

A decorative graphic consisting of a grid of dots in various shades of gray and red, arranged in a pattern that suggests a world map or a network of connections.

Liability of Social Auditors in the Textile Industry

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- The expansion of the social audit industry exemplifies the neoliberal culture of private and voluntary codes of conduct in combination with the privatization of inspections.
- Overreliance on social audits and the quantification of measurement ignores actual improvement to working conditions in factories. Social audits are at best a diagnostic tool.
- Real monitoring of working conditions requires the organization of workers in trade unions in combination with effective state inspections. As long as audits are here to stay, however, the liability of brands, factory owners, and auditing companies is necessary.
- Privatization of governance without liability has created a system without proper oversight over the quality of social audits. In addition, it leaves workers in the textile industry without a remedy.



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1. The Status Quo: Outsourcing of Production and Privatization of Governance

During the past thirty years, especially since the end of the Cold War, clothing companies have outsourced part if not all of their garment and textile production to profit from the lower wages elsewhere. Enhanced by the Multi-Fiber Agreement and following policies of trade liberalization, complex global supply chains have emerged in which one retailer can easily have more than 500 suppliers. (Rahman 2014:19) China has become the world's main garment exporter. Bangladesh is second (Wage Indicator 2016).

1.1 Working Conditions in Globalized Supply Chains

Low wages in production countries are part of a system that is less worker-friendly than in Western Europe. Furthermore, weak or non-existing trade unions, a prohibition to strike, and a lack of collective bargaining rights characterize the situation in many Asian countries like Bangladesh and Pakistan. In addition, workers often come from marginalized sections of society.

Severe violations of fundamental workers' rights occur regularly in these situations: Verbal abuse is common. Wages are frequently below the poverty line.¹ Many work without contract or with short-term contracts and are excluded from any benefits such as maternity leave, health schemes, and seniority bonuses (Chan 2013). Workers are held to high productivity targets. All of this leads workers to work extremely long hours, sometimes involuntarily, always just to make ends meet (Clean Clothes Campaign 2016). Governments of countries with a garment industry tend to be highly dependent on export revenues. This has led, for example, to the creation of so-called export processing zones making foreign investment more attractive, while formalizing the exclusion of workers' rights.

A significant proportion of workers in the garment industry are female (Hale and Wills 2005). As the elite of Bang-

ladeshi factory owners are often keen to point out, jobs in the textile sector can provide women with chances for more independence than is generally available to them. While factory jobs certainly have provided women with otherwise unavailable opportunities, the chances of such employment should not be overestimated. They frequently face sexual harassment and tend to earn less than male workers. They often bear a dual burden of day-job and evening chores and are frequently physically not able to work beyond their mid-thirties (Khosla 2009; Hossain 2012; Souplet-Wilson 2014; Kabeer 2000).

1.2 Corporate Social Responsibility

By the late 1990s, media reports had focused attention in North America and Europe on working conditions in the sourcing countries. In response, labor activists started to develop strategies in which they explicitly tried to use the changed dynamics in globalized markets to gain leverage. They put the focus on consumer-based activism, instead of emphasizing citizenship which would include workers themselves in the campaigning (Seidman 2007:28). Under the pressure of consumer campaigns, retailers such as Nike developed codes of conduct under which they voluntarily committed to certain minimum standards throughout their supply chains (van Tulder, van Wijk and Kolk 2009).

These codes of conduct are one aspect of a broader trend in corporate social responsibility. With the liberalization of markets, the role of state governance has been weakened. In accordance with neo-liberal ideology, the importance of corporate responsibility for public social wellbeing alongside that of the state has been introduced in the international development and human rights discourse (Kaleck and Saage-Maaß 2015:24-26). Many different forms of corporate social initiative have developed. Such efforts in the textile industry are premised on the assumption that, in buyer-driven value chains, the retailing brands have considerable control over manufacturers (Gereffi and Memedovic 2003:4). Due to the highly competitive and globally decentralized producing factories, production of simple apparel, in particular, is characterized by asymmetry and dependency between the supplier and the lead firm (Gereffi, Humphrey and Sturgeon 2005: 86-92). Retailers thus drafted codes of conduct to set standards for suppliers on child labor, forced labor, working hours, and health and safety.

1. For example, low-skilled workers in Bangladesh in the readymade garment industry earn a minimum wage of 5,300 Taka or barely 60 Euros per month, resulting in an income below the World Bank poverty line (Wage Indicator 2016).

Social audits emerged as a means to demonstrate conformity to the social standards adopted (Clean Clothes Campaign 2005:12). A social audit is a workplace assessment conducted over just a few days by one auditor or an auditing team. During this process, the auditors should review documentation supplied by management to check whether, for example, wages and hours are in line with the applicable labor standards; physically inspect the factory floor to ensure the presence of requisite health and safety measures like functioning emergency exits, ventilation, cleanliness, and safety equipment; and conduct interviews with management and some workers to discover whether documents on wages etc. are accurate in practice and whether, for example, union activity is suppressed (Clean Clothes Campaign 2005:23). Diagnostic social audits are generally followed by corrective action plans, the implementation of which is also inspected by social auditors in follow-up visits.

Taking stock, the results of twenty five years of corporate social responsibility in the textile industry are not encouraging. There is certainly greater public awareness about the miserable working conditions. There is also no dearth of initiatives, certificates and auditing efforts. On the contrary, most retailers in Europe and North America now have a code of conduct and refer to social audits as the basis for supplier selection. But there are clear downsides to codes of conduct and social auditing as means of verifying the implementation of such codes: these tools are voluntary, and retailers have refused to accept any legal responsibility on the basis of codes, even though it has been argued that they generally become an integral part of supply contracts as terms and conditions (Beckers, 2015:48). Additionally, there are systemic as well as methodological pitfalls with social auditing: the widespread practice of private audits reduces the pressure on host state governments to establish a functioning system for ensuring workplace health and safety itself. At the same time, social audits and certificates provide companies with justification for their purchasing policies. Due to their methodological make-up, social audits have only limited validity as to the real status of working conditions and they are prone to incorrect representation of the reality in factories. If a social audit report wrongly fails to signal instances of non-compliance, brands may continue to source from factories even though measures urgently needed to protect workers are not implemented.

The three major industrial disasters between September 2012 (Ali Enterprises) and April 2013 (Tazreen and Rana Plaza) in Pakistan and Bangladesh have shown a wider public in Europe and North America that social audits were not able to prevent the death of thousands of workers. Even if audit reports identify problems, this does not necessarily mean that improvements are implemented. That was the tragedy of the Tazreen fire in November 2012 in Bangladesh, where social audits warned about the inadequate fire safety measures, but no action was taken (SOMO & CCC 2013).

Collapse of Building Rana Plaza in Bangladesh

Facts: On April 24th 2013, the Rana Plaza building complex in Dhaka, Bangladesh collapsed, killing 1,134 persons and injuring around 2,500. The building contained five garment factories: New Wave Style Ltd., New Wave Bottom Ltd., Phantom Apparel Ltd., Phantom Tac Ltd., and Ether Tex Ltd.

Retailers: A large number of European and American retailers had sourced from factories in the building, including Benetton, El Corte Ingles, Loblaws, Primark, and Walmart.

Auditing companies: TÜV Rheinland (Germany) and Bureau Veritas (Canada) had audited factories in the building in the months prior to the collapse.

Social compliance scheme: Several social audits were conducted on the basis of the code of conduct of the Business Social Compliance Initiative (BSCI), set up by the Foreign Trade Association (FTA).

Fire at Factory Ali Enterprises in Pakistan

Facts: On 11 September 2012, a fire broke out at the factory Ali Enterprises in Karachi, Pakistan. A total of 260 workers died and another 32 were injured. Survivors and families founded the Ali Enterprises Factory Fire Affected Association.

Retailers: KiK Textilien GmbH had done business with Ali Enterprises since 2007 and purchased at all times at least 65 % of the textile products. At the time of the fire, no other buyers were known.

Auditing companies: RINA Services S.p.A. (Italy) issued an SA8000 certificate in August 2012 after its Pakistani subcontractor Renaissance Inspection and Certification Agency (RI&CA) audited the factory on request of the factory owners. In addition, company UL was commissioned by KiK and audited the factory four times between 2007 and 2011 on the basis of KiK's code of conduct. Only the UL 2007 audit report indicated failure to meet fire safety requirements.

Certification scheme: The SA 8000 certificate is an initiative of the non-profit organization Social Accountability International (SAI). SAI also accredited RINA.

2. What is the Problem with Social Audits?

The practice of social auditing has led to a mushrooming of certificates and many different standards. At the same time, though, audits have not prevented deadly disasters. We should not focus solely, however, on these catastrophes. Daily working conditions (e.g. wage, working hours), too, have shown only meager improvements (Burckhardt 2014:116; SOMO & CCC 2013:15; HRW 2015:60-61; Burckhardt & Merk 2013). There are several reasons for this disappointing diagnosis.

2.1 The Downside of Privatization

With growing efforts to show corporate social responsibility, the classic forces traditionally behind improving working conditions have been weakened or at least not strengthened. In many countries, unionization is extremely low (less than 10% in Bangladesh and less than 3% in Pakistan (Wage Indicator 2016; PILER 2015:35). In addition to the lack of pressure from a unionized workforce, the widespread practice of private audits reduces the pressure on producing country governments to establish a functioning system for labor inspections. In fact, academic research has documented that, as transnational corporations have become entrusted with governing themselves and reporting on their efforts to government and the public, there has been a persistent decline in the state-based monitoring of production processes in many countries (Le Baron and Lister 2015). For example, Bangladesh and Pakistan have suffered from deteriorating or even absent labor inspection and lack of training for state inspectors (e.g. PILER 2015:62-70).

2.2 Conflicts of Interest and the Payment of Social Audits

A major problem with the privatization of inspection lies in the negative incentive structure for auditors, which potentially leads to flawed if not faked audit results. Conflicts of interest are inevitable as commercial auditing companies are interested in keeping their clients in an increasingly competitive market (Jahn, Schramm and Spiller 2003:9). Contrary to most current models of social auditing, an independent auditor should not be paid either by the buyer or the supplier. The common approach in BSCI audits, in which factory owners pay for audits is viewed as particularly problematic as it is seen as an incentive for corruption.² Moreover, the competitive auditing market creates incentives that tend to push towards keeping auditing standards, costs, and efforts low. For example, when suppliers are interested in receiving a quality certificate without undertaking the relevant investment, there is an economic incentive to seek out lenient auditors (ibid, 2003:11). The 2016 report of Transparency International on the readymade garment sector in Bangladesh exposed the reality of the situation, concluding that »irregularities occur along the entire RMG supply chain, not as an exception but more or less as a rule«. It specifically mentions that »[b]ribery is used to hide deficiencies of quality and quantity and non-compliance with buyers' codes of conduct« (2016:38). In this regard, it is worth noting that a Bangladeshi auditor expressed his grievance with the current widespread corrupt auditing practices and was interested in promoting more stringent quality control and sanctions for sloppy auditors.³ Other researchers have come to similar conclusions (Burckhardt & Merk 2013).

There is another cause for manipulated or poorly conducted audit reports: while international textile brands and retailers require their suppliers to obtain certification, they also exert price and time pressure on them, thereby pushing them to engage in practices leading to poor working conditions. The race to the bottom for the cheapest prices should be replaced by responsible purchasing policies, i.e. longer delivery deadlines and fair prices. Also, costs of compliance should not be exclusively externalized from the retailer to its suppliers.

2. Personal conversation by the author with a BSCI auditor in Dhaka, Bangladesh, January 2016.

3. Personal conversation of the authors with an auditor for Bureau Veritas and TÜV Rheinland in Dhaka, Bangladesh, January 2016.

2.3 Methodological Limits of Social Audits

Apart from deliberate falsifications social audits frequently have methodological shortcomings that make it difficult for auditors to identify abusive conditions. Audits tend to be snapshot observations. In addition, not all relevant aspects of working conditions are easy to measure, such as discrimination. Information on sexual harassment is frequently shared only after a long period of building confidence. Announced visits pose the additional problem that factory owners can manipulate the appearance of working conditions. Unfortunately, fake documentation is not an exception either. For example, according to the Fair Labor Association, fake records on wages were found at 40 percent of suppliers (FLA 2010:5). Further, most audits fail to substantially integrate workers in assessment and subsequent improvement efforts. According to one critic, factory auditing has become a profit-driven industry of its own, which favors quick standardized checklists, instead of thorough inspections (Brown 2013).

3. Is it Possible to Reform Social Audits?

The problems with social audits were identified early on. Already in 2005, the Clean Clothes Campaign published the book »Looking for a quick fix: How weak social auditing is keeping workers in sweatshops.« Academic research has similarly documented that, as a stand-alone measure not integrated in management structures and without a bona fide trade union, codes of conduct and audits are not likely to lead to significant improvements in working conditions (Locke, Rissing and Pal 2013; Locke, Kochan, Romis and Qin 2007; Anner 2011). The methodological challenges and conflicts of interest are also widely recognized within the industry.⁴ Clearly, corporate social responsibility is not enough to secure fair and safe working conditions in production countries. As audits enable international brands to present themselves as good corporate citizens undertaking audits to monitor and improve the implementation of labor rights in their supply chain, while the auditing system has not in reality proved capable of improving rights and representation at work. Company-driven and intransparent audits work rather as tools for brands to mislead the public and maintain

the status quo; some labour organizers have therefore voiced the opinion that it would be better if social audits were not done at all.⁵ Flattering audits also undermine the competitive advantage of companies investing in serious efforts to make their supply chains more sustainable. But in the absence of effective state inspections and strong unions, private audits have emerged as the only remaining tool to check and improve working conditions. Inevitably, then, the question arises of whether »good audits« are possible.

The debate on the best way to conduct audits and certification schemes has been going on for more than a decade. Typical topics for discussion have been the disclosure of non-compliant factories, the comparative merits of internal and independent auditing, and levels of certification (factory, brand or program) (Casey 2006:3). In this regard, it is important to note that there are differences between business-led schemes such as the Business Social Compliance Initiative (BSCI), a European platform of the Foreign Trade Association (FTA), and multi-stakeholder initiatives, such as the Fair Wear Foundation (FWF). For example, the FWF established the practice of interviewing workers offsite prior to visiting factories, as well as closer involvement with trade union members throughout the audit process.⁶ And in order to deal with potential conflicts of interest, the FWF set up a system in which it addresses payment and sets uniform levels and standards of payment (FWF 2015). A recent study nevertheless shows that, on its own, the FWF system is also unable to improve working conditions in the factories monitored, while the audit reports at least seem to reliably reflect the realities in the factories (Fütterer, forthcoming 2017). Sometimes, approaches continue to diverge. While BSCI has just included non-announced visits in its new code of conduct, the Fair Wear Foundation emphasizes the importance of a good relationship and continues to rely on announced visits (FWF Audit Manual 2012:9).

A unique scheme was developed in the aftermath of the Rana Plaza collapse to implement building and fire safety inspections in Bangladesh. The Accord on Fire and Building Safety in Bangladesh (the Accord) was signed

4. Personal conversations of the authors with social auditors and social compliance initiatives.

5. Personal conversations of the authors with labor organizers from Bangladesh and Pakistan.

6. <http://www.fairwear.org/514/about/verification/>, last accessed: 14.12.2016

on May 15th 2013.⁷ It is a five-year, independent, legally binding agreement between global brands and retailers and trade unions designed to build a safe and healthy Bangladeshi readymade garment (RMG) industry. Among other features, it has an independent inspection program supported by brands in which workers and trade unions are involved. All inspected factories are publicly disclosed, as well as inspection reports and corrective action plans (CAP). The signatory brands have committed to ensure sufficient funds are available for remediation and to maintain sourcing relationships during the 5-year period of the Accord. Despite its positive features, the Accord is also not a solution to all the problems of auditing. The specific focus of the Accord on safety measures is very relevant in Bangladesh, Pakistan and the north of India, where fires and building collapses occur time and again. In other regions, though, the focus should be more on other aspects of working conditions such as remuneration, trade unionism, harassment, and overtime. Furthermore, with the focus on direct suppliers, even the factories included in the Accord inspection scheme encompass only 27 % of all garment factories in Bangladesh (Labowitz Baumann-Pauly 2015:4). In course of the last three years remediation has proved to be difficult, also because brands and factory owners cannot agree on how to cover the costs arising from improved building and fire safety (Clean Clothes Campaign 2016a).

Beyond purely private standards and audits, there have recently been *state-led* initiatives for change. Prime examples are the German Partnership for Sustainable Textile and the Dutch Agreement on Sustainable Garment and Textile. These initiatives bear the promise of sector-wide cooperation combined with multi-stakeholder involvement and state oversight. In a comparison with environmental certificates, Klinger et al point to the benefits of state-led schemes. However, they emphasize the importance of strict control of compliance (Klinger, Hartmann & Krebs 2015). In the German and Dutch initiatives, though, the measures to ensure implementation of standards are weak. The German initiative has defined common goals the companies want to achieve with respect to social standards (workplace safety, overtime etc.) and living wages in their supply chain (Bündnis für nachhaltige Textilien 2016). To reach these goals, the companies involved have to give a baseline assessment of their current activities and produce an individual action

plan for implementation.⁸ So far the initiative has not clearly defined how implementation of the action plan is to be evaluated. This bears the risk that the initiative will rely on common social auditing with all the pitfalls described above. There seem to be no clearly defined sanctions if the action plan is not implemented. Equally problematic is the lack of involvement of actors from production countries. Whether the Dutch and German initiatives will lead to real change remains to be seen, and will have to be evaluated in the coming years.

3.1 Quantification as a Tool to Conceal Violations and Avoid Accountability?

As a more fundamental critique to social audits, sociologists Le Baron and Lister have credibly demonstrated the productive power of quantification and measurement. They argue that auditing produces standardized metrics, measurements and rankings, which create the appearance of independent supply chain monitoring; but the information produced through and derived from audits is partial, highly political and fundamentally shaped by the retail audit client. Public and governmental trust in the metrics generated by audits ends up concealing real problems in global supply chains. Furthermore, the choices made regarding the scope and design of audits tend to omit the portions of supply chains where labor abuse is most likely to take place (Le Baron and Lister 2015). Already in 2006, an industry representative was reported to have said that »what is easy to measure is being measured, but what's hard to measure isn't« (Casey 2006:3).

Thus, it is possible to differentiate between better and worse forms of social auditing by looking at the methodological design. Nevertheless, these fundamental problems remain embedded. With an eye on the accumulated experience with social audits, caution is warranted when trying to improve their quality.

7. <http://bangladeshaccord.org/>, last accessed: 29.11.2016.

8. Press Release Partnership for Sustainable Textiles, Annual Assembly, 22 November 2016.

4. Does the Paradigm of Human Rights Due Diligence Change the Game?

Audits are counted among the tools used in the emerging due diligence paradigm of business responsibility for human rights violations. Human rights due diligence is gradually taking the place of corporate social responsibility as the way for corporations to deal with the demand that attention be paid to human rights violations in supply chains and worldwide business operations. In contrast to CSR approaches, human rights due diligence is explicitly based on a human rights framework. It was popularized by United Nations special rapporteur John Ruggie in the UN Guiding Principles on Business and Human Rights (UNGPs), which he prepared in 2011.

The UNGPs are based on the status quo in international law and stipulate the primary human rights obligation of states to protect their citizens against human rights violations by third parties such as business enterprises. Business enterprises have human rights responsibilities according to the UNGPs, which are based on internationally recognized human rights law and the ILO core conventions. Unlike voluntary CSR, the UNGPs set a clear framework for the conduct expected of business enterprises. The UNGPs further emphasize the need for victims of corporate abuse to have access to effective remedies. Principle 15 demands that all businesses that should implement a »human rights due diligence process« to »identify, prevent, mitigate and account for how they address their impacts on human rights.« Human rights impact assessments (HRIA) have since been added to the repertoire of environmental and social impact assessments (ESIA) to guide business operations.

Due diligence is a business term describing a company's policy and action for managing risks and avoiding liability, for example in the case of mergers. In its original sense, due diligence is thus a shield for companies to manage risks to its own business and to avoid liability. The concept of human rights due diligence as established in the UNGPs, in contrast, refers to the risks that a company may pose to *society*, not to the risks to its own business. As outlined above, the content of human rights due diligence is based on internationally recognized human rights standards and cannot be unilaterally defined by companies.

Thus, the paradigm shift from corporate social responsibility and social auditing to human rights due diligence (HRDD) and HRIA is thought to be significant. The hope is that, if done by the right people, such impact assessment and other processes of HRDD can work as tools for community empowerment (de Felice 2016). At the same time, similar to the conclusions of Le Baron and Lister (2015) regarding the politics behind the design and scope of social audits, de Felice recognizes the political nature of the design of impact assessments. He points out that selecting human rights indicators is about allotting priorities and thus »not a ›technical‹ but a ›political‹ exercise« (de Felice 2015). The issue of »ownership« of such assessments is then a key question (ibid.).

While CSR initiatives are ultimately based on the mere willingness of corporations to be good corporate citizens, human rights due diligence is based on the responsibility of business to respect human rights declared by the general assembly of the UN Human Rights Council. That is to say, due diligence is not optional, it is a must. It is also clear that human rights due diligence goes beyond auditing and includes accountability (Luginbühl and Musiolek 2016:28). At the same time, social audits are used as a tool to fulfill human rights due diligence obligations. The experience with social audits raises questions about how such due diligence can be exercised effectively without degrading into a meaningless procedure undertaken for its own sake. One major aspect seems to be accountability: brands as well as compliance initiatives and auditors need to be held to account for their activities.

5. Accountability: How to Control the Controllers?

As long as audits are carried out, then, the question is how to effectively control their quality. In January 2016, the authors visited Dhaka, Bangladesh, where they met with workers and trade unions to discuss the mechanism of social audits. These conversations, as well as other personal conversations revealed that among many trade unions and workers who are in fact very closely involved in monitoring labor conditions, there is a lack of awareness of the role played by the global social auditing business in supply chains. The European public debate, in turn, tends to focus on the responsibility of brands. There is a need, therefore, for public debate and scrutiny of auditor practices.

In order to implement effective quality control and ensure accountability, first, the probability of detecting deficient audits has to be increased. Further, auditing companies must suffer negative consequences if they deliver a deficient audit. Changing the incentives for the audit industry could simply and aptly be achieved by increasing the likelihood of liability. The current state of affairs, however, is that auditing companies are not held accountable on the basis of their reports, neither by brands or factory owners, nor by workers who supposedly benefit from auditing. In practice, social auditors do not face any liability claims for their services. This situation was even publicly acknowledged by a spokesperson of the German certification firm TÜV Rheinland (Dohmen 2016).

5.1 Transparency: Access to Audit Reports to Detect Poor Quality

One hurdle to effective oversight is that audit reports are not made public. Contrary to auditing scheme claims of »transparency« (e.g. BSCI 2015), audit reports are regarded as confidential and the property of the auditor's client and therefore generally not made public. Therefore, workers or unions have no means of verifying the veracity of such reports. Transparency is a precondition for further action, identification of problems, oversight over audit quality, and accountability. This has long been a matter of controversy (e.g. Casey 2006). Recent efforts to improve the current monitoring system rightly emphasize the transparency of supplying factories. This is a major aspect, for example, of the UK Modern Slavery Act and the California Transparency in Supply Chains Act. A similar initiative is on the table for an EU Directive.⁹ These pieces of legislation do not, however, address transparency of and access to audit reports.

5.2 The Role of Workers and Trade Unions in Quality Control of Social Audits

It is generally accepted that social audits are only snapshot observations and that real and continued monitoring can best be done by the workers on the shop level themselves. It has therefore become a widespread and

at least rhetorically shared approach that workers, trade unions, and worker's organizations should be involved throughout the process of a social audit. One problem with workers' involvement in social audits is that they are threatened with dismissal, as well as the risk of losing orders for the factory with following lay-offs if they report on abusive working conditions. This tends to lead to useless worker interviews. A solution could be to implement a special protection against such dismissals. A clause to that effect could be a standard part of the code of conduct, global framework agreements or multi-stakeholder initiatives. As workers may not be able to actually demand enforcement of such protection clauses, this can only have effect in combination with the other factors mentioned here.

The involvement of trade unions is made difficult by several practical issues, such as the lack of trade unions in most factories and the severe repression faced by many unionists (e.g. HRW 2015; PILER 2015). More importantly, and politically underestimated, the collateral degradation of trade unions to mere »witnesses« of working conditions poses the most fundamental challenge to this approach emphasizing trade union involvement in social auditing (Fütterer 2017, forthcoming). The mere diagnostic exercise of internationally driven social audits does not correspond to the original and political role of trade unions in organizing workers and building up collective power to enable workers to demand fair working conditions. The rights to freedom of peaceful assembly and association are important precisely because they enable workers to organize for the implementation of fair working conditions vis-à-vis factory owners. This is not recognized in the merely procedural stipulation to involve trade unions in social audits for retailer markets. Therefore, if audits are to be used as a tool to fulfill human rights due diligence responsibilities, they must be fundamentally re-conceptualized and re-structured in a way that ensures that they not only serve as a diagnostic tool but actually *increase* the space for workers' voice and representation, including organization in trade unions as a fundamental enabling right. Global framework agreements obviously play a role in this regard as they enhance the ability of workers' organizations to operate transnationally along the supply chain of a brand like H&M (Platzer and Rüb 2014).

The call to involve trade unions in social audits combined with the difficulties inherent in organizing those already

9. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance.

working far too many hours per day should not lead to questionable practices. Bangladeshi anthropologists have criticized local organizations for receiving CSR money from international brands to provide charity to workers in return for their presence during »human chains« protests without actually organizing them (Shifa, Gulrukh & Sumon 2015). Additionally, it is a reported common practice by companies to set up management-driven unions (»yellow unions«) or factory committees, which hinders true workers' representation. The involvement of workers' organizations in auditing is therefore an important but sensitive topic to be researched and discussed carefully in the future.

Local grievance mechanisms in factories can play a role in revealing abusive working conditions and thus exert quality control over social audits. Discrepancies between flattering audit reports and complaints filed through local grievance mechanisms can serve to detect substandard audits. Grievance mechanisms are, however, not always used or even known to workers. For example, despite multiple BSCI audits in factories in the Rana Plaza building (the BSCI auditor is obliged to make workers familiar with the BSCI grievance mechanism), labor activists reported after the collapse that none of the workers were aware of the possibility of submitting such complaints.¹⁰ Grievance mechanisms therefore have to be designed with care so that they are accessible to workers and so that they are not used as a substitute for bona fide trade union organizing.

5.3 The Oversight Responsibility of Social Compliance Initiatives

If brands and consumers rely on audits and certificates to obtain information about working conditions, special responsibility lies not only with the company doing the actual audit but also with compliance initiatives such as BSCI or SAI for the credibility of the certificates they run. They should guarantee the quality of the audits conducted under their auspices and need to play their part in detecting deficient audit reports. Scheme holders of social compliance initiatives can further counter the negative incentive structure for auditors by imposing sanctions for deficient audit reports. There are a number of possibilities for compliance initiatives to respond to

10. Activist Anthropologist interviews, 25 January 2015.

sloppy audit reports due to their role in the auditing system, ranging from excluding companies from their pool of accredited auditors to demanding higher standards during accreditation and investigating complaints.

Scheme holders have generally set up systems involving so-called duplicate audits to ensure regular verification of audit quality. While such investigations can be routine, they can also be undertaken after specific indications of poor auditing. For example, after the news reports about the fire at Ali Enterprises in Karachi, Pakistan, which had received an SA 8000 certificate, SAI did an independent investigation and issued a report analyzing the performance of the RI&CA auditors. SAI also ensured that unannounced fire safety inspections at its SA8000 certified factories in Pakistan were conducted, and temporarily suspended the issuance of SA8000 certificates (SAI 2012). While laudable, this was hardly enough as an effective signal to other auditors.

As a negative example, BSCI did not undertake any investigation into the quality of audits that were conducted in factories in the Rana Plaza building. In response to this inaction, a coalition of European and Bangladeshi organizations filed a complaint, detailing the indications that at least one of the audits was done negligently and requested an investigation (see box below). This notwithstanding, BSCI representatives refused to look into the matter or consider sanctions against the auditing company TÜV Rheinland.¹¹

6. Liability of Social Auditors

So far, the mechanisms described to create accountability do not have any legal implications but are based in principle on the voluntary commitment of brands, auditors and scheme holders to improve social audits and create accountability. While these efforts may all be necessary, the question remains how to hold auditors to account that conduct their audits negligently with severe consequences for the lives of workers. Here, legal liability comes into play. While brands, as well as compliance

11. ECCHR Website, More for show than safety: certificates in the textile industry. Complaint on audit report by TÜV Rheinland on Rana Plaza factory, https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/bangladesh-tuev-rheinland.html, last accessed: 29.11.2016.

initiatives may also be potentially exposed to liability, this paper concentrates on the liability of social auditors.

The legality and legitimacy of systems distributing liability has changed historically in response to changes in the socio-economic environment. For example, before 1900, employers were generally not responsible for any injuries suffered by their employees. This only began to change in countries like Germany after specific laws in the 19th century led to employer liability for injuries occurring during the course of employment. Germany was the first country to implement an insurance system for workers in the 1880s. Other countries quickly followed. The significance of these laws lies in the shift from fault-based reasoning to determine responsibility towards risk-based liability. This shift should be understood in the context of industrialization and the growing organization of the working class (Hoekema and van Manen 2000:133). The recent changes in the globalized textile production also warrant new legal shifts in which auditing companies are held liable when their service is substandard. Especially with regard to the Ali Enterprises fire and the Rana Plaza collapse there are different initiatives driven by affected workers, their organizations and lawyers, national and international trade unions as well as international NGOs aiming at creating liability of the involved actors, including the auditing companies.

Accountability Efforts – Rana Plaza Collapse

Civil Case in Canada: tort claim on behalf of survivors and family members of deceased workers of two factories in the Rana Plaza building (New Wave Style Ltd. and New Wave Bottom Ltd.). The claim is filed in Canada against retailer George Weston Ltd and its subsidiaries Loblaw's and Joe Fresh as well as auditing company Bureau Veritas. The claim raises both the question of supply chain liability for retailers and liability for auditors. The case is still pending.

BSCI Complaint in Belgium: Complaint filed with the Business Social Compliance Initiative of the FTA in Brussels against auditing company TÜV Rheinland for violating minimum professional standards for social auditors during a BSCI audit conducted at factory Phantom Apparel Ltd. in the Rana Plaza building. The complaint was submitted by the Bangladeshi collective Activist Anthropologist, ECCHR, FEMNET, the Clean

Clothes Campaign, and medico international. The FTA refused to investigate the allegations, but promised to put the possibility of contractual third party beneficiary rights on the agenda.

OECD Complaint in Germany: Complaint filed with the National Contact Point in Berlin against auditing company TÜV Rheinland for violating the OECD Guidelines on Multinational Enterprises during an audit conducted at the factory Phantom Apparel Ltd. in the Rana Plaza building. The complaint was submitted by the Rana Plaza Survivor Group, Ms. Raima Jahan, Mr. Mahmudul Hasan Hridoy, Ms. Rikta Khatun Joshna, Ms. Morjina Begum, Ms. Jesmin Akhter, the Garment Workers Unity Forum (GWUF), the Comrade Rubel Memorial Center (CRSK), ECCHR, medico international, and FEMNET. The confidential proceedings are still pending.

Legal Proceedings in Bangladesh: a number of criminal cases as well as claims before the Labour Court address the responsibility of factory owners, building owner, and state inspectors. In addition, Public Interest Litigation (PIL) petitions have raised questions about the responsibility for the building collapse as well as necessary measures to prevent future disasters.

Accountability Efforts – Ali Enterprises Factory Fire

Civil Case in Germany: tort claim on behalf of four survivors and parents of deceased workers belonging to the Ali Enterprises Factory Fire Affectees Association. The claim is filed in Dortmund, Germany, against retailer KiK arguing that the company has liability for personal injuries occurred in its supply chain. The case is still pending.

Criminal Investigation in Italy: A state prosecutor has initiated criminal investigation against RINA. It is still pending.

SAI Investigation in Pakistan: SAI accredited the auditing company RINA, which issued the SA8000 certificate. SAI carried out an independent investigation and issued a report analyzing the performance of the subcontracted RI&CA auditors at Ali Enterprises. SAI also ensured that unannounced fire safety inspections at its SA8000 certified factories in Pakistan were conducted and temporarily suspended the issuance of SA8000 certificates.

Legal Proceedings in Pakistan: a number of criminal cases as well as Public Interest Litigation (PIL) petitions raised the responsibility of the factory owners and government agencies.

6.1 Contractual Liability

When retailers request audits, in their role as the client of auditing firms and suppliers, they are in the position to set the standards for quality audits. On the basis of the audit contract, retailers are able to take steps against sloppy auditors. The problem is that they generally do not have an incentive to sue. This might change, though, when retailers are held liable for injuries due to abusive working conditions. In March 2015, Pakistani survivors and family members filed a civil claim in Dortmund against KiK Textilien GmbH for compensation after the fire at the factory Ali Enterprises. In its defense, KiK pointed to audit reports that had not revealed any shortcomings in fire safety measures. Interviews with former workers indicated, though, that there were many differences between the written report and the actual situation in the factory. Not only had the auditors not identified the lack of adequate fire safety measures, also the presence of child labor, and the absence of a trade union had gone unnoticed (Khan 2015). In the legal claim against KiK as major purchaser for the deaths and injuries of workers at factory Ali Enterprises, the argument was made that KiK could be vicariously liable for the poorly conducted audits it commissioned (EBHR 2015). In January 2016, it was reported that the German retailer KiK is rethinking the liability of auditors. KiK is demanding that within a certain timeframe, an auditing company should guarantee the quality of its audit. Insurance policies could carry that risk of liability (Dohmen 2016). Once the liability of brands is established for not effectively fulfilling their human rights due diligence with regard to their supply chain, it could thus become more likely that retailers hold auditors liable for poor reports, since brands are more seriously dependent on truthful assessments of the factory conditions. In theory, the same goes for factory owners, when they commission audit reports.

6.2 Criminal Liability

In addition to the contract parties holding auditing companies accountable in the case of poor reports, there is a role for governmental justice systems. For example, Pakistani lawyers filed a petition with the Pakistani government to include the Italian auditing company RINA and its Pakistani subcontractor in its criminal investigation regarding the factory fire at Ali Enterprises. They argued that RINA potentially bears criminal legal responsibility for the fire since it awarded an SA8000 certification just three weeks before the fire. After a report submitted by Italian lawyers, an Italian prosecutor opened a criminal investigation against RINA, obviously also seeing potential criminal negligence on the part of RINA managers. The Italian lawyers represent Pakistani survivors and family members in these proceedings.¹²

6.3 Third Party Beneficiary Rights

Thus far, workers have very few possibilities to hold auditors to account for their reports. As workers are not parties to the auditing contract, they cannot file claims for not fulfilling the contract service adequately.¹³ A simple and direct legal remedy should be in place for the factory workers that social audits are intended to benefit. This can easily be done, for example, in the contracts entered into by auditing companies with the client or in the framework contract with the compliance initiative. Such contracts could contain a clause explicitly conferring third-party beneficiary rights on those workers the

12. For more information, see: ECCHR, Factory Fire in Pakistan: Criminal investigations into RINA in Italy, <https://www.ecchr.eu/en/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik/proceedings-in-italy.html>, last accessed: 29.11.2016.

13. A constellation of social auditing has not come before a judge yet, but in a different case related to the auditing of (apparently deficient) breast implants, the German judges of first and second instance decided that the plaintiff did not enjoy third-party beneficiary rights. See: Zweibrücken Higher Regional Court (Oberlandesgericht), judgment of 30 January 2014; file no.: 4 U 66/13). According to the applicable EU Directive, the breast implants needed to have a CE sign, which was then audited by TÜV Rheinland. The question before the judges was, whether this gave the recipient of such a breast implant the right to sue TÜV Rheinland. After an appeal was brought before the German Federal Court of Justice (BGH), the BGH decided on 9 April 2015 to submit three questions to the European Court of Justice by way of the preliminary ruling procedure (case no.: VII ZR 36/14). The questions relate to the interpretation of the Medical Devices Directive (93/42/EEC) adopted on 14 June 1993. Recently, the Advocate General Sharpston considers that bodies monitoring the quality system of manufacturers of medical devices may be liable to patients for failure to fulfill their duties arising from EU product safety rules. See: Court of Justice of the European Union Press Release No 98/16 Luxembourg, 15 September 2016, Advocate General's Opinion in Case C-219/15 Elisabeth Schmitt V TÜV Rheinland LGA Products GmbH.

auditing cycle is intended to benefit. Non-performance or a deficient audit would constitute a breach of the obligations of the auditing company under such a contract.

6.4 Tort Liability

Finally, for certain harms such as personal injury, there is the possibility of tort liability. A unique example of a tort claim against an auditing company is a lawsuit filed in April 2015 in Canada against Bureau Veritas for having audited a factory in the collapsed Rana Plaza building without noting the obvious risk to building safety. The case is still pending.¹⁴

There is one important problem with third party beneficiary rights and other kinds of liability that depend on worker's filing of cases: When workers do not even dare to speak up on smaller things, it is unrealistic to expect them to file such claims. Workers have taken action towards liability when they had nothing to lose, after the Ali Enterprises fire and the Rana Plaza collapse. But addressing poor audit reports while still employed in the respective factory seems to be much more difficult. A reversal of the burden of proof could facilitate the access of workers to remedies. If auditors fail to identify major non-compliances, negligence should be assumed unless they can prove that relevant professional standards were adhered to.

Legal claims brought by workers against auditing companies (or brands/ factory owners) will always require a strong local union supporting their efforts, as well as an international solidarity network of unions, NGOs and lawyers. Looking back on the history of the German labor movement, trade unions and workers' organizations such as the »Rote Hilfe« have played a major role in litigation against employers for the improvement workers' rights (Schneider and Schwarz 2002; Hering and Schilde 2003).

7. Outlook

Due to the outsourcing of production in the textile industry since the 1990s and the increased emphasis on labor and human rights, international retailers have been

requiring audit certificates from factory owners as a precondition for a commercial relationship. In the absence of effective factory inspection by state authorities, which often lack adequate resources or the political will to conduct inspections, the monitoring of the labor, health and safety situation at workplaces has thus been conducted by private audit firms.

Among the multitude of initiatives to foster corporate social accountability, certification schemes have long appeared the most alluring. In addition, through the implementation of the UN Guiding Principles on Business and Human Rights on the state level, social audits become one of the prominent models for addressing the obligation to conduct human rights due diligence.

Disasters ranging from the factory fires at Ali Enterprises in Pakistan and Tazreen in Bangladesh to the collapse of the Rana Plaza building have, however, tragically revealed a number of flaws in the current practice of private certification: independent and diligent audits seem rare and require, at best, a sort of »checklist compliance.« Certifiers financed by the very same businesses they have to assess are bound by contradictory incentive structures. Ultimately, certificates generate a high level of trust while incurring almost no legal risk.

Despite notorious shortcomings, the continuing practice of social audits is too often understood as a means to monitor working conditions effectively.¹⁵ Retailers can thus claim to meet their corporate social responsibility by relying on audit reports. No incentives are given to undertake effective measures such as structural change in purchasing practices.

Social audits are thus part of the problem rather than a solution, providing minor remedies while upholding a neo-liberal framework and legitimizing endemic features of global supply chains. Despite the harsh and well-known criticism, for the moment, though, social audits seem here to stay. Therefore, new legal and regulatory

14. Rochon & Genova LLP, Rana Plaza case brief, <http://www.rochongenova.com/Current-Cases/Rana-Plaza.shtml>, last accessed: 29.11.2016.

15. For example, in a clear misunderstanding of what BSCI actually does, the Dutch company Wehkamp claims on its website that BSCI controls compliance of suppliers with the BSCI Code of Conduct: »wehkamp streeft naar een duurzame relatie met haar zakenpartners. Zo zijn onze leveranciers verplicht zich te houden aan de BSCI code (<http://www.bsci-intl.org/>). Hier controleert de BSCI op.« (Translation: wehkamp strives for a sustainable relationship with its business partners. Our suppliers are obliged to adhere to the BSCI Code. This is controlled by BSCI.) available at: <http://www.wehkampreporter.nl/maatschappelijk-verantwoord-ondernemen-bij-wehkamp>, last accessed 01.09. 2016.

pathways are necessary to challenge both the performance and integrity of auditors and certifiers. Essential to any system that claims to ensure quality audits is a mechanism ensuring the identification and sanctioning of deficient audits. Any such mechanism would have to involve independent workers' organizations and workers through bona fide social dialogue processes. In several proceedings, affected workers and their relatives in cooperation with a network of unions and NGOs have thus drawn attention to the responsibility of the whole range of international actors involved in the model of social audits: the compliance initiative (e.g. BSCI or SAI), the audit firms (e.g. RINA, Bureau Veritas or TÜV Rheinland), and the retailer commissioning audits (e.g. Loblaws or KIK Textilien).

A focus on liability carries the danger of legalization. The system built by the private auditing industry already reinforces the privatization and mushrooming of standards and the foregrounding of process-based standards while the actual improvement of working conditions and the implementation of reforms recedes into the background. Different auditing schemes have issued a plethora of auditor guidelines, manuals and standards describing in detail what exactly is expected of an auditor during a factory visit and in writing the report. A narrowing focus on the standards of care of social auditors could further such ›technification‹ of the debate. This would be contrary to the commitment that real monitoring of working conditions requires the continuous involvement of workers and trade unions (in conjunction with effective state inspections). Still, it is assumed here that the accountability of social auditors can contribute to the quality of audits. And while standards and efforts for formalizing the process of measuring working conditions are mushrooming, systems of liability are not at the same level.

As auditor liability should be a minimum condition for future audits, this does not mean that it will of its own accord lead to improved working conditions. While such liability could also entail the payment of compensation, this is certainly not the first objective. Compensation is necessary when tragedies occur like the deaths of the workers at Ali Enterprises. But the mere and simple payment of compensation without structural reforms should not lead to what Sumon, Gulrukh and Shifa have called the normalization of ›unpardonable negligence‹ (2014). Auditor liability should lead to changes in the relationship between retailers, factories, workers, and

auditors. However, this will only be the case if auditor liability is not only a theoretical possibility on paper, but also demanded in practice. This demand should come from retailers, governments, and workers. Using liability mechanisms should in particular be part of a wider strategy of local and international unions seeking to change the power imbalance between international buyers and auditing companies and local unions and workers in the production countries.

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