physically and sexually abused, kidnapped, and killed for their exercising their freedom of association rights.<sup>22</sup> An overwhelming majority of women workers have experienced gender-based violence, including inappropriate groping during security checks, intimidation by supervisors for having unwanted sexual relations, physical or verbal punishment for slow pace of work, and rape.<sup>23</sup> The police battered women workers with rods, took away their scarves, and threatened to rape them after several workers spoke up about incidents where their managers harassed them when they registered their union.<sup>24</sup> Supervisors regularly file claims against union leaders, union members, and others suspected of union participation.<sup>25</sup> Despite the fact that many of supervisors' claims are false or groundless, those who were charged face life imprisonment or the death penalty.<sup>26</sup>

Not only are many workers, especially women workers, violently suppressed by the state and their employers when they exercise their right to strike to hike wages, but they are also met with gender-based violence outside the garment factory and at home.<sup>27</sup> The vast majority of women workers experience some form of gender-based violence committed by stalkers, male co-workers, and transportation workers.<sup>28</sup> Gender norms that initially made the garment factory occupation a male-approved form of labor also hinder the quality of life for women workers, as their lower-paid male spouses feel insecure after being superseded by their wives as sole breadwinners,<sup>29</sup> which

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Johura Akter Pritu, *Initiative to End Gender-based Violence in the Garments Industry*, DHAKA TRIBUNE (Aug. 28, 2018), <https://www.dhakatribune.com/business/2018/08/28/initiative-to-end-gender-based-violence-in-the-garments-industry>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., Tula Connell, *4 Years After Rana Plaza: Increased Worker Repression*, SOLIDARITY CTR (Apr. 24, 2017), <https://www.solidaritycenter.org/4-years-rana-plaza-increased-worker-repression/>.

<sup>27</sup> Pritu, *supra* note 23.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

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manifests into the spousal abuse that over fifty percent of women workers experience.<sup>30</sup>

The focus of this Note is on the failure of mainstream solutions to adequately empower workers in Bangladesh Ready-Made Garment Industry (“RMG”) supplier factories that contract with retailers in the United States both prior to the Rana Plaza Collapse and in the aftermath. My Note will analyze the following: (1) inherent nature of the Accord on Fire and Building Safety in Bangladesh and the Alliance for Bangladesh Worker Safety, which improves only the health and safety aspect of labor conditions and fails to address its underlying causes;<sup>31</sup> (2) inadequacy of corporate compliance structures to promote genuine worker empowerment;<sup>32</sup> and (3) unlikelihood of private rights of action under the laws of both the U.S. and Bangladesh to fully rectify injuries, and (4) insufficiency of worker’s compensation schemes.<sup>33</sup>

Rather than leave the fate of labor conditions in the hands of either transnational companies (“TNC”) or northern consumers who have never experienced sweatshop conditions, this Note proposes community unionism as an organizational approach to empowering Bangladeshi garment workers.<sup>34</sup> This strategy should be reinforced by (1) enforcement of the existing right to unionize,<sup>35</sup> (2) pressure on the Government of Bangladesh to withdraw its reservation on Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) (as harassment of garment workers constitutes a form of violence against women,<sup>36</sup> and (3) encouragement for the Government of Bangladesh to adopt enforcement mechanisms under the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESR”).<sup>37</sup>

## II. BACKGROUND

Before the mid-twentieth century, garment factories in Bangladesh were virtually nonexistent. The United States emerged as the dominant military power after the Second World War, as it was the most well-equipped

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<sup>30</sup> See, e.g., Anuradha Nagaraj, *53% of Garment Workers Face Domestic Violence in Bangladesh*, GLOBAL CITIZEN (Jan. 18, 2018), <https://www.globalcitizen.org/en/content/domestic-violence-women-bangladesh-garment-workers/>.

<sup>31</sup> See discussion *infra* Section III.A-B.

<sup>32</sup> See discussion *infra* Section III.C.

<sup>33</sup> See discussion *infra* Section III.D.

<sup>34</sup> See discussion *infra* Section IV.C.

<sup>35</sup> See discussion *infra* Section IV.A.

<sup>36</sup> See discussion *infra* Section IV.B.

<sup>37</sup> See discussion *infra* Section IV.B.

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in terms of technological and economic advancements.<sup>38</sup> This status allowed the dollar to become the world currency, allowing the development of monopolies and facilitating imperialist<sup>39</sup> ventures in the Global South.<sup>40</sup>

Halfway across the globe, East Bengal (modern-day Bangladesh) was experiencing post-colonial-era turmoil that would later serve as the precondition for neoliberal exploitation. The Bangladesh Liberation War, during which the Pakistani military murdered, raped, and displaced millions of Bangladeshis in the early 1970s, facilitated the creation of the “pro-capitalist” class.<sup>41</sup> Prior to the war, East Bengal was a feudal society ruled by British East India Company during the colonial era.<sup>42</sup> Even after East Bengal was renamed East Pakistan and Pakistani nationalist sentiments increased, the region still retained its feudal economy.<sup>43</sup> The lower middle-class non-landowning village men, who desired the lifestyle of the land-owning bourgeoisie, had little to no class status during this time.<sup>44</sup> The land-owning bourgeoisie rejected entrepreneurship, as their aristocratic values were at odds with the deceitful practices the village men used to gain capital.<sup>45</sup> The conditions of the war allowed the village men to displace the land-owning bourgeoisie by engaging in entrepreneurship activities and eventually forming a distinct industrialist class, characterized by innovative tendencies and lavish lifestyles alien to the “old-money,” land-owning bourgeoisie.<sup>46</sup>

After the war, the newly independent Bangladesh experienced a weakening in its economic order, further increasing the nation’s

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<sup>38</sup> See generally David Harvey, *Neoliberalism as Creative Destruction*, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, VOL. 610, NAFTA AND BEYOND: ALTERNATIVE PERSPECTIVES IN THE STUDY OF GLOBAL TRADE AND DEVELOPMENT, Mar. 2007, at 22.

<sup>39</sup> There is no singular definition of imperialism. The Cambridge Dictionary defines imperialism as the “attempt of one country to control another country, especially by political and economic methods.” *Imperialism*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/imperialism> (last visited Mar. 23, 2020). Edward W. Said, a Palestinian American scholar and a founder of postcolonial studies, identified imperialism as a main controlling force: “Lurking everywhere behind the pacification of the subject race is the *imperial might*, more effective for its refined understanding and infrequent use than for its soldiers, brutal tax gatherers, and incontinent force.” EDWARD W. SAID, *ORIENTALISM* 36 (1979) (emphasis added).

<sup>40</sup> Dan La Botz, *Can Workers of the Global South Change the World Labor Movement?*, NEW POLITICS (Nov. 19, 2015), <https://newpol.org/can-workers-global-south-change-world-labor-movement/>.

<sup>41</sup> Fauzia Erfan Ahmed, *The Rise of the Bangladesh Garment Industry: Globalization, Women Workers, and Voice*, 16 NWSA J., 2004, at 35. According to Ahmed, there was virtually no “proto-capitalist” class before the Bangladesh Liberation War.

<sup>42</sup> *Id.*

<sup>43</sup> Ahmed, *supra* note 41, at 35–37; see also Salil Sen, *On the Liberation Struggle of Bangladesh*, MARXISTS.ORG (Sept. 20, 1971), <https://www.marxists.org/archive/shibdas-ghosh/1971/04/24.htm>.

<sup>44</sup> Ahmed, *supra* note 41, at 35–36.

<sup>45</sup> *Id.* at 36.

<sup>46</sup> *Id.* at 37.

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susceptibility to neoliberal globalization.<sup>47</sup> The three big trade unions, which had strong connections to political parties in Bangladesh, initially opposed U.S. entrepreneurship.<sup>48</sup> However, the Awami League's increased favoritism towards the United States and economic liberalization legislation and General Ziaur Rahman's imposition free market policies (and his connections with the industrialist class) in the mid-1970s to early 1980s, sowed the seeds of the Ready-Made Garment Industry ("RMG").<sup>49</sup> General Rahman's successors, especially General Hussain Muhammad Ershad, accelerated the pace of neoliberalization through his New Industrial Policy ("NIP"), which promoted an export-oriented approach to economic policy.<sup>50</sup> Korean producers took advantage of Bangladesh's neoliberalized economy by importing sewing machines, training, and providing financial support to sow the seeds of the garment manufacturing market in Bangladesh.<sup>51</sup>

Bangladesh's free market economy made the new nation susceptible to Structural Adjustment Programs by World Bank, International Monetary Fund ("IMF"), other neoliberal<sup>52</sup> reforms of the Washington Consensus

<sup>47</sup> See SAMUEL TOTTEN, PAUL ROBERT BARTROP, & STEVEN L. JACOBS, *DICTIONARY OF GENOCIDE*, VOL. 1 34–35 (2007).

<sup>48</sup> See, e.g., Pragya Khanna, *Making Labour Voices Heard During an Industrial Crisis: Workers' Struggles in the Bangladesh Garment Industry*, 44 *LAB., CAP. & SOC.* 106, 109 (2011).

<sup>49</sup> *Id.* at 108 ("The key unions were linked to political parties. The three national centres were the Jatiyo Sramik League (linked to the Awami League), the Trade Union Kendra (linked to the Communist Party of Bangladesh, or CPB) and the Jatyabadi Sramik Dal (linked to the Samajvadi Dal, formerly the Revolutionary Socialist Party)."); Chaumtoli Huq, *Opportunities and Limitations of the Accord: Need for a Worker Organizing Model*, in *LABOR, GLOBAL SUPPLY CHAINS, AND THE GARMENT INDUSTRY IN SOUTH ASIA: BANGLADESH AFTER RANA PLAZA* 24 (Sanchita B. Saxena, ed. 2019) [hereinafter *AFTER RANA PLAZA*].

<sup>50</sup> Shelley Feldman & Jakir Hossain, *The Longue Durée and the Promise of Export-led Development*, in *AFTER RANA PLAZA*, *supra* note 49.

<sup>51</sup> See *id.* at 25.

<sup>52</sup> According to Anu Muhammad, a neoliberal economy (or "neoliberalism") is a result of decreased economic growth rates, the rise of global monopolies, and "the financialization of the capital accumulation process." There are three phases of neoliberalism. It began in the 1970s and was later pushed forward with the forceful support of Ronald Regan and Margaret Thatcher in the 1980s. The second phase came with the fall of the USSR created unprecedented opportunities for neoliberal ideologues to dominate the development thinking. Finally, since 2001, the so-called War on Terror has strengthened corporate power and rationalized the use of force for geopolitical ends. Anu Muhammad, *Bangladesh—A Model of Neoliberalism: The Case of Microfinance and NGOs*, *Monthly Rev.* (Mar. 1, 2015), <https://monthlyreview.org/2015/03/01/bangladesh-a-model-of-neoliberalism/>. Globalization is characterized by an integration of economies of most nations into a "single global system." To ensure that capitalism survives in the face of growing socioeconomic instability, neoliberals have developed Structural Adjustment Programs (SAPs) under the Washington Consensus. These SAPs are disguised as a form of "aid" to so-called "developing countries" (or nations of the Global South), which are marketed to the communities as refinancing tools (such as loans). This financialization process allows neoliberals to cut spending on healthcare, education, clean energy, and welfare and forcing persons affected by those budget cuts drain their own resources while simultaneously maintaining enough funds for military development, corporate subsidies, and tax cuts. Anu Muhammad, *Bangladesh—A Model of*

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package, and Trans Pacific Partnership agreements (“TPP” or “Free Trade” agreements).<sup>53</sup> These programs effectively eliminated most forms of social insurance and commodified natural resources like agriculture.<sup>54</sup> Loans for peasants and rural middle class workers destroyed the economic stability of both groups.<sup>55</sup> As a result, former rural workers were forced into urban areas after being lured by the prospect of new employment, like garment factory jobs.<sup>56</sup> The national government in the mid-1970s was undoubtedly extremely receptive towards these reforms and viewed privatization as fundamental to a stable economy.<sup>57</sup> Additionally, Free Trade agreements popularized by Barack Obama’s administration further accelerated the pace of neoliberal globalization by allowing the United States greater access to vulnerable populations well-suited to serve as a cheap labor source.<sup>58</sup>

The expansion of the RMG industry, beginning in 1990s, led to power imbalances between U.S. retailers (“TNCs” or “buyers”) and Bangladesh garment factory owners (“suppliers”).<sup>59</sup> This power imbalance results in the “tendency of the rate of profit to fall” (“TRPF”).<sup>60</sup> First, retailers constantly seek decrease to the price of their merchandise to make a profit, which causes buyers to decrease worker’s wages to cut down labor costs.<sup>61</sup> Second, retailers also pressure buyers to decrease production time.<sup>62</sup> As a consequence, factory workers face increased physical and mental abuse from their supervisors, who threaten them with violence if workers cannot follow the quick pace of work.<sup>63</sup>

Presently, the day-to-day life of an average worker in Bangladesh is characterized by low wages, long working hours, threats and actual incidents of physical, psychological, and sexual abuse by supervisors, and poor health

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*Neoliberalism: The Case of Microfinance and NGOs*, CADTM.ORG (Mar. 16, 2015), [http://www.cadtm.org/spip.php?page=imprimer&id\\_article=11395](http://www.cadtm.org/spip.php?page=imprimer&id_article=11395).

<sup>53</sup> Carl Finamore, *The New Colonialism*, COUNTERPUNCH (Jun. 9, 2015), <https://www.counterpunch.org/2015/06/09/the-new-colonialism-2/>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> IMMANUEL NESS, *SOUTHERN INSURGENCY: THE COMING OF THE GLOBAL WORKING CLASS* 15 (2016).

<sup>57</sup> Khanna, *supra* note 48, at 109.

<sup>58</sup> Finamore, *supra* note 53.

<sup>59</sup> MARK ANNER, PENNSTATE, CENTER FOR GLOBAL WORKERS’ RTS., *BINDING POWER: THE SOURCING SQUEEZE, WORKERS’ RIGHTS, AND BUILDING SAFETY IN BANGLADESH SINCE RANA PLAZA 4* (Mar. 22, 2018), <https://ler.la.psu.edu/gwr/documents/CGWR2017ResearchReportBindingPower.pdf>.

<sup>60</sup> *See, e.g.*, KARL MARX, *CAPITAL. A CRITIQUE OF POLITICAL ECONOMY* (1867).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (“[M]ost apparel production is now made in countries, at the bottom quartile in freedom of association rights . . . there is decline in respect for workers’ rights in the 20 top apparel exporting countries corresponds to a decline in the real dollar price paid of apparel imported into the United States. Women and girls, in particular, are adversely affected by these trends in global supply.”).

and safety conditions.<sup>64</sup> Even as workers successfully raised the minimum wage by fifty percent in late 2018,<sup>65</sup> an income of \$95 per month is still woefully insufficient for the average worker to afford the bare necessities.<sup>66</sup> These conditions led to the 2013 Rana Plaza Collapse and 2012 Dhaka fire, which killed over one thousand and injured more than two thousand people.<sup>67</sup> The termination of both the Accord and Alliance<sup>68</sup> on December 31, 2018, prior to the completion of all necessary factory repairs also does not bode well for the health and safety of garment workers, as factories are likely to return to pre-Rana Plaza Collapse conditions.<sup>69</sup>

### III. FAILURE OF REFORMS TO ADDRESS SYSTEMATIC ABUSES: THE ACCORD, THE ALLIANCE, AND CORPORATE COMPLIANCE

#### A. *Deficiencies of the Accord*

The 2013 Accord on Fire and Building Safety in Bangladesh (“The 2013 Accord”)<sup>70</sup> and its 2018 counterpart (“The 2018 Accord”)<sup>71</sup> were adopted in part, as a response to the Rana Plaza disaster caused by hazardous labor conditions.<sup>72</sup> However, many provisions of the Accord were already negotiated and drafted shortly after the 2010 fire at the Garib & Garib Sweater Factory.<sup>73</sup> These agreements were designed to improve health and safety aspects of RMG factories in Bangladesh.<sup>74</sup>

<sup>64</sup> Md Arifur Rahman & Mir Sohrab Hossain, *Compliance Practices in Garment Industries in Dhaka City*, 5 J. BUS. & TECH. 71, 72 (2010) (“Poor housekeeping, storage system, ineffective monitoring and controlling system, disorganized production layout, lack of team-based work, rented factory premises, narrow staircases, closed environment, insufficient light and air, clean drinking water, separate wash room for male and female, etc. are common practices in most of the RMG factories in Bangladesh.”).

<sup>65</sup> *Id.*; see also Saurav Sarlkar, *Why 50,000 Garment Workers in Bangladesh Went on Strike*, IN THESE TIMES (Feb. 5, 2019), [http://inthesetimes.com/working/entry/21715/garment\\_workers\\_bangladesh\\_rana\\_plaza\\_garment\\_industry\\_workers\\_conditions](http://inthesetimes.com/working/entry/21715/garment_workers_bangladesh_rana_plaza_garment_industry_workers_conditions).

<sup>66</sup> Rahman & Hossain, *supra* note 64, at 72.

<sup>67</sup> See discussion *infra* Section III.A–B.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> ACCORD ON FIRE & BLDG. SAFETY IN BANGL. (May 15, 2013), <https://admin.bangladeshaccord.org/wp-content/uploads/2018/08/2013-Accord.pdf> [hereinafter BANGL. ACCORD.].

<sup>71</sup> 2018 ACCORD ON FIRE & BLDG. SAFETY IN BANGL. (June 21, 2017), <https://admin.bangladeshaccord.org/wp-content/uploads/2018/08/2018-Accord.pdf>.

<sup>72</sup> See discussion *supra* Section II.

<sup>73</sup> Huq, *supra* note 49, at 67.

<sup>74</sup> Jaakko Salminen, *The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers’ Liability in Global Supply Chains?* THE AM. J. OF COMP. L. (Aug. 24, 2018).

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The Accord is an enforceable contract between trade unions and garment brands to enact a comprehensive fire and building safety program for 5 years in Bangladesh.<sup>75</sup> Garment retailers who sign the Accord (“signatories”) must compel their suppliers that conduct safety inspections, remediation, and fire safety trainings sessions at their factories.<sup>76</sup> If suppliers fail to follow these instructions, signatories are under a duty to “terminate”<sup>77</sup> business with such suppliers.<sup>78</sup> Trade unions played an important role in the Accord, as union representatives are contracted by factories to educate workers about their rights and safety initiatives.<sup>79</sup>

On May 19, 2019, the Appellate Court decided to continue 2013 Accord’s operations under the 2018 Accord for 281 days through a memorandum of understanding between Accord and Bangladesh Garment Manufacturing Exporters Association (“BGMEA”).<sup>80</sup> While adopting provisions substantially similar to those of the 2013 Accord, the 2018 Accord involves several new key elements.<sup>81</sup> First, it added Freedom of Association (“FoA”) provisions, requiring suppliers to hold trade union-run trainings on FoA rights.<sup>82</sup> Second, it included a mechanism to translate its functions to a regulatory body—the RSC—which preserves the Accord’s potential to extend its applicability to industries beyond the RMG industry.<sup>83</sup>

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<sup>75</sup> BANGL. ACCORD, *supra* note 70, at 1.

<sup>76</sup> *Id.* at 1–2.

<sup>77</sup> “Termination” of a business relationship between a clothing retailer and factory supplier does not mean that non-compliant factories would be shut down; rather, such factories would be controlled instead by Bangladesh’s national initiative. *Id.*

<sup>78</sup> BANGL. ACCORD, *supra* note 70, at 6.

<sup>79</sup> Salminen, *supra* note 73, at 417.

<sup>80</sup> As of June 2019, many factories have yet to undergo critical renovations, such as making structural fixes, ensuring that fire alarms are fully installed, and preventing boiler explosions. These renovations may improve health and safety conditions only through ongoing monitoring. *The Bangladesh Accord Continues to Operate But its Independence May Be at Risk*, CLEAN CLOTHES CAMPAIGN (Jun. 15, 2019), <https://cleanclothes.org/news/2019/the-bangladesh-accord-continues-to-operate-but-its-independence-may-be-at-risk>.

<sup>81</sup> See *About*, ACCORD ON FIRE & BLDG. SAFETY IN BANGL., <https://bangladeshaccord.org/about> (last visited Mar. 20, 2020); see also *Statement of the Bangladesh Accord’s Witness Signatories on the three-year renewal of the agreement*, CLEAN CLOTHES CAMPAIGN (Jun. 19, 2017), <https://cleanclothes.org/news/2017/06/29/statement-of-the-bangladesh-accord-witness-signatories-on-the-agreement2019s-3-year-renewal>.

<sup>82</sup> See THE CONS. OF THE PEOPLE’S REPUBLIC OF BANGL. (2010), PART III FUNDAMENTAL RIGHTS FREEDOM OF ASSOCIATION § 38 (Bangla.). The freedom of association is the right to form and/or partake in associations or unions, subject to arguably broad limitations.

<sup>83</sup> *About*, ACCORD ON FIRE & BLDG. SAFETY IN BANGL., <https://bangladeshaccord.org/about> (last visited Mar. 20, 2020).

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While the RMG Sustainability Council (“RSC”) is set to inherit the operations of the 2018 Accord after the 281-day “transition” period,<sup>84</sup> there is reason to doubt RSC’s ability to continue inspections and repairs at a rate similar to that of the Accord.<sup>85</sup> Under the MoU, national trade unions, retailers, and the BGMEA would all *share* responsibility for continuing the Accord’s progress through the RSC.<sup>86</sup> The MoU further provides that the RSC will make sure that its operations compliment that of the Remediation Co-Ordination Cell (“RCC”).<sup>87</sup> However, the BGMEA has interpreted the MoU to (1) require Accord inspectors to seek BGMEA approval to terminate a retailer’s relationship with a supplier, (2) require the Accord to accept inspections by a Government of Bangladesh regulatory scheme,<sup>88</sup> and (3) give BGMEA the authority to finalize safety remediation requirements for newly inspected factories.<sup>89</sup> Trade unions have expressed their concerns about BGMEA’s interpretation, as not only does this interpretation subvert the original intention of the parties at the time they entered the MoU, but also compromises the independence of the Accord.<sup>90</sup> To begin, the “BGMEA unit” inside the Accord’s office may cause workers to distrust an established complaint mechanism. Another criticism is that the terms of the MoU do not establish any kind of enforcement mechanism in the event of non-compliance by any party, which does not incentivize compliance.<sup>91</sup> The MoU also fails to establish a clearly-defined decision-making structure, increasing the susceptibility of a party manipulating the terms to its advantage.<sup>92</sup> Perhaps the most alarming aspect of the RSC is that it is not even guaranteed that the

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<sup>84</sup> *Why Are Workers in Bangladesh’s Garment Industry Worried About Safety?* GLOBAL VOICES (Jan. 9, 2019), [https://www.business-standard.com/article/international/why-are-workers-in-bangladesh-s-garment-industry-worried-about-safety-119010900229\\_1.html](https://www.business-standard.com/article/international/why-are-workers-in-bangladesh-s-garment-industry-worried-about-safety-119010900229_1.html).

<sup>85</sup> *The Bangladesh Accord Continues to Operate But its Independence May Be at Risk*, *supra* note 80.

<sup>86</sup> *Accord Reaches Resolution on Continuation of its Work in Bangladesh*, ACCORD <https://bangladeshaccord.org/updates/2019/05/19/accord-reaches-resolution-on-continuation-of-its-work-in-bangladesh>; *see also* *The Bangladesh Accord Continues to Operate But its Independence May Be at Risk*, *supra* note 79.

<sup>87</sup> Since October 2018, the RCC has become the monitoring scheme for all garment factories in Bangladesh. *Why Are Workers in Bangladesh’s Garment Industry Worried About Safety*, *supra* note 84; *see, e.g.*, Reality Check, *Bangladesh Clothing Factories: Are They Safe Now?* BBC NEWS (Dec. 31, 2018), <https://www.bbc.com/news/world-asia-46349947>. Critics of the ILO-backed RCC argue that it does not have an enforcement mechanism against non-compliant factories. Furthermore, the Government of Bangladesh may not possess sufficient resources or expertise to maintain and implement new health and safety changes. *Id.*

<sup>88</sup> *The Bangladesh Accord Continues to Operate But its Independence May Be at Risk*, *supra* note 80.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

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2018 Accord will be permitted to “transition” to the RSC if the Accord does not first satisfy preliminary “readiness” requirements.<sup>93</sup>

The implementation of the Accord has directly led to improved health and safety conditions in some factories. Severe factory accidents have decreased significantly.<sup>94</sup> As of date, 1,800 factories have been independently inspected and nearly eighty percent of the workplace hazards discovered from such inspections were remedied.<sup>95</sup> There has been a decline in the usage of multipurpose buildings, which were not designed to accommodate the weight of garment manufacturing machinery.<sup>96</sup> Additionally, half a million workers have received training on health and safety workers topics, including emergencies life-saving measures.<sup>97</sup> As a result, workers are theoretically more likely to hold their superiors accountable by demanding their supervisors comply with the Accord’s safety standards or threaten to bring a criminal case for non-compliance.<sup>98</sup>

Some of the Accord’s success may be attributed to several features. First, its legally binding nature generates tangible, quantifiable changes in the structure and operation of many garment factories. Second, its private-sector funding covers the cost of health and safety inspections.<sup>99</sup> Third, it sets the minimum health and safety requirements for the national initiative to follow.<sup>100</sup>

<sup>93</sup> *Id.*

<sup>94</sup> Michelle Chen, *6 Years After the Rana Plaza Collapse, Are Garment Workers Any Safer?* THE NATION (Jul. 15, 2019), <https://www.thenation.com/article/rana-plaza-unions-world/>.

<sup>95</sup> IndustriALL is a global union confederation that was a party to the 2013 and 2018 Accord. See INDUSTRIALL, *THE 2018 BANGLADESH ACCORD: BRANDS AND UNIONS RENEW COMMITMENT TO SAFE JOBS*, <http://www.industrialunion.org/sites/default/files/uploads/documents/2017/BANGLADESH/bangaccordbackground.pdf> (last visited Feb. 11, 2019); NESS, *supra* note 56. There have also been other studies done that estimate the number of inspections in the wake of the Rana Plaza collapse amount to be much higher, around 3,425 inspections. Gillian B. White, *What’s Changed Since More Than 1,110 People Died in Bangladesh’s Factory Collapse?* THE ATLANTIC (May 3, 2017), <https://www.theatlantic.com/business/archive/2017/05/rana-plaza-four-years-later/525252/>.

<sup>96</sup> Whitney Bauck, *5 Years After Rana Plaza, How Much Has Changed in Bangladesh?* FASHIONISTA (Apr. 12, 2018), <https://fashionista.com/2018/04/rana-plaza-collapse-bangladesh-factory-safety-accord>.

<sup>97</sup> *Id.*

<sup>98</sup> Pranab Panday & Md. Awal Hossain Mollah, *The Judicial System of Bangladesh: An Overview From Historical Standpoint*, 53 INT’L J. L. & MGMT. 6, 26 (2011). The legal system of Bangladesh consists of three branches: legislative, judicial, and executive. The judicial branch is comprised of the Bangladesh Supreme Court and subordinate courts with civil, criminal, or special authority. Civil courts—i.e., Labour Courts—have jurisdiction over breaches of duties regarding employment conditions and wage disputes. Criminal courts have jurisdiction over health, safety, welfare, maternity rights, and child labor matters. See also LEGAL ENFORCEMENT OF HEALTH AND SAFETY LAW IN BANGLADESH: A BRIEFING BY THE BANGLADESH WORKER SAFETY PROGRAMME FOR CORPORATE ACCOUNTABILITY, CENTRE FOR CORPORATE ACCOUNTABILITY.

<sup>99</sup> White, *supra* note 95.

<sup>100</sup> See Abdurrahman Erol, *Five Years Later: Why do the Accord, the Alliance, and the National Initiative Perform Differently in Terms of Remediations?* ASSER INST: DOING BUSINESS RIGHT BLOG

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However, the Accord fails to address underlying systemic problems. The Accord's inability to produce the agreed-upon results reveals its inability to meet even its own goals. Digging deeper, the inherent nature of the Accord—an initiative with an expiration date that addresses only health and safety issues—clashes with the fundamental, ongoing human needs of workers that go beyond merely installing fire detection systems.<sup>101</sup>

First, the Accord failed to fully remedy the very safety hazards purports to solve even in Accord-monitored factories. Since the Rana Plaza Collapse, only 1,690 out of the 5,271 garment factories in Bangladesh are covered by the Accord's health and safety standards.<sup>102</sup> Only approximately eleven percent of all Accord-monitored factories have completed the required repairs as of 2017.<sup>103</sup> The major reasons for the slow pace of remediation are the sheer magnitude of inspections (factories must undergo both initial and follow-up inspections), barriers to obtaining proper equipment, a shortage of building safety experts, and the failure of the Government of Bangladesh to finalize new amendments to and enforce the Bangladesh Labour Act.<sup>104</sup> Factories experienced further pressure to complete all defects and provide Accord-mandated training within five years<sup>105</sup> using mostly their own resources.<sup>106</sup> Since companies and trade unions recognized that the vast majority of factories failed to fulfill their commitments a year prior to the expiration of the Accord, the Accord had to be renewed for another three years after 2018.<sup>107</sup> Retailers' reluctance to push for genuine change is profit-driven, as many have not helped factory owners cover remediation costs. Additionally, factory owners themselves are unwilling to prioritize workers' health and safety needs over profits. There is a potential for factory owners

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(Apr. 27, 2018), <https://www.asser.nl/DoingBusinessRight/Blog/post/five-years-later-evaluating-some-national-responses-after-rana-plaza-by-abdurrahman-erol>.

<sup>101</sup> See, e.g., *Safety Hazards Identified, at Accord Factories*, ACCORD (Aug. 22, 2018), <https://bangladeshaccord.org/updates/2018/08/22/safety-hazards-identified-at-accord-factories>.

<sup>102</sup> See Reality Check, *supra* note 87. Note that this number of total garment factories in Bangladesh does not include small-scale, unregistered factories that are subcontract with larger factories. See White, *supra* note 95; see also Lydia DePillis, *Two Years Ago, 1,129 People Died in a Bangladesh Factory Collapse. The Problems Still Haven't Been Fixed*, WASH. POST (April 23, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/04/23/two-years-ago-1129-people-died-in-a-bangladesh-factory-collapse-the-problems-still-havent-been-fixed/>.

<sup>103</sup> Rezwan, *Why Are Workers in Bangladesh's Garment Industry Worried About Safety?* BUSINESS STANDARD (Jan. 9, 2019), [https://www.business-standard.com/article/international/why-are-workers-in-bangladesh-s-garment-industry-worried-about-safety-119010900229\\_1.html](https://www.business-standard.com/article/international/why-are-workers-in-bangladesh-s-garment-industry-worried-about-safety-119010900229_1.html).

<sup>104</sup> Joseph Allchin & Amy Kazmin, *Unions Censure Western Brands Over Bangladesh Factory Safety Delays*, FINANCIAL TIMES (Oct. 1, 2015), <https://www.ft.com/content/7a3822e6-6804-11e5-a155-02b6f8af6a62>.

<sup>105</sup> See BANGL. ACCORD, *supra* note 70, at 1.

<sup>106</sup> Refayet Ullah Mirdha, *Accord: Blessing Turns Burden?* THE DAILY STAR (Nov. 28, 2018), <https://www.thedailystar.net/frontpage/news/accord-blessing-turns-burden-1666225>.

<sup>107</sup> See *About*, ACCORD ON FIRE & BLDG. SAFETY IN BANGL., *supra* note 83.

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to stall repairs until factory conditions deteriorate to peddle funds from Western retailers and avoid paying the full cost.<sup>108</sup> RMG industry experts and scholars have argued both for and against factory owners to shoulder the entire cost of remediation.<sup>109</sup> Remediation delays may have been decreased or avoided if its drafters had required suppliers *and* retailers to share such costs. A proposal to share remediation fees may also represent accountability, as it shows retailers are taking responsibility for contracting with factories engaging in unsafe labor practices.

A larger issue the Accord fails to tackle is the health and safety conditions in *non*-Accord-monitored factories. It is estimated that there are 5,104 registered garment factories, but only around 1,500 are covered by the Accord.<sup>110</sup> Even more alarming is the amount of un-registered factories within the subcontracting scheme that are not monitored by the Accord, the Alliance, or the government of Bangladesh.

Third, the narrow focus of the Accord and the RSC on health and safety issues neglects systemic issues underlying poor labor conditions, including low wages, lack of employment benefits, and the availability of sick and maternity leave, or even the broader issue of labor organizing.<sup>111</sup> For example, the Accord increased transparency in reporting only regarding site inspections for individual workplaces.<sup>112</sup> These site inspection reports do not contain any observations regarding non-health and safety issues, but only identify the quality of floor beams, roof slabs, internal columns, water ingress, and other building structural concerns.<sup>113</sup> The parties to the 2018 Accord and the RSC should expand the scope of the MoU to encompass wages, protections against employer retaliation, sanctions for retaliation, freedom of association rights, gender-based violence in the workplace, work breaks, sick leave, and vacation time.<sup>114</sup> If the MoU is re-negotiated, trade

<sup>108</sup> See DePillis, *supra* note 102 (quoting Alliance advisor Ian Spaulding as saying, “[w]hen a factory owner believes that someone is going to rescue them, it encourages them to wait until things are really bad and wait for the money to pour in”).

<sup>109</sup> *Id.*

<sup>110</sup> Christie Miedema, *Dhaka Fire Shows that Bangladesh Must Build Better Safety Systems, Rather Than Scrap the Accord*, BUS. & HUM. RTS. RESOURCE CTR. (Jun. 3, 2019), <https://www.business-humanrights.org/en/dhaka-fire-shows-that-bangladesh-must-build-better-safety-systems-rather-than-scrap-the-accord>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See, e.g., ACCORD, ALIF APPARELS LTD. (9813), GOLDSTAR GARMENTS LTD. (9844) (Aug. 16, 2014), [https://accord2.fairfactories.org/accord\\_v2\\_files/1/Audit\\_Files/14476.pdf](https://accord2.fairfactories.org/accord_v2_files/1/Audit_Files/14476.pdf). A list of Accord-inspected factory reports can be found online: *Factories*, Accord, <https://bangladeshaccord.org/factories> (last visited Mar. 22, 2020).

<sup>114</sup> See *infra*, see Section IV for a more in-depth discussion. Associate Professor of Law Chaumtoli Huq, among other scholars, argues that “the Accord is limited in its scope to only safety whereas a jobber’s agreement contracted with suppliers on a wide range of issues including wages.” Huq, *supra* note 49, at 68. Jobber agreements were agreements in the United States between garment factories and their

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union representatives should be permitted to speak about the current concerns of workers regarding each topic and to bargain for a specific remedy.

While the Accord seems to be representative of workers' interests on its face due to the fact that trade unions are privy to the agreement, it is actually inherently undemocratic upon further examination of the agreement's origins. Professor Chaumtoli Huq emphasizes that the Accord was not enacted "through the legislative process of Bangladesh, any democratic law-making process or any referendum process involving workers or even in the international sphere whereby they could be able to directly comment on its usefulness or applicability."<sup>115</sup> As evidence of the Accord's undemocratic nature, Professor Huq points to the existence of a "vibrant-worker led movement that operates in parallel to the negotiation of the Accord."<sup>116</sup>

Moreover, the Accord reinforces the very business model that led to the Rana Collapse—the very sort of safety hazard it was designed to avoid. Professor Huq argues that the Accord did not fundamentally alter the relationship between buyers and suppliers, which would be signified by an increase in prices that would incentivize suppliers to pay higher wages and benefits to workers.<sup>117</sup> Rather, the Accord relies on retailers to "pay a set amount based on their size and revenues to support the governance of the Accord," instead of including a provision to either encourage or mandate its signatories to require the suppliers that it contracts with to pay workers a higher wage, or even to create "new legal rights or benefits for workers."<sup>118</sup> Professor Huq further argues that pushing for higher wages is important, as there is a correlation between increased wages and better labor conditions.<sup>119</sup> As such, the Accord cannot be said to be a genuine worker's rights agreement.

The Accord's temporary nature is at odds with need for a stable, long-term scheme for health and safety monitoring.<sup>120</sup> As the 2013 Accord

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subcontractors, which usually required the garment factory to hire only unionized subcontractor workers or agree to terms that relate to systemic labor abuses in the subcontracting scheme. *Id.* at 68.

<sup>115</sup> Huq, *supra* note 49, at 70.

<sup>116</sup> *Id.* at 71.

<sup>117</sup> *Id.* at 73.

<sup>118</sup> *Id.* at 74.

<sup>119</sup> *Id.*

<sup>120</sup> *Bangladesh Police and Garment Workers Clash Over Wage Rise*, AL JAZEERA (Jan. 13, 2019), <https://www.aljazeera.com/news/2019/01/bangladesh-police-garment-workers-clash-wage-hike-190113150811791.html>. In 2015, it was estimated that approximately 8,900 taka per month is necessary to cover a worker's basic needs. See Emilie Schultze, *Exploitation or Emancipation? Women Workers in the Garment Industry*, FASHION REVOLUTION (2015), <https://www.fashionrevolution.org/exploitation-or-emancipation-women-workers-in-the-garment-industry/> ("In Bangladesh . . . the minimum wage for garment workers is 5,300 taka . . . per month which is far from the 8,900 taka . . . that are needed to cover a worker's basic needs, and even further way from a living wage."). Despite a two week-long demonstration for higher wages in early January 2019, the Government of Bangladesh refused to raise the

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is no longer in effect and its functions are currently being transitioned to the RSC, an entity that the BGMEA seeks to dominate. If the BGMEA successfully dominates the very compliance body that is designed to ensure that factory suppliers' compliance, the interests of workers will most certainly be threatened.<sup>121</sup>

In addition, the Accord alone cannot improve working conditions without either economic incentives or broad social consensus against inhumane working conditions that precedes the Accord or the law.<sup>122</sup> Some researchers have concluded that for multilateral agreements—like the Accord—to be effective, they must be “tailored to the economic and social circumstances prevailing in a country at a specific time.”<sup>123</sup> Applying this concept, for labor agreements to be effective, they must align with the social norms of a particular country before Bangladeshi policymakers would willingly implement and enforce it.<sup>124</sup> As of 2019, factory owners and the BGMEA have pushed back against the Accord, arguing that they have become financially burdened since they have to shoulder remediation costs.<sup>125</sup> Such opposition continues to be a significant hurdle to implementing progressive labor initiatives.

In sum, while the Accord's efforts to include both trade unions and suppliers are laudable, the Accord remains a soft law, “non-binding” approach to improving health and safety conditions and other labor conditions in garment factories. More importantly, it is insufficient to either equalize or eliminate the relations of power between workers, suppliers, and retailers. It is difficult to determine whether the multilateral agreements like the Accord is sufficient to encompass a transnational legal pluralist approach, or even overcome a nation reluctance to change its policies that is economically dependent on the success of its RMG industry.<sup>126</sup>

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minimum wage from 8,000 taka (\$96) to 18,000 taka (\$215). *Bangladesh Police and Garment Workers Clash Over Wage Rise*, *supra* note 120. However, the cost of living has risen since then. *Id.*

<sup>121</sup> Rezwan, *supra* note 103.

<sup>122</sup> WORLD SCIENTIFIC PUBLISHING COMPANY, REGULATION OF FOREIGN INVESTMENT: CHALLENGES TO INTERNATIONAL HARMONIZATION 167 (Zdenek Drabek & Petros C. Mavroidis eds., 2013) (citing Andrew G. Brown & Robert M. Stern, *What are the Issues in Using Trade Agreements to Improve International Labor Standards?* 7 WORLD TRADE REV. 331 (2008)).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Reality Check, *supra* note 87. A growing group of factory owners have expressed discontentment, claiming that they have spent up to several billion USD on structural, electrical, and fire defects. They further claim that the Accord puts too much pressure on them to fix what they deem to be “negligible” issues,” as such factory owners—instead of Western retailers that contract with them—must pay the full cost of remediations. Mirdha, *supra* note 106

<sup>126</sup> See discussion *supra* Section II.

*B. Unenforceability of the Alliance*

The Members Agreement of The Alliance for Bangladesh Worker Safety (“Alliance”) was a coalition of 29 retailers<sup>127</sup> that established the Bangladesh Worker Safety Initiative, a binding, five-year commitment designed to improve safety in RMG factories.<sup>128</sup> It was formed in 2013, shortly after the 2013 Accord was established.<sup>129</sup> Some key features of the Alliance are the development of factory safety assessments and clear safety standards (Fire Safety and Structural Integrity Standard),<sup>130</sup> implementation of a safety remediation plan (Corrective Action Plan),<sup>131</sup> disclosure of information regarding factories to decrease subcontracting,<sup>132</sup> provision of basic fire safety training to workers,<sup>133</sup> and utilization of a committee of independent experts to oversee the implementation of the Alliance’s objectives.<sup>134</sup> In addition, agents of the Alliance will work with the Accord to help monitor Accord-inspected factories.<sup>135</sup>

At the very least, the Alliance represented the recognition by U.S. retailers and public officials alike, the need for concrete solutions to resolve health and safety issues. The Alliance was organized by the U.S. Bipartisan Policy Center and discussions leading to its formation were led by both a former U.S. Senate Majority Leader and a former U.S. Senator.<sup>136</sup> The retailers involved “represent the majority of North American imports of

<sup>127</sup> The current group includes the following companies: Ariela and Associates International, LLC; Bon Worth; Canadian Tire Corporation, Limited; Carter’s, Inc.; The Children’s Place Retail Stores, Inc.; Costco Wholesale Corporation; Fruit of the Loom, Inc.; Gap, Inc.; Giant Tiger; Hudson’s Bay Company; IFG Corp.; Intradeco Apparel; J.C. Penney Company, Inc.; Jordache Enterprises, Inc.; The Just Group; Kate Spade & Company; Kohl’s Department Stores; L. L. Bean, Inc.; M. Hidary & Company, Inc.; Macy’s; Nordstrom; One Jeanswear Group; Public Clothing Company; Sears Holdings Corporation; Target Corporation; The Warehouse; VF Corporation; Wal-Mart Stores, Inc.; and YM, Inc. *Membership*, ALL. FOR BANGLADESH WORKER SAFETY, <http://www.bangladeshworkersafety.org/who-we-are/membership> (last visited Mar. 22, 2020).

<sup>128</sup> *About the Alliance For Bangladesh Worker Safety*, ALL. FOR BANGL. WORKER SAFETY, <http://www.bangladeshworkersafety.org/who-we-are/about-the-alliance> (last visited Mar. 22, 2020).

<sup>129</sup> See BANGL. ACCORD, *supra* note 70.

<sup>130</sup> ALL. FOR BANGL. WORKER SAFETY, ALLIANCE FIRE SAFETY AND STRUCTURAL INTEGRITY STANDARD, VERSION 1.1, ii (Aug. 12, 2014), <http://www.bangladeshworkersafety.org/files/Alliance%20Standard%20V1%201.pdf>.

<sup>131</sup> *Remediation*, ALL. FOR BANGL. WORKER SAFETY, <http://www.bangladeshworkersafety.org/what-we-do/remediation> (last visited Mar. 22, 2020).

<sup>132</sup> PROTECTING THE LIVES AND LIVELIHOODS OF BANGLADESH’S GARMENT WORKERS: FIRST ANNUAL REPORT OF THE ALLIANCE FOR BANGLADESH WORKER SAFETY 6 (Jul. 2014), [https://www.ids.trade/files/alliance\\_annual\\_report\\_\\_2014-1.pdf](https://www.ids.trade/files/alliance_annual_report__2014-1.pdf) [hereinafter FIRST ANN. RPRT.].

<sup>133</sup> *Training*, ALL. FOR BANGL. WORKER SAFETY, <http://www.bangladeshworkersafety.org/what-we-do/training> (last visited Mar. 22, 2020).

<sup>134</sup> *Standards & Inspections*, ALL. FOR BANGL. WORKER SAFETY, <http://www.bangladeshworkersafety.org/what-we-do/standards-inspections> (last visited Mar. 22, 2020).

<sup>135</sup> *Id.*

<sup>136</sup> *About the Alliance For Bangladesh Worker Safety*, *supra* note 128.

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RMG from Bangladesh.”<sup>137</sup> In addition, like the Accord, retailers are a party to the commitment and are theoretically “bound” to uphold the Alliance’s terms. Further, signatories are incentivized to maintain compliance with Alliance’s standards, as those who leave the Alliance required to pay a financial penalty.<sup>138</sup>

There is also some evidence that basic fire safety training has led to increased worker knowledge regarding common fire hazards and fire safety procedures. After the completion of Alliance-led training, fifty-one percent of workers able to identify common fire hazards and the number of “workers who could correctly identify what to do in case of a fire increased from 39% to 98%.”<sup>139</sup> It is interesting to note whether supplier factories may attempt to escape their legal liability for the future deaths or injuries of workers who received Alliance-led training by pointing to the Alliance-led trainings and workers who receive the training and failing to follow protocol as a form of contributory negligence.

Finally, the Alliance’s disclosure of inspection reports and published updates regarding its Corrective Action Plan on its website demonstrates some level of commitment to increased transparency within the global supply chain.<sup>140</sup> Increased transparency allows retailers to better determine broader performance issues and encourage other retailers to better monitor their relationships with suppliers.

Despite the recognition by U.S. retailers and public officials for concrete solutions, some commitment to transparency regarding factory safety, and worker safety education, the Alliance ultimately lacks enforceability, requires retailers to make minimal efforts to comply with Alliance’s optional terms, fails to represent the interests of workers, and does not sufficiently address the systemic injustices underlying the Rana Plaza Collapse.

Unenforceability is evident in the Alliance’s optional membership requirement. Much like the Accord, the Alliance does not legally require retailers that source from Bangladesh to become signatories, or

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<sup>137</sup> *Id.*

<sup>138</sup> DOROTHÉE BAUMANN-PAULY ET AL., CLOSING GOVERNANCE GAPS IN BANGLADESH’S GARMENT INDUSTRY—THE POWER AND LIMITATIONS OF PRIVATE GOVERNANCE STRUCTURES 6 (Mar. 23, 2015), <http://ssrn.com/abstract=2577535>.

<sup>139</sup> *Alliance For Bangladesh Worker Safety Completes all Factory Inspections, Reaches One Million Workers With Fire Safety Training*, GLOBENEWSWIRE (Jul. 22, 2014), <https://www.globenewswire.com/news-release/2014/07/22/652442/10090421/en/Alliance-for-Bangladesh-Worker-Safety-Completes-all-Factory-Inspections-Reaches-One-Million-Workers-with-Fire-Safety-Training.html>.

<sup>140</sup> FIRST ANN. RPRT., *supra* note 132, at 9; *Inspection Reports & CAPs*, ALL. FOR BANGL. WORKER SAFETY <http://www.bangladeshworkersafety.org/factory/reports-caps> (last visited Mar. 2, 2019).

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“Members.”<sup>141</sup> The Alliance binds only retailers that are signatories. Though a number of the largest retailers have signed the Alliance, the vast majority of retailers (e.g., Cotton On Group, Madewell, Puma, and Zara) in the United States, Europe, and Australia are not signatories.<sup>142</sup>

The Alliance’s unenforceable nature is also observed in the regulatory governance gap. A regulatory governance gap (also known as a “regulatory gap” or “governance gap”) refers the inability and/or unwillingness of state actors to provide basic rights, such as labor protections for workers.<sup>143</sup> During its operation, the Alliance lacked the legal authority to make provisions of the Bangladesh Worker Safety Initiative enforceable against its signatories.<sup>144</sup> Though the government of Bangladesh and other international institutions have some ability to grant such authority to private institutions in other circumstances, here they lack the resources, administrative capacities, and political power to do so.<sup>145</sup> As a result, signatories face little to no liability if they refuse to comply with the Bangladesh Worker Safety Initiative, despite the fact that signatories are a party to the agreement and they are contractually bound on paper.

Another problematic consequence of the Alliance’s unenforceable nature is that retailers and suppliers are not required to undergo remediation to improve unsafe factories.<sup>146</sup> First, Members are not obligated to contribute to the remediation fund; it is a “voluntary loan program” that allows Western retailers to donate as much or as little as they wish for critical repairs.<sup>147</sup> Second, only the provisions concern Members’ fees are subject to binding arbitration; the rest of the Alliance’s terms are not legally enforceable.<sup>148</sup> Also, the Alliance’s protocol for resolving ethics complaints is unclear. The

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<sup>141</sup> See generally ALL. FOR BANGL. WORKER SAFETY, <http://www.bangladeshworkersafety.org/> (last visited Mar. 2, 2019).

<sup>142</sup> It can be logically inferred that retailers who are not mentioned on the “Membership” page are not signatories. *Membership*, ALL. FOR BANGL. WORKER SAFETY, <http://www.bangladeshworkersafety.org/who-we-are/membership> (last visited Mar. 22, 2020).

<sup>143</sup> See, e.g., BAUMANN-PAULY ET AL., *supra* note 138, at 1.

<sup>144</sup> Beryl ter Haar & Maarten Keune, *One Step Forward or More Window-Dressing? A Legal Analysis of Recent CSR Initiatives in the Garment Industry in Bangladesh*, 30 INT’L J. COMP. LAB. L. & INDUS. REL. 1, 5 (2014).

<sup>145</sup> *Id.* at 5; BAUMANN-PAULY ET AL., *supra* note 138, at 3.

<sup>146</sup> *Id.*

<sup>147</sup> *Understanding the Alliance and the Accord on Bangladesh Worker Safety*, OXFAM (Dec. 5, 2013), <https://www.oxfam.org.au/2013/12/understanding-the-alliance-and-the-accord-on-bangladesh-worker-safety/>. As argued in the Accord section (subsection III) [Part III.A], both retailers and suppliers should take accountability for the labor conditions they created which lead to the deaths of over a thousand workers.

<sup>148</sup> See *Understanding the Alliance and the Accord on Bangladesh Worker Safety*, *supra* note 147; see also *Is the Alliance Legally Binding?*, ALL. FOR BANGL. WORKER SAFETY: FAQ, <http://www.bangladeshworkersafety.org/who-we-are/faq> (click the dropdown for the relevant question) (last visited Mar. 22, 2020).

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Integrity Program does not include any provisions for sanctions regarding persons who have engaged in “unethical” behavior; the program merely allows aggrieved individuals to submit complaints without any promise of an investigation or even notice to the supplier.<sup>149</sup>

While looking good on paper, the Alliance requires extremely minimal effort from retailers to comply with fire safety requirements. Unlike the Accord, the Alliance does not require signatories to make *any* monetary payments, with the exception of administrative fees and an optional loan program.<sup>150</sup> This may mean that Alliance-monitored factories may not receive any financial support to make necessary repairs. Even if signatories choose to provide financial support, factory inspectors operating under the Alliance are not independent, because “brands and retailers choose the auditors, pay the auditors, and control the inspections.”<sup>151</sup>

Further, the Alliance does not genuinely represent garment workers or their interests. Neither workers nor trade unions had a hand in developing or implementing the Alliance’s initiatives. According to a 2015 study by the Bangladesh Garment Worker Unity Forum, “98% of garment workers have never heard of . . . the Alliance.”<sup>152</sup>

Lastly, like the Accord, the Alliance does not address the systemic injustices underlying the Rana Plaza Collapse. The scope of the Alliance covers only “improvements in fire, structural, and electrical safety” in garment factories; it does not address wages, hours, the right to a dignified work environment, and maternity leave.<sup>153</sup> Just as problematic is the temporary duration of the Alliance—as of December 31, 2018, the Alliance has ceased operations.<sup>154</sup> This means that there is no guarantee that trainings similar to Alliance-led fire safety trainings will occur after that date.

Taken altogether, the Alliance falls short of resolving safety issues it purports to resolve and fails to disrupt the existing power dynamics between workers, trade unions, suppliers, and retailers. The signatories’ commitments on paper are ultimately hollow promises lacking financial backing, legal enforceability, and real action.

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<sup>149</sup> See *Does the Alliance Have a Protocol for Receiving and Resolving Ethics Complaints?*, ALL. FOR BANGL. WORKER SAFETY: FAQ, <http://www.bangladeshworkersafety.org/who-we-are/faq> (click the dropdown for the relevant question) (last visited Mar. 22, 2020).

<sup>150</sup> *Understanding the Alliance and The Accord on Bangladesh Worker Safety*, *supra* note 147; see also Haar & Keune, *supra* note 144, at 5, 24 (identifying the substantive differences between the Accord and the Alliance, including the validity of the Alliance, as it was not formed by workers).

<sup>151</sup> *Understanding the Alliance and The Accord on Bangladesh Worker Safety*, *supra* note 147.

<sup>152</sup> Nafisa Tanjeem, *Thinking Beyond Accord and Alliance*, THE DAILY STAR (Apr. 21, 2017), <https://www.thedailystar.net/star-weekend/thinking-beyond-accord-and-alliance-1393888>; Huq, *supra* note 49, at 70.

<sup>153</sup> *Frequently Asked Questions*, ALL. FOR BANGL. WORKER SAFETY, <http://www.bangladeshworkersafety.org/who-we-are/faq> (last visited Mar. 22, 2020).

<sup>154</sup> *Id.*

*C. Dissonance Between Corporate Codes of Conduct and Human Rights*

In the past decade, corporate codes of conduct have emerged as the primary means of self-regulation for some of the large clothing retailers in the United States<sup>155</sup> Touted by many scholars, NGOs, and corporate advisors as the most effective and viable option for “ethical” retailing, codes of conduct set forth standards on conditions of employment, such as wages, hours, discrimination, child labor, health and safety, and freedom of association.<sup>156</sup> Generally, these codes are known as sources of “alternative regulation,” because they are “often driven by transnational interests and actors, [are] non-binding and operate[] parallel to state mechanisms.”<sup>157</sup> Codes of conduct may be either external (formulated by intergovernmental organizations and NGOs) or internal (created by retailers themselves).<sup>158</sup> Such codes vary in substance, from general statements of business principles to specific regulations.<sup>159</sup> Codes of conduct also vary in sources of authority; some cite national law, while others look to internationally-agreed upon standards (e.g., ILO standards), and some rely on both.<sup>160</sup>

In addition to the rising popularity of retailer-created internal codes, the demand for accountability also engendered the creation of global voluntary compliance bodies and international labor standards.<sup>161</sup> The

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<sup>155</sup> See generally Debra Cohen Maryanov, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 LEWIS & CLARK L. REV. 397, 401–12 (2010).

<sup>156</sup> U.S. DEP’T OF LABOR, BUREAU OF INT’L LABOR AFFAIRS, THE APPAREL INDUSTRY AND CODES OF CONDUCT: A SOLUTION TO THE INTERNATIONAL CHILD LABOR PROBLEM? iv (1996), [https://www.dol.gov/sites/dolgov/files/ILAB/research\\_file\\_attachment/apparel.pdf](https://www.dol.gov/sites/dolgov/files/ILAB/research_file_attachment/apparel.pdf).

<sup>157</sup> Kristy Ward, *Does Third-Party Monitoring Improve Labor Rights? The Case of Cambodia, in AFTER RANA PLAZA*, *supra* note 49, at 85.

<sup>158</sup> Some examples of external codes of conduct include the United Nations Code, OECD Code, ILO Code, and the Sullivan Principles. While external codes address crucial labor issues, such as unsafe working conditions, forced labor, and low-wages, most of them have been unpopular or adopted but lack enforcement. Internal codes were created by companies in response to rising pressure from foreign workers, media, investors, and socially-conscious consumers. Some well-known internal codes include Levi Strauss’ Labor Rights Code and Reebok international human rights advocacy program. Internal codes of conduct tend to be different from their external counterparts in that the latter are voluntary, private initiatives that focus on labor and environmental issues. By contrast, external codes that defined the “first wave” of corporate codes were developed by the U.S. federal government in response to bribery and other questionable payments. See Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT’L L. 663, 663–89 (1995); see also RHYS JENKINS, UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT, CORPORATE CODES OF CONDUCT: SELF-REGULATION IN A GLOBAL ECONOMY iii (April 2001), [http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/E3B3E78BAB9A886F80256B5E00344278/\\$file/jenkins.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/E3B3E78BAB9A886F80256B5E00344278/$file/jenkins.pdf) [hereinafter CORPORATE CODES OF CONDUCT].

<sup>159</sup> CORPORATE CODES OF CONDUCT, *supra* note 158.

<sup>160</sup> *Id.*

<sup>161</sup> Rahman & Hossain, *supra* note 64 at 72.

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primary standards governing the RMG industry in Bangladesh were established by trade unions and national trade organizations, or the Bangladesh Garment Manufacturers and Exporters Association and Bangladesh Knitwear Manufacturers and Exporters Association.<sup>162</sup> Other regulatory bodies include the Business Social Compliance Initiative, Ethical Training Initiative, Fair Labor Association, International Organization for Standardization, United Nations Working Group on Business and Human Rights, SAI Global, and Worldwide Responsible Accredited Production.<sup>163</sup> Retailers may adopt labor standards promulgated by these compliance bodies in a way similar to their adoption of other voluntary external codes.

If labor standards are sufficiently specific, all-encompassing, and uniformly enforced, codes of conduct may lead to limited improvement of labor conditions in supplier factories.<sup>164</sup> To do this, companies must first address a wide range of employment issues they can feasibly oversee in their codes. In drafting standards for such issues, employers ought to avoid stating generalized, lofty goals with little possibility of actualization. Rather, the

<sup>162</sup> *Id.* at 72–74.

<sup>163</sup> The following (non-exhaustive) list contains arguably the most prominent compliance bodies in the RMG industry:

- (1) Business Social Compliance Initiative, a supply chain management system;
- (2) Ethical Training Initiative, an alliance of trade unions, companies, and NGOs promoting ethical trading practices and workers' rights;
- (3) Fair Labor Association, a non-profit collective of universities, civil society organizations, and businesses which audits participating factories and make public results of such audits, provides a complaint mechanism for third parties in serious labor violation cases, and requires companies to implement the FLA Workplace Code of Conduct (based on ILO's International Labour Standards) as a condition of membership;
- (4) International Organization for Standardization, an organization that develops and publishes international standards, including the ISO 14001, which is a criteria for companies to maintain an effective environmental management system;
- (5) SAI Global, a risk management services company that provides risk management solutions, assurance, and information to businesses;
- (6) United Nations Working Group on Business and Human Rights, a group of independent experts established by the Human Rights Council designed to promote and implement the Guiding Principles on Business and Human Rights through country visits and regular communication with state actors, making recommendations for increasing access to remedial measures, and reporting back to the Human Rights Council and the Generally Assembly; and
- (7) Worldwide Responsible Accredited Production, a non-profit consisting of global social compliance experts that administer a compliance training program which allows corporations to obtain certification upon course completion.

Mohammad Nurul Alam et al., *Social Compliance Factors (SCF) Affecting Worker Productivity (EP): An Empirical Study on RMG Industry in Bangladesh*, 10 *PACIFIC BUS. REV. INT'L*, 87, 88–9 (2018); *Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> (last visited Feb. 10, 2019).

<sup>164</sup> See Maryanov, *supra* note 155, at 407–08; see also Compa & Hinchliffe-Darricarrère, *supra* note 158, at 688.

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goals should make reference to nationally or internationally established labor standards, such as provisions set forth in the Bangladesh Labour Act or ILO's International Labour Standards. Establishing specific and attainable goals not only helps retailers maintain public confidence and trust, but also provides some sort of trajectory towards implementing more concrete solutions to systemic problems and encourages other retailers to follow suit. Second, there must be a permanent and consistent scheme of monitoring to ensure compliance with labor standards.<sup>165</sup> Some elements U.S. retailers ought to implement into enforcement schemes are on-site, day-to-day operations managers, independent auditors and reporters that conduct investigations on labor conditions in garment factories, compliant mechanism(s) for workers, and pledges to allow and encourage union organizing.<sup>166</sup>

Further, codes of conduct that integrate extensive compliance systems may supplement U.S., Bangladeshi, or international law in areas that are either difficult or impossible to enforce, thus leading some foreseeable improvement of labor conditions.<sup>167</sup> A major weakness of labor standards promulgated by international agencies (i.e., the ILO) is that they are enforceable only if a nation ratifies them.<sup>168</sup> By contrast, legally-binding codes that set forth standards similar to those established by international agencies<sup>169</sup> may better serve as gap fillers for nations that have not ratified the ILO, thus creating a private right of action for workers to use against non-compliant retailers. In practice, such codes have achieved relative success in improving the health and safety standards for garment factories, as they are stronger financial incentives that "bypass" the existing social norms and national or local labor legislation.<sup>170</sup>

Codes of conduct have also expanded the scope of the retailer's responsibility further down the chain to its supplier factories, which may have a positive effect on labor conditions.<sup>171</sup> It is understandable that retailers

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<sup>165</sup> Compa & Hinchliffe-Darricarrère, *supra* note 158, at 688.

<sup>166</sup> *Id.*

<sup>167</sup> An example of an extensive compliance system is one that is characterized by increased interaction between "sourcing, production, and quality personnel and the factory." See Maryanov, *supra* note 155, at 449.

<sup>168</sup> Constantinos Kombos & Maria Hadjisolomou, *The Mechanisms Used by the ILO and the EU in Combating Employment Discrimination in Pay: Converging Divergence?* 11.2 ELECTRONIC J. COMP. L., Sept. 2007, at 15.

<sup>169</sup> Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167, 200-01 (2018).

<sup>170</sup> Nena Bode, *Global Actors, Local Governance: Corporate Social Responsibility in the Indian Garment Industry*, CULTURAL ANTHROPOLOGY AND DEV. SOC. Jul. 2013, at 24 ("CSR can rightly be considered as the 'governing arm' of neoliberal capitalism. Their ultimate interest to support ethical conduct will remain subjective to their need for profit."); see also Berger-Walliser & Scott, *supra* note 169, at 211-12

<sup>171</sup> See generally Bode, *supra* note 170.

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would ideally want suppliers alone to face responsibility for unsafe factory conditions, because retailers are unlikely to know the day-to-day activities of supplier factories and do not have direct control over factory supervisors or the factory building. However, efficient and complete remediation of unsafe conditions is better accomplished when retailers shoulder some (or arguably, more) costs of repairs because retailers often have greater financial resources.<sup>172</sup> Holding retailers responsible for acts of their suppliers may also be justified because it leads to increased transparency within the global supply chain, as consumers become more aware of human rights abuses within the subcontracting scheme.<sup>173</sup> Expanding on this point, Professor John Ruggie, former UN special representative for business and human rights, argues that retailers who claim to be committed to human rights should not be “shortchanging itself by not being transparent . . . If it believes its [human rights] practices are strong, they should be disclosing the sites they are monitoring and take credit for that.”<sup>174</sup> While expanding the scope of responsibility seemingly increases retailers’ legal liability, it may decrease overall liability (and thus, long-term costs) because retailers would be more incentivized to take preventative measures to decrease the likelihood of large-scale disasters (i.e., the Rana Plaza Collapse and the Garib & Garib Sweater Factory fire).

Though codes of conduct should not displace government regulation or progress achieved by grassroots labor movements in Bangladesh, they may be an economical way supplement these measures, as they are cheap to implement and flexible.<sup>175</sup> If codes of conduct were not created, the government of Bangladesh would have to step in, expending its resources to implement labor standards adopted from compliance bodies like the ILO or create new labor legislation and permit adjudication when injured parties sue on grounds of newly-developed legislation.<sup>176</sup> On the other hand, retailers’ rigorous enforcement of codes of conduct may mean less government regulation and thus conserving limited state resources.<sup>177</sup>

Despite their theoretical benefits and potential for generating limited improvement in labor conditions in supplier factories, codes of conduct are inherently incompatible with the human needs of workers.<sup>178</sup> Though modern view perpetuates the idea that companies have become more “ethical” and “eco-friendly” philanthropists out of genuine concern in social

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<sup>172</sup> See discussion *supra* Section III.A; see generally Bode, *supra* note 170.

<sup>173</sup> See discussion *supra* Section III.A.

<sup>174</sup> Brian Stauffer, *Soon There Won't Be Much to Hide: Transparency in the Apparel Industry*, HUM. RTS. WATCH (2018), <https://www.hrw.org/world-report/2018/essay/transparency-in-apparel-industry>.

<sup>175</sup> See Maryanov, *supra* note 155, at 400–09.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See generally Bode, *supra* note 170.

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justice issues, the reality is that companies remold their labor practices according to *shifts in consumer attitude*, for the principal purpose of *profit maximization*:

Until recently, corporations did have little concern for wider responsibilities that went beyond their businesses. The statement “The business of business is business” of Milton Friedman, implies that the first concern of firms is maximizing ‘shareholder’ value. The primary concern was to make profits, capturing large market shares and being of interest to the ultimate owners of the company. Everything and everybody else—including workers and their communities, the environment, local economies, customers and suppliers—were not of the company’s direct concern . . . this can be understood in the context of neoliberal market capitalism, which dominates the global economy.<sup>179</sup> Only then, through competition, maximal economic growth can be achieved. This vision on the market has largely become commonsense and coincides with the idea of individual freedom as the highest level of value. Supporters of a neoliberal economy see the fact that individuals have choices as a “moral good” . . . formulating codes of conduct and ethical standards are in the first place concerned with intrinsic motivations: codifications are primarily encouraged with sustaining a successful business.<sup>180</sup>

Thus, the goal of retailers both *prior* to the rise of codes of conduct and in the era of globalization, *after* large-scale disasters have occurred, has always been to maximize profits.<sup>181</sup> Proponents of the “ethical corporation” concept may argue that even if this were so, retailers are not prohibited from pursuing the incidental objectives of increasing the quality of their workers’ working conditions or minimizing the impact of their business on the environment.<sup>182</sup> However, while retailers have implemented codes that are facially “socially-conscious,” the actual impact of such codes are temporary, limited in scope, or not well enforced.<sup>183</sup> More importantly, the issues that many codes of conduct address are those vital to the retailers’ reputation, as opposed to those central to the workers’ needs.<sup>184</sup> The inherent nature of codes of conduct

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<sup>179</sup> See Muhammad, *supra* note 52. Neoliberalism is a brand of capitalism whereby “market forces operate relatively freely and play the predominant role in the economy . . . regulated capitalism [is] a form of capitalism in which such non-market institutions as states, corporate bureaucracies, and trade unions play a major role in regulating economic activity, restricting market relations and market forces to a lesser role in the economy.” *Rough Road for Capitalism*, HARVARD MAG. (Jan.-Feb. 2015), <https://harvardmagazine.com/2015/01/rough-road-for-capitalism>. While this definition succinctly identifies the “brand” of capitalism, it is also problematic because the distinction between government and corporate regulation, or private versus public law initiatives is seldom clear-cut.

<sup>180</sup> Bode, *supra* note 170, at 8, 10.

<sup>181</sup> CORPORATE CODES OF CONDUCT, *supra* note 158, at iv. See also *id.*

<sup>182</sup> CORPORATE CODES OF CONDUCT, *supra* note 158, at iv–v, 29–30.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

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perpetuates the false notion that capitalism can be “humane” for the fundamental purpose of profit maximization.<sup>185</sup> In this way, codes of conduct serve to maintain the existing system neoliberal capitalism rather as forces of genuine disruption.

To begin, codes of conduct are temporary standards that fluctuate with consumer preferences, which do not and cannot accurately reflect the actual needs of workers.<sup>186</sup> Retailers have argued that codes ought to be adopted because they have the “flexibility to evolve with ‘public demands.’”<sup>187</sup> However, retailers consider the “public” to be only their Western consumer base, rather than garment workers.<sup>188</sup> Retailers’ fear of consumers is associated with a greater likelihood of acknowledgment of consumer demands, may be due to the conception that the average U.S. consumer has more knowledge about labor rights and the means to negatively affect a retailers’ reputation (i.e., through social media) than the average garment worker who has comparably less leverage.<sup>189</sup> Thus, retailers are more likely to alter their company policies for American middle-class buyers—people who has never had the experience of working in a garment factory and whose perception of labor conditions and workers in the Global South has been skewed by the Western media’s sensationalism of “disasters.”<sup>190</sup> Though it is possible for vigilant consumers to advocate on behalf of workers by being conscious of Orientalist biases,<sup>191</sup> it is difficult for

<sup>185</sup> *Id.*

<sup>186</sup> Maryanov, *supra* note 155, at 405–07.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> INTERROGATING HARMFUL CULTURAL PRACTICES: GENDER CULTURE, AND COERCION 19 (Chia Longman & Tasmin Bradley eds., 2d ed. 2015) (“Whereas we applaud and support the continuous efforts of the brave women (and men) that commit to both grassroots and policy activism . . . sensationalism and—sometimes racist—victimisation of women of the South always lurks around the door. One only has to remember the co-optation of feminist discourse in the war on Iraq and Afghanistan was bombed by the US ‘in the name of freeing women from their burqas’, while the work of local feminist organisations was ignored . . .”).

<sup>191</sup> Orientalism, as Edward Said famously argued, is the colonialist and imperialist lens by which the West (United States, Europe, and Australia or “the Occident”) has represented and continues to represent the East (peoples of Asian and Middle Eastern descent or “the Orient”). Under this theory, the West is the more dominant, civilized, knowledgeable, sophisticated, and progressive culture, whereas the East is the servile, barbaric, exotic, helpless, mysterious, and backwards Other. Zoheh Mashiur, *The Trap of Re-Orientalism*, THE DAILY STAR (Aug. 23, 2019), <https://www.thedailystar.net/star-weekend/burn-the-watchtower/news/the-trap-re-orientalism-1789009> (last visited Feb. 15, 2019).

The pervasiveness of Orientalist modes of thinking is particularly prevalent in the American media. See, e.g., Brent Brewer, *Orientalism as an Issue in the Media and Beyond*, CHICAGO MONITOR (Jul. 9, 2019), <https://chicagomonitor.com/2019/07/orientalism-as-an-issue-in-the-media-and-beyond/>. The existence of the garment industry is an example of Orientalism, at play: Westerners have a tendency to view the garment sector as source of progress, pulling women out of poverty and recognizing their ability to work. However, “it is not that simple . . . [y]es the women’s lives have in fact changed, but unfortunately, with such change comes many problems . . . when the East borrows Western technology, a lifestyle

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even the most well-intentioned consumer to subvert the power dynamics that prioritizes consumer interest and conceals the true demands of workers.<sup>192</sup>

Second, codes of conduct are limited in scope because they only address “‘measurable;’ issues such as healthcare, safety, and work hours.”<sup>193</sup> They seldom address freedom of association, right to engage in collective bargaining, and discrimination based on maternity status and/or gender.<sup>194</sup> A potential explanation for this limitation is that retailers want to do the bare minimum to please socially-conscious consumers who may nevertheless be ill-informed about the crucial role of union activity. Retailers have little incentive to ensure that suppliers are promoting and ensuring workers’ freedom of association rights, as retailers do not want to expend additional resources paying for a wage hike or acceding to other demands retailers’ they themselves did not make. In other words, it would be illogical for Western retailers to shift control over labor conditions to factory workers because retailers are well aware that workers are the fundamental source of profit. Moreover, retailers are incentivized to downplay the necessity of union activities by offering corporate codes as a financially viable alternative of improving labor conditions.<sup>195</sup>

Third, even if codes of conduct do identify specific labor standards and address non-“measurable” issues, most codes still lack implementation through proper monitoring and enforcement mechanisms.<sup>196</sup> Despite the fact that many Western retailers create codes in response to known sweatshop conditions and/or are aware of code violations, such violations are seldom remedied.<sup>197</sup> Many retailers are unwilling to create such mechanisms because they result in an ongoing drain of company resources. Moreover, even if monitoring schemes are implemented, they are often not independent because companies hire their own compliance officers.<sup>198</sup>

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accompanies these new forms and Western gender relations travel with the technology.” LAURA NADER, *CONTRARIAN ANTHROPOLOGY: THE UNWRITTEN RULES OF ACADEMIA* 134 (2018). After the Rana Plaza Collapse, many of the articles written about garment workers (mostly young girls and women from lower socioeconomic classes) were portrayed as helpless survivors, powerless to fight against evil giant corporations and justifying (ironically) Western intervention and Western-led initiatives. See, e.g., Ashfaquzzaman, *supra* note 6, at 18–19.

<sup>192</sup> *Id.*

<sup>193</sup> Bode, *supra* note 170, at 10.

<sup>194</sup> CORPORATE CODES OF CONDUCT, *supra* note 158, at 30.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*; see also Maryanov, *supra* note 155, at 411–12.

<sup>197</sup> CORPORATE CODES OF CONDUCT, *supra* note 158, at 25–26.

<sup>198</sup> *Id.* (“A survey of 132 codes by Kolk et al. . . . came to very similar conclusions. In 41 per cent of cases there was no specific mention of monitoring, and in a further 44 per cent the firms themselves monitored compliance. Less than 10 per cent of company codes and 5 per cent of those set up by business groups had some form of external monitoring . . .”).

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Fourth, codes of conduct ultimately serve retailers' interests rather than to empower workers.<sup>199</sup> Even if some of the hazardous labor practices are changed, they are only changed for the sake of profit maximization. Codes of conduct allow apparel companies to formulate a "marketable brand image of social consciousness" in order to deflect public criticism:

Under pressure, big multinationals ask their critics to judge them by CSR criteria, and then, as the critics charge, mostly fail to follow through. Their efforts may be enough to convince the public that what they see is pretty, and in many cases this may be all they are ever intended to achieve. But by and large CSR is at best a gloss on capitalism, not the deep systemic reform that its champions deem desirable.<sup>200</sup>

Since the financial success of retailers is dependent on consumer satisfaction, codes also place the Western consumer's desires above those of workers.<sup>201</sup> Studies have shown that the average consumer factors in the existence of a compliance system to implement "ethical," internationally-recognized labor conditions before purchasing from a clothing brand.<sup>202</sup> Additionally, if retailers implemented and enforced codes, then it would give the corporation full control over labor source since it (a) avoids costly litigation (less workers-plaintiffs would bring suit against the retailer) and (b) translates to decreased government oversight.<sup>203</sup>

The "ethical nature" of codes maintains the neoliberal order by perpetuating the false notion of a "humane capitalism." There can never be ethical consumption under capitalism, because the exploitation of labor is necessary to sustain the existence of capitalism, and exploitation cannot be

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<sup>199</sup> Maryanov, *supra* note 155, at 405 ("Codes of conduct provide a desirable alternative to more costly types of regulation. Altruistic commitment to social justice is not the primary motivation of MNCs to adopt codes of conduct. Rather, MNCs value the opportunity to preserve free market competition. Without external regulation, corporations can respond quickly to market changes and maximize profit. Also, codes of conduct respond directly to demands for CSR, making them an asset in public relations.").

<sup>200</sup> Clive Crook, *The Good Company*, THE ECONOMIST (Jan 20, 2005), <https://www.economist.com/special-report/2005/01/22/the-good-company>.

<sup>201</sup> White, *supra* note 95. "Sadly, the interest in making improvements after Rana Plaza in many ways can be traced back to the fact that wealthier consumers in other countries were in some way implicated by the collapse."

<sup>202</sup> Rahman & Hossain, *supra* note 64.

<sup>203</sup> I recognize that the distinction between private-law forms of governance by retailers and national government regulation is unclear and often intertwined. "Labor law poignantly illustrates the dark side of entrusting conflict resolution and redistributive mechanisms to private ordering . . . . Prioritizing public over private law rests on the assumption that a clear distinction exists between the two bodies of law. But although the demarcation of spheres of law is a staple of the Western nineteenth-and twentieth-century legal trajectory, it is also one of the most contested distinctions in legal-political thought. Calling one body of law 'public' and another one 'private' connotes universes of meaning, order, and value—the scope and impact of which must be critically unpacked in order to understand the respective discursive universes in which such references occur." Peer Zumbansen, *Happy Spells? Constructing and Deconstructing a Private-Law Perspective on Subsidiary*, 79 LAW & CONTEMP. PROBS. 215, 218 (2016).

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morally justified.<sup>204</sup> Therefore, relying solely on corporate compliance systems to improve labor conditions cedes the power to determine the conditions of labor to the corporate entity, as opposed to the worker.

In the final assessment, allowing codes of conduct to control the garment industry rather than either the workers themselves or even the state preserves and enables the very neoliberal status quo that oppresses workers to remain unregulated.<sup>205</sup> Such codes are a manifestation of retailers adjusting to the change in consumer desires—caused, in part, by consumer recognition of dire labor conditions in supplier factories—to continue their purpose of profit maximization. At their very best, codes of conduct brainwash consumers with the false guarantee of “ethically-made” clothing and rob workers of genuine worker empowerment.

*D. Inadequacy of Workmen’s Compensation under the  
Bangladesh Labour Act and the Pilot Employment Injury  
Insurance Scheme*

i. Workmen’s Compensation under the Bangladesh Labour Act

Workmen’s Compensation was enacted under the Bangladesh Labour Act (“BLA”) to compensate (in the form of cash benefits and medical care) to workers or their dependents for physical injuries related to employment, regardless of whether the worker committed negligent or wrongful acts.<sup>206</sup> Some view Workmen’s Compensation as revolutionary, since it “overrides old doctrines of assumed risks, common employment, contributory negligence, and the end of personal actions with the death of the workman.”<sup>207</sup> For workers and dependents to receive compensation, the injury either (a) meets the requirements of an “occupational disease” (the injury is deemed to be “peculiar” to the worker’s employment) or (b) is “peculiar” to the industry of the worker’s employment.<sup>208</sup> Exception (b) is applicable only where the worker has been employed after “a continuous period of six months.”<sup>209</sup> Workmen’s Compensation is the sole remedy for workplace-related injuries and the worker does not have a private right of

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<sup>204</sup> See generally KARL MARX, CAPITAL: VOLUME ONE: A CRITIQUE OF POLITICAL ECONOMY 282 (Friedrich Engels ed., 2011). I find Section 4—“The Fetishism of Commodities and the Secret Thereof”—to be particularly useful for understanding Marx’s theory of commodity fetishism.

<sup>205</sup> NESS, *supra* note 56, at 16.

<sup>206</sup> Sazeeda Johora Thakur, *Compensation for Work Related Injury or Illness under the Bangladesh Labour Act*, 19 J. BUS. AND MGMT. 21, 21–22 (2017).

<sup>207</sup> *Id.* at 21.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

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action to bring suit against the supplier for damages sustained due to injury or death.<sup>210</sup>

There are admittedly some legitimate benefits of Workmen's Compensation. First, it provides a much quicker and efficient route of relief. Instead of pursuing litigation, an extremely time-consuming and cost inefficient means of resolving injury claims in a system rife with corruption,<sup>211</sup> workers may instead utilize Workmen's Compensation to receive pay outs from suppliers that "are relatively speedy and may be realized within a year or so by the bereaved family of the deceased worker."<sup>212</sup> Second, the compensation scheme also incentivizes suppliers to improve health and safety conditions. Since Workmen's Compensation operates similar to strict liability, suppliers would be theoretically incentivized to decrease their liability (both number of instances and severity) by shouldering the costs of building safety improvements and fire safety trainings. Finally, it may also serve as a "backwards-looking" healthy and safety remedy to complement the Accord's "forward-looking" processes. While the Accord provides the "forwards-looking" remedy through prevention of large-scale disasters, Workmen's Compensation provides the "backwards-looking" remedy by giving money to those who were wronged—injured, dead, and family members of the worker-decedent.

Despite the potential to cover many workers and serve as an alternative to private rights of action, Workmen's Compensation remains an insufficient compensation scheme for workers who were killed or injured during the Rana Plaza Collapse and for other workers whose injuries do not meet the criteria for compensation. To begin, workers and their dependents cannot be compensated for suffering from stress-related or mental injuries, as only physical injuries are covered.<sup>213</sup> This is significant, as many workers suffer from depression, anxiety, and other psychological trauma not only caused by the Rana Plaza Collapse and other large-scale disasters, but also from traumatic experiences of gender-based violence and inhumane labor conditions on a day-to-day basis.<sup>214</sup> For those who suffer only physical injuries, the compensation scheme will not provide any compensation if they have spinal cord injuries, paralyzed limbs, kidney malfunction, head trauma,

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<sup>210</sup> See *id.* at 21–23.

<sup>211</sup> See CLEAN CLOTHES CAMPAIGN, EMPLOYMENT INJURY INSURANCE IN BANGLADESH: BRIDGING THE GAP 2 (Apr. 2018), <https://cleanclothes.org/file-repository/resources-publications-employment-injury-insurance-in-bangladesh-bridging-the-gap/view> (follow link to download PDF) [hereinafter BRIDGING THE GAP]; discussion *infra* Section III.E.i.

<sup>212</sup> Thakur, *supra* note 206, at 23.

<sup>213</sup> *Id.* at 23.

<sup>214</sup> Seventeen survivors of the Rana Plaza Collapse reported that in addition to recovering from physical injuries, they continue to suffer from trauma, depression and suicidal ideation, sleep disorders, anxiety, and sudden anger. Kabir, *supra* note 5.

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or back pain.<sup>215</sup> Amending the Workmen's Compensation to include the aforementioned injuries would cover many more workers.

The amount of compensation under Workmen's Compensation falls well below the ILO's Employment Injury Recommendation ("Convention 121"),<sup>216</sup> which Bangladesh has not ratified.<sup>217</sup> Convention 121 proposes that each nation that adopts the recommendation should establish a scheme for providing employment injury benefits to workers who sustain injuries from industrial accidents and occupational diseases.<sup>218</sup> Importantly, Convention 121 provides that the cash benefits should be "not less than two-thirds of the injured person's earnings" or if the benefits are "provided at flat rates, not less than two-thirds of the average earnings of persons employed in the major group of economic activities."<sup>219</sup> By comparison, Workmen's Compensation provides only 1,000,000 taka (approximately \$1,180 USD) to dependents of deceased workers, 1,250,000 taka (approximately \$1,470,00 USD) to workers who have a "permanent disablement" under the scheme, and for those with a "temporary disablement": the full amount of monthly wages for two months, plus two thirds of the monthly wages for the following two months, and half of the monthly wages for the remaining months during the period of disablement.<sup>220</sup> For those with "occupational disease," the amount of compensation is half of monthly wages during the period of disablement for a maximum of two years.<sup>221</sup> The guidelines under Workmen's Compensation thus fall short of Convention 121's standards, in regard to compensation for dependents of deceased workers and for workers with a permanent disablement or occupational disease. The temporary disablement provision only meets Convention 121's standards for the first two months of the disablement period. While it may be foreseeable that some workers with less serious disabilities may return to work, the temporary disablement rate does not account for the fact that not all the conditions that fall under the definition of temporary disablement will affect workers the same way. Thus,

<sup>215</sup> *Id.* at 25.

<sup>216</sup> Worker Injury Benefits Recommendation, 1964 (No. 121) (1964), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55\\_TYPE,P55\\_LANG,P55\\_DOCUMENT,P55\\_NODE:REC,en,R121,/Document](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REC,en,R121,/Document) [hereinafter Worker Injury Benefits Recommendation].

<sup>217</sup> The countries that have ratified Convention 121 are as follows: Belgium, Bolivia, Bosnia and Herzegovina, Chile, Croatia, Cyprus, Democratic Republic of the Congo, Ecuador, Finland, Germany, Guinea, Ireland, Japan, Libya, Luxembourg, Montenegro, Netherlands, North Macedonia, Senegal, Serbia, Slovenia, Sweden, Uruguay, and Venezuela. *Ratifications of C121 - Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980] (No. 121)*, INTERNATIONAL LABOUR ORGANIZATION, [https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312266](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312266) (last visited Mar. 22, 2020).

<sup>218</sup> *Id.*

<sup>219</sup> Worker Injury Benefits Recommendation, *supra* note 216.

<sup>220</sup> Thakur, *supra* note 206, at 23.

<sup>221</sup> *Id.*

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there is no legitimate reason the drafters cannot simply extend “two-thirds of monthly wages” compensation rate to cover the entire period of disablement.

Given that Bangladesh already has a system of compensation for injured workers in place, amending Workmen’s Compensation to include a broader array of injuries to cover workers who need it the most and to comply with Convention 121’s standards is certainly feasible. However, it is still unclear whether all workers with injuries who do meet those guidelines have actually received compensation today or are even aware of their rights under the Workmen’s Compensation scheme. It is also unclear whether workers or their families who have received compensation under the Rana Plaza Donor’s Trust Fund<sup>222</sup> are simultaneously eligible for payment under Workmen’s Compensation. Most importantly, neither trade union members nor worker representatives had a hand in setting the compensation rates. This is not to say that the government of Bangladesh can never represent workers’ genuine interests through state-promulgated and state-enforced schemes, but that the compensation scheme might have more closely represented workers’ basic needs if workers or their representatives were permitted to create the scheme.

ii. Pilot Employment Injury Insurance Scheme

An alternative compensation scheme, the Employment Injury Insurance (“EII”) Scheme, is set to launch “in some selected RMG factories” by June 2020.<sup>223</sup> Established by the ILO and funded by the German government, the EII Scheme aims to create a state-run program to provide a permanent source of loss of income payments to injured or killed workers and their families.<sup>224</sup> Though the EII Scheme seems to remedy the defects of Workmen’s Compensation by “following more closely with the “letter of Convention 121,” it is vague as to whether its compensation provisions will strictly follow the “two-thirds of the injured person’s earnings” requirement. Even more problematic has been the outright opposition to the scheme by apparel sector leaders, which has already caused delays in the scheme’s launching<sup>225</sup> and does not seem likely to abate anytime soon. Finally, like the Accord, the Alliance, and corporate codes of conduct, the EII Scheme

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<sup>222</sup> Established by the ILO and funded by retailers, Rana Plaza Donor’s Trust Fund was designed to compensate over 5,000 workers and their families injured or killed by the Rana Plaza Collapse. Many of the awards were not completed for a long period after the Collapse due to retailers’ hesitation to make timely donations. THE RANA PLAZA ARRANGEMENT, <https://tanaplaza-arrangement.org/> (last visited Feb. 14, 2020); see, e.g., Mirjam van Heugten, *WE WON!! Rana Plaza Workers Get Compensation*, CLEAN CLOTHES CAMPAIGN (Jun. 8, 2015), <https://cleanclothes.org/news/2015/06/08/we-won-rana-plaza-workers-get-full-compensation>.

<sup>223</sup> Monira Munni, *Employment Injury Insurance: Pilot Scheme in RMG Sector Likely by June Next Year*, THE FIN. EXPRESS (Dec. 29, 2019), <https://thefinancialexpress.com.bd/trade/employment-injury-insurance-pilot-scheme-may-launch-in-rmg-sector-by-june-next-year-1577594237>.

<sup>224</sup> BRIDGING THE GAP, *supra* note 211, at 5.

<sup>225</sup> *Id.*

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cannot truly represent workers' rights, as neither trade unions nor workers representatives had any say in its development, (attempted) implementation, or enforcement.

*E. Barriers to Private Rights of Action under the Bangladesh Labour Act and U.S. Law*

Theoretically, private rights of action brought under the BLA may provide workers with an avenue of relief and raise awareness regarding labor conditions in supplier factories, these causes of action cannot fundamentally destroy or alter the relations between workers and retailers.

Under the laws of Bangladesh, workers may “submit a complaint on unfair labour practices or anti-union activities to the Department of Labour for remedial action, which would be properly dealt with in an appropriate time frame.”<sup>226</sup> Unfair labor practices include a supplier placing certain restrictions on a worker's freedom of association rights, the vast majority of which were added in 2013.<sup>227</sup> In 2016, very few complaints turn into litigation or are even investigated—most of them are resolved through a helpline for workers or resolved through settlement.<sup>228</sup>

Under U.S. laws, foreign and domestic plaintiffs injured as a result of a defendant's violation of a federal statute are authorized to bring a private right of action.<sup>229</sup> Such actions may be based on federal statutes, such as the Racketeer Influenced and Corrupt Organizations Act,<sup>230</sup> Federal Torts Claim Act,<sup>231</sup> and the Alien Tort Claims Act.<sup>232</sup> Some state statutes may also allow U.S. consumers or competing retailers to bring suit against retailers that

<sup>226</sup> Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) (2017), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101\\_COMMENT\\_ID:2252760](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101_COMMENT_ID:2252760).

<sup>227</sup> BANGLADESH LABOUR ACT (2006), [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=76402&p\\_country=BGD&p\\_classification=01.02](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=76402&p_country=BGD&p_classification=01.02) (follow link to PDF of Unofficial English Translation).

<sup>228</sup> Freedom of Association and Protection of the Right to Organize Convention, *supra* note 226.

<sup>229</sup> 7 U.S.C. § 25 (2018); *see* Donna L. Goldstein, *Implied Private Rights of Action Under Federal Statutes: Congressional Intent, Deference, or Mutual Abdication?* 50 *FORDHAM L. R.* 611 (1982).

<sup>230</sup> 18 U.S.C. §§ 1961–1968 (1970). The RICO Act provides both civil cause of action for injured plaintiffs to recover damages against defendants who perform offenses (including murder, kidnapping, and bribery) as part of an ongoing criminal organization and also allows for the prosecution of such organizations and the imposition of criminal penalties.

<sup>231</sup> 28 U.S.C. §§ 1346 (1946). The Federal Tort Claims Act waives the sovereign immunity, granting federal courts jurisdiction in tort actions in which the plaintiff's injury was allegedly “caused by the negligent or wrongful act or omission” of any worker of the U.S. federal government within the scope of employment. Though there is no private cause of action under the FTCA itself, plaintiffs may bring suit under the broad grant of remedies.

<sup>232</sup> 28 U.S.C. §§ 1350 (1789). The Alien Tort Claims Act grants federal courts original jurisdiction over civil tort actions brought by a foreign plaintiff, alleging violation of either the law of nations or a treaty in which the U.S. is a party. *See* Legislative Attorney, American Law Division, *The Alien Tort Statute: Legislative History and Executive Branch Views*, CRS Report for Congress (Oct. 2, 2003).

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contract with sweatshops but falsely misrepresent the brand by claiming otherwise. Foreign plaintiffs may also bring tort claims under state law alleging that the retailer(s) has breached its duty of care by violating its own code.

Suits by workers, U.S. consumers, and competing retailers may (a) set precedent for increased litigation against retailers, (b) increase retailers' actual compliance with their own codes and national and international labor standards, (c) result in greater labor law legislation favorable to workers, (d) compensates low-wage plaintiffs for injuries, and (e) raise awareness for workers regarding their own rights.<sup>233</sup> The threat of publicizing lawsuits may serve as an enforcement mechanism of codes because the livelihood of retailers depends on positive public relations.

However, benefits of litigation in both the United States and Bangladesh for foreign, low-wage worker-plaintiffs are different than those for the average middle-class, English-speaking American consumer-plaintiff that has greater economic resources, time, language skills, and access to knowledge regarding the American and Bangladeshi legal systems.<sup>234</sup> Another limitation of such benefits is that even if labor legislation is created as a result of litigation in Bangladesh, workers' rights may not necessarily be protected due to the likelihood of poor enforcement.<sup>235</sup>

One of the greatest challenges for worker-plaintiffs seeking relief through Bangladesh's judicial system is that the judicial and the law enforcement systems are the "the most corrupt sectors in public administration."<sup>236</sup> According to a national survey in 2010, Transparency International Bangladesh found that eighty-eight percent of all households seeking judicial services were harassed, bribed, deceived, or subjected to other forms of corruption.<sup>237</sup> Corruption especially harms low-wage workers

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<sup>233</sup> Maryanov, *supra* note 155, at 412-37. Both Bangladesh and the United States have a judicial system with a hierarchal system of courts, as well as specialized courts—e.g., Labour Courts. Like most common law jurisdictions, the doctrine of precedent is applicable in adjudication. See Panday & Mollah, *supra* note 98, at 6-30.

<sup>234</sup> See generally Victoria A. Magagna, *Consumers of Privilege: A Political Analysis of Class, Consumption, and Socialism*, 21 *POLITY* 711 (1989).

<sup>235</sup> Farzana Nawaz & Transparency International, *Overview of Corruption Within the Justice Sector and Law Enforcement Agencies in Bangladesh*, 1 *TRANSPARENCY INT'L* 1, 8 (2012).

<sup>236</sup> *Id.*

<sup>237</sup> There are high rates of corruption within the legal system of Bangladesh: "Corruption in the judiciary can take the form of bribery, nepotism, embezzlement of funds, trading of influence and deception. According to the household survey of TI Bangladesh, bribery is the most prevalent form of corruption in the judiciary. Among the households who received services from the judiciary, 59.6% had to pay a bribe. Incidence of corruption varies depending on the level of court - 68.9% had to pay a bribe in the magistrate court, 58.4% in the civil court and 73.6% in the high court. The TI Bangladesh report found that the average amount of bribe paid in the high court is the highest (12,761 taka or approximately 153 USD), while the average amount of bribe paid in the magistrate court is 6,598 taka (approximately 80 USD) and the civil court is 6,178 taka (approximately 74 USD). Bribes were paid for a variety of reasons:

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because this means that many of them would be unable to afford the cost of a bribe. Even if a plaintiff is able to afford the bribe, they face partial judges who are often appointed for political reasons.<sup>238</sup>

Foreign worker-plaintiffs may also face difficulties in establishing jurisdiction and liability based on either contract or tort theories when bringing suit against retailers in the United States.<sup>239</sup>

Most importantly, litigation in either American or Bangladeshi courts cannot subvert the inherent power relation between the workers and retailers. Winning judgments against factory supervisors and retailers may compensate the individual plaintiff for her physical and/or emotional injuries, establish or reaffirm labor legislation for better labor conditions, or clarify workers' rights. Winning judgments will never abolish the system that relies on the exploitation of vulnerable populations; it merely improves some conditions of exploitation to make exploitation of such populations more palatable.<sup>240</sup>

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56.3% households paid a bribe for expediting the hearing of a trial, 32.7% for influencing the verdict of trial, 22.2% for collecting documents, 6.3% for deferring the date of hearing and 1% for hiding documents. Corruption and harassment also occur, at various points of interaction with the judicial system—39.7% of households reported being harassed by lawyers, 24.5% by staff of the court, 16.9% by lawyers' assistants and 2.7% by brokers." *Id.* Another report on the corruption of Bangladesh's judiciary states the following: "Two thirds of the people who used a court in 2004 paid bribes, with the typical bribe amounting to 25 percent of average annual income." Panday & Mollah, *supra* note 98, at 26.

<sup>238</sup> "Partisan political appointments of judges has been cited as a significant reason for judicial corruption and inefficiency . . . there have been wide ranging criticisms about the nature and extent of de facto independence. The Constitution stipulates that the president should appoint the Supreme Court judges after extensive consultation, no clear guidelines exist on the process of consultation or the qualification of the judges." Nawaz & Transparency International, *supra* note 235, at 4. Moreover, judicial corruption may also be a result of low salaries, lack of employment benefits, accountability mechanisms, and transparency (in terms of assets), the usage of bribery to obtain necessary information regarding cases, and underdeveloped rules of judicial conduct. *Id.*

<sup>239</sup> *U.S. Court Dismisses Lawsuit Over Rana Plaza collapse against Wal-Mart, JC Penney, Children's Place*, BD NEWS 24 (May 6, 2016), <https://bdnews24.com/bangladesh/2016/05/06/us-court-dismisses-lawsuit-over-rana-plaza-collapse-against-wal-mart-jc-penney-children-s-place> (reporting that state judge dismissed worker's lawsuit against three retail giants on the grounds that the statute-of-limitations had expired and that such retailers owed no duty of care to workers employed by supplier factories). *But cf.* Maryanov, *supra* note 155, at 419 (arguing that while after "*Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)], the circuits have overwhelmingly rejected ATCA claims based on allegations of mere sweatshop conditions," federal courts have "left open the possibility that it will recognize new norms of customary law as measured by a two-pronged standard: (1) specificity and (2) universal acceptance.").

<sup>240</sup> Another concern is that as workers demand higher wages and labor costs rise, garment factories may eventually relocate to the prison industry: "The Bangladesh Knitwear Manufacturers and Exporters Association (BKMEA) trained 300 [to] 400 prisoners to work two shifts in a mini-garment factory . . . with the idea of having prisoners earn money for their labor while serving sentences. Each prisoners' earnings will go to their respective accounts, which they can save or use to send to family." Tara Donaldson, *Bangladesh Opens First Ever Garment Factory in a Prison*, SOURCING J. (Dec. 28, 2017), <https://sourcingjournal.com/topics/labor/bangladesh-opens-first-garment-factory-in-prison-76514/>. This demonstrates that the exploitation of vulnerable populations for labor is a fundamental characteristic in all capitalist economies. In the garment industry, what changes is the particular *population* of persons subject to exploitation.

## IV. CRITICAL REFOCUS ON SYSTEMIC SOLUTIONS

A. *Enforcing the Right to Unionize without Retaliation*

Though the Accord, Alliance, and Bangladeshi labor laws have led to some improved safety procedures, they have failed to address the continuing threats and acts of violence by garment factory suppliers against workers, ongoing arbitrary arrests by the Bangladeshi police, criminalization of strikers, and abysmal wages and protracted hours of work.<sup>241</sup> It was only through the occurrence of a singular and publicized human rights violation—the Rana Plaza Collapse—that spurred public interest. However, the reason for the disaster was a labor rights issue caused by systematic factors. Thus, the ultimate solution to these issues cannot be resolved through the mere amendment of laws that do not address the inherent imbalance of power between the corporate entity and the individual worker. However, this is not to say that existing laws cannot be amended to afford Bangladeshi workers temporary relief as they continue to exercise FoA-associated rights.

First, there must be provisions added to the Bangladesh Labour Act prohibiting physical and mental harassment while workers are acting within the scope of their employment. The Amendment to the Bangladesh Labour Act as well as the Act itself prohibits discrimination solely based on trade union membership. Presently, there are no provisions in the Act regarding workplace harassment, much less prohibition on harassment based solely on trade union membership and reporting work-related grievances.<sup>242</sup> Since labor laws in Bangladesh are founded on a common law system, I propose that the Legislative branch adopt both *quid pro quo* and hostile work environment harassment legislation. Such legislation will be modeled after federal labor and employment laws in the United States, as well as policies enacted by the Department of Labor.<sup>243</sup> Furthermore, labor laws should

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<sup>241</sup> *Bangladesh: Protect Garment Workers' Right*, HUM. RTS WATCH (Feb. 6, 2014), <https://www.hrw.org/news/2014/02/06/bangladesh-protect-garment-workers-rights>; *Bangladesh: Stop Persecuting Unions, Garment Workers*, HUM. RTS WATCH (Feb. 15, 2017), <https://www.hrw.org/news/2017/02/15/bangladesh-stop-persecuting-unions-garment-workers>.

<sup>242</sup> See generally JAKIR HOSSAIN & MOSTAFIZ AHMED, BANGLADESH LABOUR LAW: REFORM DIRECTIONS 12–14 (2010).

<sup>243</sup> *What Do I Need to Know About... Workplace Harassment*, U.S. DEP'T OF LAB., CIVIL RTS. CTR, <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/workplace-harassment/2012> (last visited Mar. 24, 2020). *Quid pro quo* (“this for that”) harassment is when a figure of authority promises either a tangible or intangible asset in exchange for a worker’s sexual favor(s). Such harassment may also occur when a figure of authority conditions an employment decision on the worker’s refusal to complete a sexual favor(s). Hostile work environment harassment is defined as the unwelcome acts that create an intimidating, hostile, or offensive workplace atmosphere by authority figures, co-workers, and anyone the worker interacts with while acting within the scope of employment. Behavior that falls into this latter category include discussing sexual acts, using degrading terms and gestures (sexually suggestive or racially offensive), touching other unnecessarily, and sabotaging another’s work. *Id.*

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provide all garment workers with whistleblower protections mirroring The Whistleblower Protection Act of 1989.<sup>244</sup> These amendments may not only address harassment by garment factory owners and supervisors, but also encourage innocent workers to report harmful, even deadly behaviors in the workplace.<sup>245</sup>

According to the eighth periodic report issued by the Committee on the Elimination of Discrimination against Women (“Committee”), there has only been one amendment to the BLA unrelated to the prohibition of physical and/or verbal harassment by garment factory supervisors.<sup>246</sup> While the 2013 Amendment to the BLA increased the maternity leave to 6 months, this provision fails to adequately address systemic abuses.<sup>247</sup>

Second, a system of accountability that allows workers to hold liable suppliers and individual garment factory supervisors for the labor law violations is long overdue.<sup>248</sup> Imposing criminal penalties on supervisors that abuse their workers is not the most effective route, even if from the retributory standpoint it seems instinctively justifiable to simply “lock them up and throw away the key.” In conjunction with community-led education on gender-based violence in the workplace, the imposition of non-criminal punishment on supervisors that violate labor laws will most effectively decrease physical and verbal abuse in the workplace. As discussed in Section C, education on gender discrimination helps workers develop more holistic and long-term solutions to mitigate labor violations in the workplace.

*B. Strengthening the CEDAW, ICCPR, ICESCR, and ICERD: A Step Towards Eliminating Gender-Based Violence in Factories*

i. Bangladesh’s Ratification of CEDAW with Reservations

The Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW” or “the Convention”) is a comprehensive international human rights treaty created to eliminate discrimination against women.<sup>249</sup> As an expansion of the Universal Declaration of Human Rights

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<sup>244</sup> THE WHISTLEBLOWER PROTECTION PROGRAMS, U.S. DEP’T OF LAB., <https://www.whistleblowers.gov/> (last visited Mar. 25, 2020).

<sup>245</sup> *Id.*

<sup>246</sup> UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW), CONCLUDING OBSERVATIONS ON THE EIGHTH PERIODIC REPORT OF BANGLADESH 1 (Nov. 18, 2016), <https://www.refworld.org/docid/583864444.html>.

<sup>247</sup> *Id.* at 1.

<sup>248</sup> *Id.*

<sup>249</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter *CEDAW Convention*].

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(UDHR), CEDAW aims to effectuate UDHR's recognition of "the inherent dignity and of the equal and inalienable rights" of mankind.<sup>250</sup> CEDAW addresses the inequalities in the legal status of women, reproductive rights, and various cultural norms that restrict women from exercising their fundamental rights.<sup>251</sup> States have the options of ratifying CEDAW with no reservations on any of its Articles, ratifying CEDAW with reservations or declarations, or not ratifying CEDAW at all.<sup>252</sup>

The Optional Protocol to CEDAW is the complaint and inquiry mechanism by which survivors of "grave or systematic violations" under the Convention may bring claims against the injuring party.<sup>253</sup> However, states may choose to opt out of this mechanism of the Protocol.

To effectively enforce CEDAW, the Committee must interpret the terms of the Convention and determine the "consistency and rigor" of its application of such terms.<sup>254</sup> The Committee identifies the different categories of discrimination against women, characterizes behavior that would fall under such categories, and articulates the legal protections granted by CEDAW's provisions on the right to equality.<sup>255</sup> Many scholars view CEDAW's definition of discrimination against women as a broad definition which covers both direct and indirect forms of discrimination in all spheres.<sup>256</sup> The Convention defines "discrimination against women" as the following:

"[D]iscrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>257</sup>

According to Simone Cusack and Lisa Pusey, direct discrimination under CEDAW is discrimination that impairs or nullifies a woman's rights on the

<sup>250</sup> *Id.*

<sup>251</sup> Simone Cusack & Lisa Pusey, *CEDAW and the Rights to Non-Discrimination and Equality*, 14 MELBOURNE J. OF INT'L. L. 1, 2-3 (2013), [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0003/1687440/03Cusack1.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0003/1687440/03Cusack1.pdf).

<sup>252</sup> See UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AT 60 AND THE CEDAW COMMITTEE (Nov. 4, 2008), [https://www.ohchr.org/documents/HRBodies/CEDAW/Statements/UDHR60\\_Mr.Flinterman.pdf](https://www.ohchr.org/documents/HRBodies/CEDAW/Statements/UDHR60_Mr.Flinterman.pdf).

<sup>253</sup> *Optional Protocol to the CEDAW Convention*, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter *Optional Protocol*].

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 5-11.

<sup>256</sup> *Id.*

<sup>257</sup> *CEDAW Convention*, *supra* note 249.

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basis of gender or sex.<sup>258</sup> By contrast, indirect discrimination is discrimination based on a “law, policy, programme or practice” that is neutral on its face, but discriminates against women in practice.<sup>259</sup> Notably, the Committee has classified some oppressive practices as gender-based violence as a form of discrimination against women under CEDAW.<sup>260</sup> Violence by non-state actors against women, such as verbal and physical abuse directed at women workers by supervisors in privately-owned garment factories, would fall under this category.<sup>261</sup>

A state that ratifies Convention is legally compelled to take measures to prevent discrimination against women by both public and private state actors, including adopting, modifying, and abolishing such discriminatory legislation.<sup>262</sup> Such measures include enacting legislation to stop human trafficking and ensuring a proper understanding of maternity.<sup>263</sup> States that are parties to CEDAW cannot refuse to comply with any of the obligations in Article 2, 3, 4, and/or 5 by adopting the treaty with any reservations on these Articles.<sup>264</sup> The government of Bangladesh adopted CEDAW and ratified the document with two reservations.<sup>265</sup> Bangladesh has declared that it is not legally obligated to investigate claims brought under CEDAW, as it has opted out of this mechanism of the Protocol pursuant to Article 10.<sup>266</sup>

Labor conditions in garment factories subject workers—most of who are women and young girls—to both direct and indirect forms of discrimination within the meaning of CEDAW. Factory supervisors ensure a compliant workforce by exploiting young girls’ low socioeconomic status and second-class status as women. As discussed in Section II,<sup>267</sup> such exploitation is manifested in form of threatening psychological or physical injury, insults based on gender, and actual violence resulting in serious injuries or death.

<sup>258</sup> *Id.* at 7.

<sup>259</sup> *Id.* Cusack and Pusey further explain the meaning of discrimination: “To constitute discrimination under art 1, the difference in treatment must impair or nullify a woman’s rights, by which it is meant that it adversely affects her rights; ‘[a] sex-based action or practice which enhances women’s enjoyment of their rights and freedoms is not discrimination against them within the meaning of the *Convention*’. In addition, the difference in treatment must affect a woman’s human rights and fundamental freedoms.” *Id.*

<sup>260</sup> *CEDAW Convention*, *supra* note 249, at 8.

<sup>261</sup> *Id.* at 8–9.

<sup>262</sup> *Optional Protocol*, *supra* note 253, at art. 2.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> Citizens’ Initiatives on CEDAW, Bangladesh (CIC-BD), *Withdrawal of Reservation*, THE DAILY STAR (Sept. 3, 2015), <https://www.thedailystar.net/op-ed/politics/withdrawal-reservation-136687>.

<sup>266</sup> *Optional Protocol*, *supra* note 253 (“*Declaration*: ‘The Government of the People’s Republic of Bangladesh declares in accordance with Article 10 (1) thereof, that it would not undertake the obligations arising out of Articles 8 and 9 of the said *Optional Protocol*.’”).

<sup>267</sup> See discussion *supra* Section II.

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Improving labor conditions necessarily entails determining the root cause of gender-based violence and both developing new and strengthening existing tools (i.e., CEDAW) that directly address such violence.<sup>268</sup> Although Bangladesh has ratified CEDAW, the goals of CEDAW have not been properly effectuated within the walls of garment factories. The lack of effectuation is largely because Bangladesh does not have effective complaint and enforcement mechanisms to permit workers to voice their experiences of gender-based discrimination.<sup>269</sup>

A direct solution would be to encourage workers and provide them with necessary financial and political resources, which would help them push the government of Bangladesh to ratify Article 10's Protocol. To accomplish this, all workers should undergo mandated trainings regarding the right to be free from gender-based discrimination administered by the CEDAW Committee. By expanding workers' knowledge of women's rights, workers are directly empowered to create progressive norms regarding the treatment of women not only in the workplace, but also within society itself. Using knowledge of their government's activities (or inactivity), workers may apply political pressure to hold the government of Bangladesh responsible.<sup>270</sup>

Despite the fact that nations are not mandated to adopt CEDAW and enforceability problems, grassroots labor movements should still push for the government of Bangladesh to enforce CEDAW. Cosette D. Creamer and Beth A. Simmons argue that requiring governments to report does have an effect on human rights outcomes, because (1) "reporting to treaty monitoring bodies initiates a dialogue with international experts that can have important consequences," which may "contribute to socialization of domestic elites and bureaucrats responsible for human rights practices," (2) it may also set in motion domestic bureaucratic routines to gather, authenticate, and analyze information that might not have occurred in the absence of the obligation to report, and finally, (3) "it is even possible that reporting helps to develop an autonomous capacity to self-monitor and self-enforce."<sup>271</sup>

ii. Alternative Initiatives: ICCPR, ICESCR, and ICERD

The International Covenant on Civil and Political Rights ("ICCPR") is a multilateral treaty that obligates its signatories to actively protect the individual's right to self-determination, rights to physical integrity,

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<sup>268</sup> See generally Susanne Zwingel, *How Do Norms Travel? Theorizing International Women's Rights in Transnational Perspective*, 56 INT'L. STUD. QUARTERLY, 115, 115 (2012).

<sup>269</sup> Anna Duke, *The Global #MeToo Movement: The Fight to End Gender Violence in the Garment Industry's Supply Chains*, MEDIUM (Jul. 30, 2014), <https://medium.com/@ihrcclinicuchicago/the-global-metoo-movement-the-fight-to-end-gender-violence-in-the-garment-industrys-supply-308d4be058c0>.

<sup>270</sup> See Cosette D. Creamer & Beth A. Simmons, *The Dynamic Impact of Periodic Review on Women's Rights*, 81 L. & CONTEMP. PROBS. 31, 45 (Feb. 7, 2018).

<sup>271</sup> *Id.* at 32.

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individual liberties, and political rights, as well to ensure procedural fairness within the judicial system.<sup>272</sup> Importantly, Article 22 establishes the freedom of association, allowing for “the right to form and join trade unions for the protection of his interests.”<sup>273</sup> Read in conjunction with Article 2, Article 22 mandates that state parties must protect the right for both men and women to exercise their freedom of association.<sup>274</sup> The First Optional Protocol to the ICCPR establishes an enforcement mechanism whereby survivors who claim a violation under the treaty may submit a written complaint to the Human Rights Committee for consideration.<sup>275</sup> To date, Bangladesh has ratified ICCPR with no reservations regarding the freedom of association under the treaty.<sup>276</sup>

While Bangladesh has legally assented to all of the provisions of ICCPR, there is no mechanism for workers to claim violations of the treaty because it has not ratified the Optional Protocol.<sup>277</sup> Although trade union membership has risen after the Rana Plaza Collapse, there are still countless instances of workers being physically or verbally abused by their managers due to their union membership or suspected involvement in unions.<sup>278</sup> To more effectively implement ICCPR, Bangladesh should be pressured to ratify the Optional Protocol to ICCPR.

Adopted alongside the ICCPR through GA. Resolution XXI, the International Covenant on Economic, Social and Cultural Rights (“CESCR”) is a multilateral treaty which requires its parties to grant and/or enforce labor rights and rights relating to social security, health, family, education, standard of living, and participation in cultural life.<sup>279</sup> Labor rights granted under the

<sup>272</sup> Rights to physical integrity include the “inherent right to life” and the right to be free from cruel, inhuman, or degrading treatment. Slavery and forced labor (with some exceptions) are prohibited under this category. Individual liberties include freedom of speech, freedom of religion, right of privacy, freedom to choose place of abode for both aliens and citizens. ICCPR also protects the right of both men and women to enjoy civil and political rights. *International Covenant on Civil and Political Rights*, 26, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter *ICCPR Convention*].

<sup>273</sup> *Id.* at 178.

<sup>274</sup> *Id.* at 173–74, 178.

<sup>275</sup> *First Optional Protocol to the ICCPR*, G.A. Res. 2200, U.N. GAOR, 21st. Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967).

<sup>276</sup> *Ratification Status for Bangladesh*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, [https://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=14&Lang=EN](https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=14&Lang=EN) (last visited Mar. 22, 2020).

<sup>277</sup> *Id.*

<sup>278</sup> See discussion *supra* Section II.

<sup>279</sup> *International Covenant on Economic, Social, and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter *CESCR Convention*]. Rights relating to health include the right of all individuals to control their own physical health, such as the right for women to control their reproductive health (freedom from genital mutilation, accessibility to contraceptives, and information pertaining to sexual health). To adequately protect such a right, state signatories must provide their citizens with access to basic necessities. CESCR also requires parties to provide free primary education, social insurance that gives

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CESCR primarily focus on the right to work, form trade unions, and the right to strike.<sup>280</sup> Under Article 6, the right to work allows individuals to choose his work “to gain his living” and mandates that state parties “take appropriate steps to safeguard this right.”<sup>281</sup> Article 7 commits parties to ensure that all workers are provided with “fair wages,” safe and healthy labor conditions, and reasonable limitations of working hours.<sup>282</sup> Under Article 8(a)–(c), workers have a limited right to form trade unions that is subject to “those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.”<sup>283</sup> Furthermore, workers’ right to strike must be exercised in a manner that does not violate the laws of the state party pursuant to Article 8(d).<sup>284</sup> Bangladesh has ratified CESCR with reservations on the articles involving labor rights.<sup>285</sup> Specifically, Bangladesh declares its right to implement Article 7 and 8 consistent with its national constitution and its laws (e.g., BLA, Joint Directorate of Labor, etc.).<sup>286</sup>

Not only are some of the provisions of the CESCR too general in nature, but Bangladesh’s failure to fully ratify the treaty hinders its ability to push for improvements in supplier factories. Primarily, “fair wages” under Article 7 is not defined, allowing suppliers to construe the provision in their favor. For example, suppliers may interpret “fair wages” to mean wages equal to the standard wage an average worker receives per hour in the 2018, which the Fair Labor Association (FLA) found to be an unliveable wage.<sup>287</sup> Second, though Bangladesh’s reservations in the CESCR are consistent with the language found in the BLA, these limitations on trade union rights are broad.<sup>288</sup> In other words, the government of Bangladesh can limit garment workers at several factories from unionizing or striking if suppliers complain that such workers are disrupting “public order.” Public order can be interpreted to mean any act that is contrary to a social norm in Bangladesh (i.e., working). One solution is to clarify terms such as “national security,” “public order,” and “rights and freedoms of others,” thereby preserving trade union rights.

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benefits to the disabled, injured, elderly, and orphaned. Rights to family life mandate that parties prohibit forced marriages and child labor, as well as paid maternity leave.

<sup>280</sup> *Id.* at arts. 6, 8.

<sup>281</sup> *Id.* at art. 6.

<sup>282</sup> *Id.* at art. 7.

<sup>283</sup> *Id.* at art. 8(a)–(c).

<sup>284</sup> *Id.* at art. 8(d).

<sup>285</sup> *Id.* at arts. 7–8; see discussion *supra* Section IV.A.

<sup>286</sup> *CESCR Convention, supra* note 279, at arts. 7–8.

<sup>287</sup> *Id.* at art. 7.

<sup>288</sup> *Id.* at art. 8; see discussion *supra* Section IV.A.

### C. *Need for Community-Based Approaches*

#### i. Transnational Legal Pluralism

*Lawyers, called upon as problem solvers, find themselves couched and constrained in the dynamics of their clients' interest representation within a legal, justiciable framework. To solve, or even to address the problem adequately, the lawyer has to go far beyond the legal litigation itself. A contextual reading of the facts of Rana Plaza focuses on this gap between the justiciable case and the bigger underlying problem. It reveals the societal dimension of a case, what human rights lawyers call the "root causes" of a rights violation . . .*

*What significance, for example, should the compensation fund for eventual future disasters in the industry have, which G7 leaders announced on June 8th during their Schloss Elmau meeting? What impact will the recently filed murder charges before a Bangladeshi court for the wrongful death of 1,137 Rana Plaza workers have for safer regulation of the supply chain? It is only by going beyond these attention-capturing developments that one can further unfold the complexity of globe-spanning production and distribution regimes such as that of the garment supply chain.<sup>289</sup>*

– Peer Zumbansen

In the age of neoliberal globalization, scholars increasingly turn to transnational legal pluralism as an alternative framework that accounts for the fragmentation in international legal authority.<sup>290</sup> Legal pluralism is the theory that multiple legal systems simultaneously exist within a given society.<sup>291</sup> It is also significant that many legally plural societies are also culturally plural, as cultural norms of any given society are necessarily entangled with its legal systems.<sup>292</sup> Western imperialism, colonialism,

<sup>289</sup> Zumbansen, *supra* note 203, at 233–34.

<sup>290</sup> *Id.*

<sup>291</sup> Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC. R. 869, 870 (1988). As Merry defines, a "legal system" is one that includes forms of governance with judicial functions (adjudication and interpretation of laws) and legislative functions (creation and amendment of laws). Here, a formal legal system is defined as the codified laws, regulations, and policies established and implemented by nationally and locally-governed institutions. State actors, such as law enforcement officials, attorneys, and legislators. Many formal legal systems in liberal democratic states consist of the division of duties between legislative, judicial, and executive branches. *See, e.g., Legal Systems*, LEGAL INFORMATION INSTITUTE [https://www.law.cornell.edu/wex/legal\\_systems](https://www.law.cornell.edu/wex/legal_systems) (last visited Feb. 2, 2019). By contrast, informal legal systems are uncoded rules that intersect with rules of formal legal systems that govern a given society. Informal legal systems include "traditional, tribal, religious courts, and community-based systems." *Informal Justice (Factor 9)*, WORLD JUSTICE PROJECT <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018/factors-rule-law/informal-justice-factor-9>.

<sup>292</sup> Merry, *supra* note 291, at 869.

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neocolonialism, and neoliberalism have imposed colonial laws over many Global South nations, which had their own systems of governance prior to colonialization.<sup>293</sup> The culture and laws of South nations were and continue to be shaped by trade, migration, and colonization by non-European societies.<sup>294</sup> As such, the practical effects of legal and cultural pluralism is best understood through the framework of transnational legal pluralism, which accounts for the dynamic, concurrent, and nonlinear<sup>295</sup> interplay between transnational,<sup>296</sup> national, and local norms within a particular context.<sup>297</sup> Transnational legal pluralism recognizes that legal systems and informal norms often intersect in unclear and complex ways to produce effects that cannot simply be attributable to “*only* culture,” “*only* sexism,” “*only* x-nation’s laws,” or “*only* x-foreign nation’s imperialism.”<sup>298</sup> This contemporary framework is an alternative to “normative hierarchy” arguments that reduce the cause of systemic oppression to the false dichotomy of *either* nation-state’s formal legal system (“public law”) or “corporate greed” (“private law”).<sup>299</sup>

Transnational legal pluralism provides a more accurate analysis of the lived realities of workers under capitalism and white supremacy, thus promoting a better understanding of workers’ actual needs.<sup>300</sup> Advocates for transnational legal pluralism argue that workers’ lived realities must be understood within a framework that emphasizes the “actors, norms, and processes” (“A-N-P”) with an underlying sociological foundation.<sup>301</sup> Transnational legal pluralism rejects the logic of the spectacle and substitutes it with a nuanced, critical perspective:

Although a global public may today learn of an egregious rights violation committed by a multinational company, subsidiary, or contracting partners, a closer look at such events often reveals a much more complex picture. The

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<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> Zwingel, *supra* note 268, at 116 (“Rather, it [transnational perspective of norm creation] conceptualizes global norm creation and appropriation as an open process of negotiation in which various state actors are involved. All these actors are considered contextualized—there is no qualitative difference between local, national, or international—and as seen as being part of a nonlinear dynamic of norm production.”).

<sup>296</sup> The term transnational is a complex one. See generally Constance DeVereaux & Martin Griffin, *International, Global, Transnational: Just a Matter of Words?* EUROZINE (Oct. 11, 2006), <https://www.eurozine.com/international-global-transnational-just-a-matter-of-words/>.

<sup>297</sup> *Id.*

<sup>298</sup> See Zumbansen, *supra* note 203, at 220–21.

<sup>299</sup> Let’s call “corporate greed” for what it actually is: capitalism. Capitalism necessitates greed. See generally John E. Elliot, *Marx’s “Grundrisse”: Vision of Capitalism’s Creative Destruction*, 1 J. POST KEYNESIAN ECON. 148 (1978–1979).

<sup>300</sup> *Id.*

<sup>301</sup> Zumbansen, *supra* note 203, at 224–25.

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legal “case” or “event” is but an indicator of complicated socioeconomic, cultural, and historical constellations of interests and stakes, the understanding of which will frequently require intensive, sometimes years-long, on-the-ground, ethnographic research.<sup>302</sup>

The goal of emancipating individuals from capitalism cannot be achieved by organizing profit-oriented entities and other individuals without the lived experience as a low-income South worker around sensationalized images of poverty.<sup>303</sup> Rather, workers *themselves* must organize around their *own* experiences with the material conditions of their workplace keeping in mind the ever-evolving formal legal institutions as well as cultural, religious, and other informal norms that hinder their struggle.

Liberation of workers from their labor conditions requires a rudimentary understanding of the impact of European colonialism, the rapid pace of neoliberal globalization which shifted cheap labor sources from North to South, widespread corruption within the Bangladesh government, and pervasive cisheteropatriarchal gender norms.<sup>304</sup>

As discussed previously in Section III, the precarious labor conditions in garment factories are further exacerbated by the reluctance of Bangladesh’s national government to implement fire and health safety conditions.<sup>305</sup> First, investors are important stakeholders who have the ability to affect the national government’s stance on the Accord and RMG industry, as they continue to pour several billion dollars in the industry. The RMG is the largest industry in Bangladesh and it is one of the largest garment exporters to the U.S.<sup>306</sup> Therefore, there is little incentive for the national government to make good faith efforts to ensure better labor conditions when it profits regardless of the existence of health and safety standards.<sup>307</sup> Any decision to keep or remove such standards is likely attributable to investors’ motives. Thus, it is no surprise that the Supreme Court of Bangladesh adjourned its hearing on the Accord’s operation for the sixth time the day after RMG investors urged the national government to keep the Accord in operation.<sup>308</sup>

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<sup>302</sup> *Id.* at 9.

<sup>303</sup> See MEDIA EVENTS IN A GLOBAL AGE (Nick Couldry, Andreas Hepp, & Friedrich Krotz eds., 2009) for a useful discussion on the relationship between the U.S. media, consumer culture, and the concept of the spectacle.

<sup>304</sup> See discussion *supra* Section II.

<sup>305</sup> See discussion *supra* Section III.

<sup>306</sup> See, e.g., Ahmed, *supra* note 41, at 34–35.

<sup>307</sup> *Id.*

<sup>308</sup> Hannah Abdulla, *Bangladesh Accord Ruling Pushed Back for the Sixth Time*, JUST-STYLE (Feb. 19, 2019), [https://www.just-style.com/news/bangladesh-accord-ruling-pushed-back-for-sixth-time\\_id135624.aspx](https://www.just-style.com/news/bangladesh-accord-ruling-pushed-back-for-sixth-time_id135624.aspx).

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Garment workers, most of whom are young, low-income women, are in the best place to remedy gender-based violence in their workplace that stem from sociocultural traditions.<sup>309</sup> Initiatives like CEDAW, ICCPR, ICESCR, and ICERD have minimal effect not only because the Bangladesh government is more committed to ensuring a cheap, easily exploitable labor source to maintain its RMG exports levels, but also because gender norms continue to be stringently maintained.<sup>310</sup> Even a policy of increasing discipline for sexually abusive supervisors would be difficult to enforce, since most perpetrators are usually non-state actors.<sup>311</sup>

Garment workers are also better positioned to understand and directly combat the broader underlying issue: why are most garment workers women in the first place? The answer lies in sociocultural gender norms that suppliers—rural village men—have manipulate to create a compliant workforce.<sup>312</sup> While most workers tend to be low-income, they are “not the poorest of the poor,” but “women of the rural middle class.”<sup>313</sup> Suppliers recognized that women of rural middle class families desire “docile” and “socially acceptable work,” or work distinguishable from the “masculine,” manual labor of inferior peasant sharecroppers.<sup>314</sup> Additionally, suppliers were initially championed by their village members as “village heroes” due to their promise of jobs that reinforces traditional gender norms:

[T]he industrialists were able to persuade reluctant male guardians that the honor and propriety of the women would be protected in the factory, which also allowed spatial segregation between the sexes. Initially, this sense of kinship was more important than prestige because it assured the women and their families that there would be no sexual exploitation.<sup>315</sup>

Workers are further marginalized by forces outside their private employers, supervisors, and the national government. They are hated by workers in the West for “taking away jobs” and subject to NGO-devised solutions rooted in discouraging actual social revolution, corporate social responsibility programs, and unhelpful temporary trade agreements that have minimal effect on their everyday workplace experience.<sup>316</sup>

<sup>309</sup> See discussion *supra* Section I–II.

<sup>310</sup> See discussion *supra* Section II.

<sup>311</sup> Zwingel, *supra* note 268, at 116 (“As many violations of women’s rights are rooted in sociocultural traditions and perpetrators are often nonstate actors, such violations were long seen as a problem to be solves by incremental change from within a given society, not be international interference or even pressure.”).

<sup>312</sup> Ahmed, *supra* note 41, at 35.

<sup>313</sup> *Id.* at 37–38.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 38.

<sup>316</sup> *Id.*

These considerations demonstrate that issues created by the RMG industry cannot be reduced to the result of “culturally backwards” gender relations, “corrupt” state actors, or “corporate greed.” Power dynamics created by class hierarchies, gender norms, forms of colonialism, and neoliberalism must serve as the underlying framework for which we evaluate the potency of different solutions. It is against this backdrop that the model of community unionism must be analyzed.

ii. Using Community Unionism to Combat Neoliberal Globalization

Neoliberal globalization has given rise to a new class of social initiatives that address the intersection of non-employment and workplace issues to affect broader sociopolitical change than what traditional trade unions have accomplished.<sup>317</sup> This emerging set of social initiatives aims to change labor conditions for some of the most vulnerable workers, as retailers increasingly rely on nations in the South for cheap labor sources.<sup>318</sup> Community unionism is one of the organizational strategies developed in response to workers’ hardships beyond the workplace through political education, direct political action, legal representation of low-income workers, and improvement of the quality of housing, welfare, and public services.<sup>319</sup>

Community unionism is a viable alternative to multi-national agreements, international and national initiatives, and corporate codes of conduct, and other neoliberal solutions because it has the potential to empower garment workers through an intersectional framework.<sup>320</sup> While concept of community unionism originated in the United States in the 1960s, it can be applied to garment workers in the Global South since low-wage workers throughout the world are connected by neoliberal exploitation.<sup>321</sup>

As the vast majority of garment workers are low-income women bearing the brunt of globalization, there is a great need for a social model that encompasses all of their needs as humans and not merely as workers.<sup>322</sup>

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<sup>317</sup> See, e.g., Simon J. Black, *Community Unionism: A Strategy for Organizing in the New Economy*, 14 *NEW LAB. F.* 24, 26 (2005).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 24–26. Note that this definition of community unionism is just one of the several forms of community unionism. The model of community unionism I am proposing here most closely resembles the organizational structure originally proposed by James O’Connor and Jack T. Conway.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 27–28 (“Unlike trade unions, most community unions seek to organize the employed, unemployed, and underemployed; they press for change in the workplace and beyond, organizing around issues such as welfare reform, health care, jobs, housing, and immigration. Membership is based on community not workplace. In short, these community unions bridge the home-workplace divide: whereas

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Theoretically, traditional trade unions may successfully engage in collective bargaining for higher wages and employment policies that hold employers accountable for acts of sexual harassment. However, the direct impact of trade unions on addressing the regulatory role of patriarchal gender relations in factories is minimal.<sup>323</sup> In terms of improving women workers' lives, community unions can either supplant or supplement the work of trade unions by accomplishing the following: (1) raising awareness about sexist surveillance tactics used by supervisors to ensure compliance, (2) formulating trainings for both workers and management on forms of gender-based discrimination in the workplace, potential recourse, and workers' rights, (3) raising funds for or demanding from employers to construct day-care and breastfeeding facilities either in factories or near factories, (4) directly assisting mothers with daily chores and childrearing, (5) pooling community resources so that any member can use funds to pay for rent, food, and/or medical emergencies, (6) creating safer routes or means of transportation to and from worker,<sup>324</sup> and (7) publicizing incidents of gender-based violence against workers. These services are important because they represent the implicit acknowledgment that the source of woman garment workers' hardships is cisheteropatriarchal capitalism.

Second, community unionism is necessary because it encompasses the needs of a larger population, as opposed to the trade union model. In other words, it assists the unemployed, formally employed, and informally employed.<sup>325</sup> For instance, workers who have lost their employment status after termination based on their gender, disability, and/or trade union membership can request assistance from a community union, which also aids the unemployed.<sup>326</sup> Within the RMG industry in Bangladesh, the conditions of employment vary depending on the relationship between the factory and U.S. retailers.<sup>327</sup> In comparison to its lower-tier counterparts, "first tier" and "second tier" factories have direct, long-term business connections to retailers and improved labor conditions.<sup>328</sup> Many "third tier" factories are those which higher-tiered factories subcontract with to finish excess work and employ workers informally.<sup>329</sup> Community unions would extend aid to workers, regardless of the type of factory that employs them.

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trade unions primary concerns are typically workplace-related, these organizations take a holistic approach to the lives of working people.”).

<sup>323</sup> Khanna, *supra* note 48, at 115.

<sup>324</sup> *Id.*

<sup>325</sup> Black, *supra* note 317, at 25.

<sup>326</sup> *Id.*

<sup>327</sup> Khanna, *supra* note 48, at 113.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

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Third, community unionism fosters a sense of solidarity not only between garment workers of different tiered factories, but also between garment workers and non-garment workers.<sup>330</sup> Solidarity is vital to improving labor conditions because it politicizes issues in the workplace and encourages all workers to organize around their shared class interests.<sup>331</sup> Traditional trade unions are inherently exclusive because they do not directly fight for the rights of the disabled, unemployed, workers who are not in the industry, and workers of the informal, unregulated labor markets (e.g., prison laborers, sex workers, domestic servants, food-cart workers, unpaid workers, and unpaid homemakers).<sup>332</sup> By contrast, community unions foster ties with workers, non-workers, and anti-capitalists around the work to create a stronger movement. This type of organization model acknowledges that capitalism affects individuals *systemically*.

Fourth, community unionism is designed to more effectively tackle the issue of shifting cheap labor source as a result of neoliberal globalization. As the minimum wage increases, capitalists will seek out cheaper alternative labor sources and/or make part of the process automated. For instance, Bangladesh has already developed its first-ever prison labor system.<sup>333</sup> Community unionism combats this issue by uniting workers regardless of their locality. This approach is effective because workers everywhere will be in solidarity (there will be an “even, across the board” minimum wage) and even if things become automated, there must be workers to construct those machines in the first place. Thus, the bettering of conditions in one geographic area will always mean worse conditions in another within capitalist societies.

Fifth, community unionism gives workers sufficient control over the means of production and the conditions of labor, community-based movement must be led by Bangladeshi garment workers themselves, not by retailers or Western consumers.<sup>334</sup>

Sixth, community unionism is an effective means of achieving international socialism,<sup>335</sup> or the idea that all nations must unite to overthrow

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<sup>330</sup> Black, *supra* note 317, at 27.

<sup>331</sup> *Id.*

<sup>332</sup> NESS, *supra* note 56, at 6.

<sup>333</sup> Donaldson, *supra* note 240.

<sup>334</sup> See discussion *supra* Section IV.A.

<sup>335</sup> International socialism is also known as proletarian internationalism, which is a central theme in *The Communist Manifesto*. Proletarian internationalism is a fundamental characteristic of any socialist party: “Imperialism, with its world economy and with its world politics (involving wars of massive destruction, fascist barbarism, and counterrevolutionary policies) dictates that the class struggle is international in character—and so is the fight to create a socialist society . . . revolutionary internationalism does not just mean speaking foreign tongues or being experts on the political life of other countries . . . imperialists . . . blame everything from war to inflation to unemployment on the competition between American workers and those in other countries . . . [proletarian internationalism] is a militant organization

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capitalism and substitute it with a global socialist order.<sup>336</sup> Currently, trade unions are segregated from one another on the basis of their trade, leadership, politics, and a common platform.<sup>337</sup> Community unionism provides this common platform by unifying communities—as opposed to only trade unions—on the basis that they have been negatively affected by capitalism, sexism, imperialism, and colonialism.<sup>338</sup> As opposed to trade unions organizing around only short-term goals confined to their particular industry or workplace (e.g., wage increase, maternity leave, etc.), community unions push to achieve both short-term and long-term goals.<sup>339</sup> Another reason community unionism directly leads to the development of international socialism is that it is a form of rank-and-file organization,<sup>340</sup> which more effectively mobilizes workers than labor union bureaucracy. Under the Marxist definition of socialism, the push for higher wages and economic benefits undermines capitalism by forcing capitalists to “consistently identify strategies to reduce labor costs through the reversal of social gains and reduction in wage costs.”<sup>341</sup> This produces economic crises, which in turn lead to worker unrest and eventual overthrow of the capitalist state through revolution.<sup>342</sup>

For community unionism to effectively meet the needs of garment workers, the following elements should be met: (a) propose a unified goal with the abolition of capitalist mode of production as the ultimate end; (b) be in solidarity with workers of other trades both in Bangladesh and outside of Bangladesh; and (c) be readily adaptable to dynamic challenges of neoliberal

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of the world working class and its purpose is to create revolutionary mass parties.” Mary Scully, Address, at 1991 debate regarding the Fourth Int’l Tendency: The Importance of Ideas in Party Building (Aug. 7, 1981), <https://www.marxists.org/history/etol/document/fit/scully01.htm>. (last visited Mar. 1, 2019).

<sup>336</sup> The end of a global socialist order communism, which is a classless, stateless world order absent the exploitation of labor.

<sup>337</sup> Khanna, *supra* note 48, at 126.

<sup>338</sup> *Id.*; see generally Black, *supra* note 317; Zumbansen, *supra* note 203.

<sup>339</sup> Black, *supra* note 317, at 28.

<sup>340</sup> Rank-and-file organizations or movements are those lead by class-conscious leaders. They are diametrically opposite of labor bureaucracy.

<sup>341</sup> NESS, *supra* note 15, at 32. Marx famously predicted that capitalism will ultimately lead to its own collapse: “Along with the constantly diminishing number of the magnates of capital, who usurp and monopolise all advantages of this process of transformation, grows the mass of misery, oppression, slavery, degradation, exploitation; but with this too grows the revolt of the working class, a class always increasing in numbers, and disciplined, united, organised by the very mechanism of the process of capitalist production itself. The monopoly of capital becomes a fetter upon the mode of production, which has sprung up and flourished along with, and under it. Centralisation of the means of production and socialisation of labour, at last reach a point where they become incompatible with their capitalist integument. This integument is burst asunder. The knell of capitalist private property sounds. The expropriators are expropriated.” CAPITAL: VOLUME ONE, *supra* note 209 at 836–37.

<sup>342</sup> NESS, *supra* note 56, at 32; Boswell & William J. Dixon, *Marx’s Theory of Rebellion: A Cross-National Analysis of Class Exploitation, Economic Development, and Violent Revolt*, 58 AM. SOC. REV. 681, 685 (1993).

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globalization.<sup>343</sup> Policies are effective to the extent that those who create those policies have an express commitment towards a common purpose. Second, solidarity is also vital to fostering awareness of neoliberal globalist policies which subject all workers:

Bangladeshi community here in the United States and globally present us with an opportunity to envision what might a global grassroots solidarity look like. The emerging leadership of women in the female majority workforce of the garment industry, push out of migrants from rural Bangladesh to urban Dhaka for work and then eventual migration outside of Bangladesh to countries like the United States due to neoliberal economic policies, and War on Terror policies post 9-11 continuing today connects the emergence of women organizing in these places, and we should examine them as inter-related socio-economic processes. As such, when we explore solutions for change while we need to organize locally, our vantage point must remain global.<sup>344</sup>

Community unions must also be readily adaptable to the rapid pace of globalization, which will constantly impose new laws and informal norms, as well as introduce new actors.<sup>345</sup> The organizational structure of community unions must allow unions to engage in unbroken communication across borders to develop strategies to combat these new struggles.<sup>346</sup>

Community unionism is not without its shortcomings. First, community unions may become bureaucratic, even if they are organized within the community.<sup>347</sup> Union bosses are paid more in union dues than the actual workers they are supposed to represent, more than the CEOs of companies in the trade in some cases.<sup>348</sup> While there is no evidence that community unions will necessarily succumb to these patterns, leaders must still prepare for this possibility. Community union leaders and members should counteract these bureaucratic tendencies by electing leaders who currently work in the industry and adopting other measures to increase worker representation.<sup>349</sup>

Second, community unions may not be as effective in achieving short-term economic demands (e.g., increase in minimum wage) due to their

<sup>343</sup> See generally Black, *supra* note 317.

<sup>344</sup> Naree Shongothok, *Bangladeshi Women Organizing for Social Change*, L. AT THE MARGINS (Feb. 4, 2019), <https://lawatthemargins.com/naree-shongothok-bangladeshi-women-organizing-social-change/>.

<sup>345</sup> See discussion *supra* Section IV.C.i.

<sup>346</sup> See generally Black, *supra* note 317.

<sup>347</sup> NESS, *supra* note 56, at 53. The issue with labor unions becoming bureaucratic is that it “institutionalizes class struggles by restricting bargaining and routing demands exclusively through state and capitalist institutions.” See also La Botz, *supra* note 40.

<sup>348</sup> La Botz, *supra* note 40. See also *How Much Do Union Bosses Make?* TRUTHABOUTUNIONS.ORG (Jul. 26, 2018), <https://www.truthaboutunions.org/2018/07/26/how-much-do-union-bosses-make/>.

<sup>349</sup> La Botz, *supra* note 40.

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organizing around political issues rather than engaging in collective bargaining.<sup>350</sup> Emerging community unions may resolve this problem through coalition building with existing trade unions and other community unions.<sup>351</sup> To achieve short-term economic goals, community unions can also engage in both union bargaining activities with foreign unions—i.e., transnationally—and cooperative development of market regulations.<sup>352</sup>

A broader challenge to the model of community unionism is that even if it is successfully implemented within communities of a particular nation, it may be unsuccessful in bringing together nations with histories of political tensions. While analysis on effects of political tension on the success of community unions is beyond the scope of this Note, it is an important consideration. The ultimate goal of a global socialist order cannot be achieved without alliances between all communities with the shared experience of oppression.<sup>353</sup>

## V. CONCLUSION

The harmful outsourcing practices by retailer giants of the West gave rise to neoliberal globalization, which targets some of the world's most vulnerable people through labor exploitation. Reformist solutions proposed by some Global North scholars and NGOs, profit-driven entities, such as single-issue-focused<sup>354</sup> temporary agreements, corporate social responsibility programs, and private rights of action, are insufficient to remedy the issues they purport to solve and wreak havoc on marginalized communities. On the other hand, community unionism unites rank-and-file movements to advocate for better labor conditions with the ultimate goal of achieving a true global democracy. Perhaps the answer to a world free of exploitation lies not in temporary multilateral trade agreements or unenforced laws, but within the people of Bangladesh.

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<sup>350</sup> Black, *supra* note 317, at 31.

<sup>351</sup> *Id.*

<sup>352</sup> Alan Hyde & Mona Ressaissi, *Unions without Borders: Recent Developments in the Theory, Practice and Law of Transnational Unionism*, 14 *CANADIAN LAB. & EMP. L. J.* 47, 48 (2008).

<sup>353</sup> See discussion *supra* Section IV.A.

<sup>354</sup> In this context, “single-issue-focused” means addressing one problem—e.g., health and safety hazards—without aiming to resolve the underlying issue—capitalism.