MOST SERIOUS OFFENSES AND PENALTIES CONCERNING UNSAFE FOODS UNDER THE FOOD SAFETY LAWS IN BANGLADESH, INDIA AND AUSTRALIA: A CRITICAL ANALYSIS

Abstract

The right to food is an internationally recognized human right, which inherently denotes the right to safe food simply because unsafe foods cause different diseases resulting in consumers' disability, organ failure or even early demise. Food safety currently may not be an issue of public concern in Australia, but it has been a 'silent killer' for decades in both Bangladesh and India resulting in deaths of thousands and injuries of millions of others. Unscrupulous businesses have been making money at the cost of immense human casualties with almost complete impunity in Bangladesh. The situation in Bangladesh is so intractable that the government has been making laws one after another, but food traders remain undeterred. Consequently consumers continue to die from adulterated foods. This paper examines the loopholes in the definitions of the most serious offences under three major pieces of legislation in Bangladesh, India and Australia. It finds that all the three statutes are flawed in varying degrees, though they may mutually benefit from one another.

I Introduction

FOOD SAFETY is a requirement on which unanimity is warranted irrespective of the socio-economic status of any consumer anywhere on earth at any given time. This is so because unsafe foods cause irreparable loss to human health and life including terminal diseases leading to an early demise. This issue is thus directly concerned with the right to life,[1] which is a universally recognized human right, as well as a constitutionally protected fundamental right enshrined in many national constitutions including those of Bangladesh[2] and India.[3] This critical right is legally protected in Australia though it has not been embraced in its national constitution.[4]

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1 See S. M. Solaimanand Abu Noman M. A. Ali, "Rampant Food Adulteration in Bangladesh: Gross Violations of Fundamental Human Rights with Impunity" 14 *Asia Pac. J. HR. & L.*

2 9-65 (2013).2Constitution of the People's Republic of Bangladesh, 1972, art. 32.

3 Constitution of India, 1950, art. 21.

4 The Constitution of Australia does not embrace any 'bill of rights' unlike many others, therefore it does not contain the right to life. However, the right to life comes from the international instruments to which Australia is a party; specifically Australia is a party to seven core international human rights treaties. The right to life is contained in the International Covenant

Admittedly, food safety is not presently a serious concern in Australia perhaps mainly because of its effective regulatory regime and the consciousness of its consumers. However, the abundance of unsafe foods is a matter of critical concern in both Bangladesh and India,[5] whilst the magnitude of the problem might be the worst in the former as evidenced by the print media reports being published almost every day.[6]

A joint study, undertaken following the presence of lead in children's blood in an area of Munshiganj district, conducted by the representatives of the Harvard School of Public Health, the Boston Children's Hospital and the Dhaka Community Hospital published in November 2013, reveals that the excessive level of toxic metal in turmeric powders of diverse brands was "primarily responsible for lead contamination in the blood of 284 children, aged between 20 and 40 months."[7] Recently, another research unveils that more than 30 million people have been suffering from kidney diseases in Bangladesh caused by adulterated foods.[8] Further, yet another recent investigation carried out jointly by the Food and Agriculture Organization of the United Nations

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on Civil and Political Rights (ICCPR), art. 6(1); the Second Optional Protocol to ICCPR, art. 1; the Convention on the Rights of the Child (CRC), art. 6; the Convention on the Rights of Persons with Disabilities (CRPD), art. 10. See Australian Government, Right to Life, *available at*:http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheetsPages/Righttolife.aspx (last visited on Aug. 16, 2014).

5 Kounteya Sinha, "70% of Milk in Delhi, Country is Adulterated" *Times of India* (India), Jan. 10, 2012;Drive against Adulterated Food Products before Festive Season" *Times of India* (India), Sep. 29, 2014; Debarati Mukherjee, "Food adulteration a rising problem in India" *Deutsche Welle* (Ger), Aug. 31, 2010; Debu C, "19 19Adulteration: Dying a Slow Death" *Maps of India, available at:* http://www.mapsofindia.com/my-india/government/food-adulteration-dying-a-slow-death (last visited on Oct. 11, 2014).

6 See for example Dulal Chandro, "Food Adulteration and Health Hazard - How to Establish Consumer Rights" *Financial Express* (Bangl), Nov. 29, 2014; "50 pc Food Items Sold on City Streets Contaminated: Study" *Financial Express* (Bangl), Jan. 26, 2015; FE Report, "Mobile Courts to Enforce Safe Food Act from Feb 1" *Financial Express* (Bangl), Jan. 30, 2015; "Ensuring Food Safety" *Financial Express* (Bangl), Nov. 13, 2014; Muhammad Mustafa, "Food Adulteration and My Experience at Hawaii Airport" *Financial Express* (Bangl), Oct, 11, 2014; Tarequl I. Munna, "Waging a War on Food Adulteration" *Financial Express* (Bangl), Aug. 21, 2014; "Govt Adopts Zero Tolerance Policy for Use of Formalin in Foods" *Financial Express* (Bangl), Jul. 23, 2014; "Enforce Safe Food Law in 2 Months- HC Asks Govt to Take Steps" *Daily Star* (Bangl), Jul. 21, 2014; "Poultry Turning Dangerously Toxic Time to Act Decisively" *Daily Star* (Bangl), Jul. 17, 2014; Moniruzzaman Uzzal, "Food Adulteration Reaches New Height" *Dhaka Tribune* (Bangl), Apr. 30, 2014.

7 "Study on Munshiganj samples– Turmeric Powder Way too Toxic" *Daily Star* (Bangl), Nov. 15, 2013. Reportedly, the lead has been transferred to those children mainly through their breastfeeding mothers.

8 "Adulterants in Food: More than 3 Crore Suffering from Kidney Disease" *Daily Janakantha* (Bangl), Aug. 24, 2014 [translated from Bengali].

and the Government of Bangladesh reaffirms the continued prevalence of adulterated foods and food ingredients in the country.[9] Amid such a reality one commentator asserts that "[i]t is very difficult to find a food item which is free of adulteration. Vegetables, fish, milk, fruit, sweetmeats, ice cream, spices - nothing is safe."[10] Even the food minister himself echoes an identical view, and publicly admits that the people of Bangladesh are worried about the quality of food they are eating because "[m]aximum food sold in the market are adulterated and poisoned, which are causing severe health hazards in the country."[11]

All these findings suggest that a serious lack of food safety in the country has been a chronic problem which has already caused deaths of several thousand people over the years and affected numerous others in varying degrees ranging from disability to organ failures.[12] Perhaps even more appallingly, there is no sign of ending this peril. As an endeavour to combat this menace, this paper is concerned with the food safety laws of Bangladesh, India and New South Wales in Australia (NSW), in which the statutory law of one jurisdiction will be examined in light of the other two.

In so doing, this paper focusses on the most serious offenses under the major statutory laws governing food safety in Bangladesh, India and NSW. Amongst the Australian eight state and territory jurisdictions, the law of NSW has been chosen in this research because its food regulation has been applauded both at home and abroad.[13] The statutes covered in this paper are: the Safe Food Act 2013 (SFA-Bangladesh), The Food Safety and Standards Act 2006 (FS&SA-India), and the Food Act 2003 (FA-NSW).

There are obviously several offenses in each of these legislations, the 'most serious offenses' have been singled out based on the highest penalties prescribed in these statutes. This paper seeks to critically analyze the definitions of the most serious offenses and the corresponding penalties set forth in the statutes. It aims to submit recommendations for the improvement of the present laws in the three jurisdictions with a particular focus on the SFA-Bangladesh. It should be noted that the SFA-

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9 Raju Ahmed, "Opinion: What are We Eating? Food or Poison" *Daily Janakantha* (Bangl), Aug. 19, 2014 [translated from Bengali].

10 Munna, *supra* note 6; Mustafa, *supra* note 6.

11 "Seminar on Safe Food Act 2013" *Daily Independent* (Bangl), Jun. 3, 2013.

12 For year-wise fatalities of unsafe foods in Bangladesh, see Solaiman and Ali, *supra* note 1 at 38.

13 Food safety regulation of NSW is highly regarded at home and abroad. For example, see generally E. A. Szabo *et al*, "Outcome Based Regulations and Innovative Food Processes: An Australian Perspective" 9 *Innovative Food Science & Emerging Technologies* 250 (2008); Australian Government, Productivity Commission Research Report, Performance Benchmarking of Australian and New Zealand Business Regulation: Food Safety 362 (2009); Tania Martin *et al*, "A New Era for Food Safety Regulation in Australia"

Bangladesh has been put in place on February 1, 2015 although enacted in 2013 amid public outcry.[14] In conclusion, this paper finds that each of these statutes can mutually benefit from one another, although they all have a few drawbacks in common.

II The most serious food safety offenses and penalties in Bangladesh

The SFA-Bangladesh defines its highest penalty offense in section 23 in the form of prohibition which provides that:[15]

> Any person who, whether by himself/herself or by any other person on his/her behalf, directly or indirectly shall not engage with using or mixing - a chemical product or its ingredient or substance (such as, calcium carbide, formalin, sodium cyclamate), pesticides or insecticides (for example, D.D.T., P.C.B., Oil etc.), food pigments or flagrances, whether or not they create attraction, or other toxic admixtures, or food or food ingredients processing aids that are harmful to human health or cause food poisoning with any food[16] or food ingredients or storing, marketing or selling foodstuffs or food ingredients with such an admixture.

Section 23 evidently prohibits any sort of adulteration of food stuff or food ingredient that is directly or indirectly harmful to "human health" regardless of their actual effects on consumers. It "impliedly" imposes liability on "any person" who by himself/herself or by any other person on his/her behalf, directly or indirectly' contravenes the prohibitions.[17] It is unusual that it does not include "natural persons" as discussed below, whereas the offense must be committed first by human beings who extend their hands and minds to those who are defined as persons in the statute. Penalties for the contravention of section 23 are mentioned separately in the single schedule of this legislation.

Although the prohibitions are broad and they include almost all "acts" contributing to food adulteration and dealing with adulterated foods, section 23 does have some

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14 *Food Control* 429 (2003); Karinne Ludlow, "The Readiness of Australian Food Regulation for the Use of Nanotechnology in Food and Food Packaging" 26 *University of Tasmania L. Rev.* 177, 184–189 (2007); S. MacKay, " Legislative Solutions to Unhealthy Eating and Obesity in Australia" 125 *Public Health* 896, 898, 900, 901 (2011).14FE Report, "Mobile Courts to Enforce Safe Food Act from Feb 1" *Financial Express* (Bangl) Jan. 30, 2015; Uzzal, *supra* note 6.

15 Authors' translation from Bengali.

16 The statutory definition of food includes everything consumable by human beings including water, however, categorically excluding medicines, drugs and beauty products: s. 2(3) of the SFA-Bangladesh.

17 The imposition of liability is said to be 'implied' because this section just proscribes actions without having to mention any liability therefor.

hidden loopholes which may significantly affect the conviction of every "true" offender in all cases. These are discussed below.

Shortcoming in defining *actus reus* (guilty act)

Section 23 does not include "omission" as a constituent element of *actus reus* of the offenses covered therein. A foremost element of an offense is physical "conduct" which is usually made up of both "actions" and "omissions". Section 23 explicitly embraces actions, whilst impliedly ignores omissions. This ignorance may have a significant implication for prosecution leading to acquittal of an accused who might have actually caused food adulteration or subsequent dealing with adulterated foods. The premise of this argument is that one can cause food adulteration or deal with adulterated foodstuffs not only by an action, but also by an omission. For example, the removal or intentional omission of an authentic and valuable ingredient from a foodstuff without the buyer's knowledge can cause food adulteration. It is also called "food fraud". As it is defined by the US Pharmaceutical Convention (USP):[18]

> Food fraud in the context of food ingredients refers to the fraudulent addition of non-authentic substances or removal or replacement of authentic substances without the purchaser's knowledge for economic gain of the seller. It is also referred to as economic adulteration, economically motivated adulteration, intentional adulteration, or food counterfeiting.

To make this point clear, two examples are provided below adopting from the US food safety literature. The first example states that "the removal of non-polar constituents from paprika (e.g. lipids and flavor compounds) to produce paprika-derived flavoring extracts, or "defatted" paprika, which lacks valuable flavoring compounds as normal paprika."[19] The second example describes the "poor quality honey that has been filtered to remove pollen or other residue from the beehive, in order to make it difficult to determine the honey's botanical and geographic origin or to circumvent the ability to trace and identify the actual source of the honey."[20]

These examples mirror the offensive omissions that may cause food adulteration. Section 23 of the SFA-Bangladesh should therefore add "omissions" as offensive conduct in order to prevent the fraudulent or mischievous behaviour of unscrupulous businesses that are eager to take advantage of a legal loophole. A question may arise

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18 USP, Food Fraud Database: Glossary of Terms, Food Fraud Database, *available at:* http://www.foodfraud.org/glossary-terms, (last visited on Sep. 12, 2014).

19 J.C. Moore *et al*, "Development and Application of a Database of Food Ingredient Fraud and Economically Motivated Adulteration from 1980 to 2010" *Journal of Food Science* 118 (2012).

20 Moore *et al*, *supra* note 19 at 122; Johnson, *supra* note 19, at 8.

as to how a corporation can be punished for an "omission". A legal response to this question could be that a company can be held criminally liable for an omission of its own, without the need for attribution of another's omission to the entity,[21] although the attribution of subjective *mens rea* (guilty mind) to a company from its employee may have sometimes its conceptual and theoretical difficulties as held in *Bunnings Group Ltd* v. *CHEP Australia Ltd.*[22]

The examples and arguments presented above suggest that the absence of "omission" as part of *actus reus* in section 23 of the SFA-Bangladesh in proscribing food adulteration and dealing with adulterated foods may proffer an opportunity to potential violators, and therefore, its present articulation may not be resistant enough to deter potential violators of this statutory proscription from committing the crime.

Absolution of 'natural persons' from liability

The word 'person' used section 23 of the SFA-Bangladesh has been defined in its section 2(28) which includes "any company, organization, whether statutory or not, commercial establishment, partnership firm, association, club, and society too." So, it does impose liability on all types of businesses, arguably in exclusion of natural persons. It may be argued by opponents of this exclusion that section 23, in conjunction with section 2(28), imposes liability on "any company … whether statutory or not,…and society too", and that the very last word "too" includes humans. Apparently, there is no reason to presume that the word "too" would inherently include natural persons, because the definition encompasses all types of organizations regardless of their separate legal personality in law. Hence, the term "too" arguably ensures inclusion of those organizations that have no separate juristic personality and operating in any form of business, such as a partnership firm in Bangladesh. On the other hand, in defining most serious offenses, the FS&SA-India has used an identical expression namely "any person who, whether by himself or by any other person on his behalf…", but it prescribes liability separately for both humans and companies in the absence of any statutory definition of "person" unlike the SFA-Bangladesh as will be discussed in part III of this paper. Although, the FA-NSW does impose liability on "any person", it has taken a somewhat difference approach unlike the other two. Offenses in the FA-NSW are defined separately with varying degrees of *mens rea* elements, and the liability of corporations has been mentioned separately from that of individuals, which is discussed in part IV in this paper. Notably, the FA-NSW does not precisely define the word 'person' unlike the SFA-Bangladesh, however, any potential ambiguity about its (person) meaning has been avoided by stating the liability of individuals and

21 *Linework Ltd* v. *Department of Labour* [2001] 2 N.Z.L.R. 639, per Blanchard J.

22 (2011) NSWCA 342 (Austl); *Transco PLC* v. *Her Majesty's Advocate* (2004) SCCR 1.

corporations distinctly as has been done in the FS&SA-India.[23] Thus both individuals and juridical persons (corporations) have been manifestly brought under the penal sanctions for unsafe foods in both India and NSW, though arguably not in Bangladesh. Any legal ambiguity typically impedes its enforcement giving the benefit of doubt to the accused.

The liability of individuals must come first ahead of their business organizations whether it is a defined legal person or not. This claim is strongly supported by the provisions in the FS&SA-India and FA-NSW by imposing liability separately on individuals. The rationale behind this emphasis on individuals lies in the core common law principles of complicity. Lord Haldane espoused in *Lennard's Carrying Co Ltd* v. *Asiatic Petroleum Co Ltd* that: [24]

My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

Although the criminal liability of corporations is now widely recognized, it must be acknowledged with respect to a corporate conviction that the crime attributed to such an artificial person is actually committed by humans wearing the veil of incorporation. It is debatable whether the corporation or the individual should be regarded as the primary actor, but there is little dispute that both of them should be held liable, and it is also accepted in the statutes of India and NSW. To avoid an extended discussion on the determination of the primary and secondary actors in the present context, Lord Haldane's above quoted assertion is taken into consideration that individuals who provide "hands and minds" are the primary actors. Likewise, both the FS&SA-India and FA-NSW have mentioned "individuals" liability ahead of their entity. However, labelling one primary (individuals) and the other secondary (corporations) actors does not make any difference in terms of their criminal liability as discussed below.

There is no dispute that the principal actor must be liable for any offense so far as the elements of the offense are met in the absence of any successful defense. So, the imposition of liability on individuals who commit wrongs hiding under a corporate veil is imperative. However, few important rules regarding the liability of secondary actors for those who may have a differing view are added.

Generally, the liability of secondary actors can be either primary or derivative (derivative of the liability of the principal whose liability has to be established first)

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23 For example, see part 2 of the FA-NSW.

24 [1915] A.C. 705.

under the common law principles of "complicity"[25] depending on the agreement between different actors involved in the commission of a given crime.[26] The complicity may not be an offense in itself, rather a means towards the end of committing a crime. The common law rules of complicity are divided into three categories. These are rules relating to: joint criminal enterprise (JCE), extended joint criminal enterprise (EJCE) and accessorial liability (AL). Briefly, a JCE involves a prior agreement between the accused persons to commit a particular crime; and an EJCE entails such an agreement to have been reached earlier but one or more (certainly not all of the members) of the enterprise commit an additional offense while committing or attempting to commit the agreed upon crime. Unlike the rules of JCE and EJCE, those of AL (accessory before the fact)[27] do not require the accused persons to reach an agreement before the commission of the offense, but the accessory or secondary actor 'aids, abets, counsel or procure' the principal actor to commit the crime either being present in person at or from behind the scene.[28] Both JCE and EJCE may be more relevant to our present context, than AL in that "any person acting on behalf of another" as expressed in s23 of the SFA-Bangladesh with respect to food adulteration is logically believed to have an employment or some other type of contractual relation (e.g., independent contractor) with that another person (principal actor). In both instances, regardless of whether it is a JCE or an EJCE, all members of the group are primarily liable as principals, and thus they are equally punishable for the agreed upon offense committed irrespective of their actual personal or individual contribution to the commission thereof, so far as they were present at the scene.[29] With respect to an EJCE, the secondary participant may be equally punishable as principal along with the primary actor for the additional offense committed by the latter subject to the conditions that the former foresaw the possibility of commission of the additional crime (both conduct and fault elements of the crime) by the latter, nonetheless, he/she or voluntarily went ahead with the plan to commit the foundation (agreed upon)

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25 We are using the term 'complicity' to refer to the implicit agreement between the company and its officers, and also their mutual relations, in connection with rendering foods unsafe or dealing with such foodstuffs.

26 See, for the decisions of the HCA, *Osland* v *R* (1999) 159 ALR 170 (Austl); *McAuliffe* v. *R* (1995) 130 ALR 26 (Austl); *Giorgianni* v. *The Queen* (1985) 156 CLR 473 (Austl).

27 The rules of accessory after the fact are deliberately avoided because they are less important in our present context.

28 See Attorney-General's Reference [1975] Q.B. 773; *Giorgianni* v. *The Queen* (1985) 156 CLR 473 (Austl); *Wilcox* v. *Jeffery* [1951] 1 All ER 464. A detailed discussion of complicity rules falls beyond the scope of this paper, however, a discussion of these rules can be found in: David Brown *et al*, *Criminal Laws* 985-1074 (Federation Press, 5th ed., 2011).

29 See *Osland* v. *The Queen* (1998) 159 ALR 170 (Austl), 188-204; *McAuliffe* v. *The Queen* (1995) 183 CLR 108 (Austl), at 113-114.

offense.[30] However, the conviction may differ if the prosecution fails to prove that the secondary actor foresaw both the conduct and the exact fault elements of the primary actor for the additional offense. For example, as held by the High Court of Australia (HCA), the primary actor may be convicted of murder, whilst the secondary actor can still be held liable for manslaughter, where the prosecution fails to establish the latter's (secondary actor) foresight of the possibility that the former (primary actor) would kill someone with a *mens rea* element of murder[31] during the commission of the agreed upon crime.[32] The above discussion suggests that the secondary actor shall not be relieved of the liability in either of the two criminal enterprises (JCE or EJCE). Rather, the secondary participant shall be inculpated into the wrongful act based on his/her own voluntary and informed indulgent in the commission of the offense.

The wording of section 23 as far as it relates to the exculpation of secondary actors is thus flawed. The penal law generally does not ignore the criminal liability of anyone as long as he/she had voluntarily taken part in the commission of *actus reus* with the required *mens rea* in the absence of any appropriate defense (e.g., self-defense, duress, etc).

Absence of *mens rea* (guilty mind)

Section 23 of the SFA-Bangladesh is silent about *mens rea*. Therefore an ambiguity exists in relation to an essential element of a serious offense which is truly criminal given the severity of its punishment. The golden thread of criminal law entails the court to punish someone only for one's own offensive conduct carried out jointly with, or independently of, others with the required *mens rea* element unless the offense is one of absolute or strict liability.[33] The golden thread further requires the prosecution to prove both the *actus reus* and *mens rea* beyond any reasonable doubt.[34]

This silence about *mens rea* may create complexity in the enforcement of the prohibitions contained in section 23 especially because of the absence of common law principles in practice in Bangladesh. The HCA, the highest court of Australia, held in *He Kaw Teh* v. *The Queen* (*He Kaw Teh*) that the absence of *mens rea* element in a

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30 *McAuliffe* v. *The Queen* (1995) 183 CLR 108 (Austl).

31 The *mens rea* elements of murder under s. 18 of the Crimes Act 1900 (NSW) are reckless indifference to human life, or intent to kill, or inflict grievous bodily harm, or constructive murder.

32 *Gillard* v. *The Queen* [2003] HCA 64 (Austl); *The Queen* v. *Nguyen* [2010] HCA 38 (Austl).

33 *Woolmington* v. *DPP* [1935] AC 462 (H.L.). The offences of absolute and strict liability are punished based on *actus reus* alone without requiring the prosecution to prove *mens rea*.

34 *Id.*

statutorily defined offense does not imply that no fault element is required to convict the accused.[35] Rather, it means, if a statutory definition neither includes nor does it overtly exclude the need for a *mens rea* element, the legal presumption is that the consideration of an appropriate fault element to be determined by the trial court is essential. The presumption is, however, rebuttable by the prosecution. In relation to such a determination or a rebuttable presumption, the court should take into account three things. First, the court would consider the expression or wording of the section of the legislation which creates the offense in order to find out any inherent indication of the legislature's intention whether or not to add *mens rea* to the definition.[36] Second, regard has to be had for the subject matter of the legislation as a whole to determine whether the offense is truly criminal, because such a serious offense (truly criminal) requires a fault element.[37] Third, due consideration should be given to the efficacy of law with or without the presumed *mens rea*. The efficacy factor is significant to resolve the difficulty in accepting or rejecting the presumption. If the acceptance that the disputed conduct constitutes an absolute, or at least a strict liability offense "will assist in the enforcement of the regulations" and "will promote the observance of the regulations", then the presumption is likely to be displaced.[38] As the judicial presumption is rebuttable, it can be entirely displaced if successfully rebutted by the prosecution, which will mean that the law-makers had not intended to add any *mens rea* as a constituent element of the offense. The determination of whether the conduct prohibited under section 23 of the SFA-Bangladesh is truly criminal requires the consideration of penalties prescribed for any contravention thereof. As mentioned earlier, section 23 attracts the highest penalties (both incarceration and pecuniary) compared to those of the other offenses against the SFA-Bangladesh. The penalties are comprised of imprisonment for a term between five and four years, or a fine between Tk 10 lac (US$12,820 approx) and Tk 4 lac (US$ 6,410 approx) or both. The schedule containing the penalties for all of the offenses against the SFA-Bangladesh also mentions the punishments for a reoffender under section 23, which are strictly five years of incarceration or a fine of Tk 20 lac (US$ 25,640 approx) or both. So the penalties are high not only in terms of the maximum, but also with respect to the minimum. This is not a usual phenomenon in Bangladesh to set minimum limits of punishments by statutes. Therefore, the stringency of penalties does substantiate a claim that the offenses against section 23 are truly criminal. In view of the wording of

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35 *He Kaw Teh* v.*The Queen* (1985) 157 CLR 523 (Austl) [hereinafter *He Kaw Teh* Case]. This case involved importation of a large amount of heroin.

36 *Id.* at 5.

37 *Id.* at 6.

38 As quoted in *He Kaw Teh* [7] *Lim Chin Aik* v. *Regina* [1963] A.C. 160, 174.

section 23 concerning the *mens rea* requirement, it (section 23) is obviously silent; it does not, however, overtly negate the need for this crucial element of a serious offense.

Although it has been judicially recognized that the statutory offenses which aim to protect public interests are generally deemed to have displaced the *mens rea* element,[39] the offense defined in section 23 of the SFA-Bangladesh is the most serious one in this legislation and the penalties are severe too. Therefore, there is a scope for the court to legally presume an appropriate *mens rea* element relying on *He Kaw Teh*.[40] Instead of leaving it to the court to be decided through the common law adversarial system, it is advisable to vividly include the *mens rea* element in the statutory definition of the offense especially in Bangladesh where the judiciary itself is reportedly accused of corruption.[41] In penal laws, *mens rea* elements are intention to commit the offense, committing the offense with knowledge, recklessness as to the conduct whether it commits the offense, and the weakest form of the fault element is "grossly or wickedly" negligent conduct.[42] Later in this paper, an appropriate *mens rea* element is recommended for enactment in light of the other two jurisdictions.

Apart from the above shortcomings, section 23 is enriched with its niceties. One of the most important points to be mentioned here is that the offense is not contingent upon consequence of the wrongful act. In other words, the adulterated foods need not be consumed or even reached its end users, because mere engagement in any proscribed act would be regarded as sufficient to satisfy the *actus reus* part of the offense. It is plainly reliant on the deontological (duty-based philosophy) ethics which seeks to judge the morality of human conduct (rightness or wrongness in particular conduct) by reference to the duty of the person (done for duty's sake regardless of consequence) whose conduct is in question.

III The most serious food safety offenses and penalties in India

Similar to the SFA-Bangladesh, offenses and penalties are stated separately in the FS&SA-India, though somewhat differently. Section 48 of the FS&SA-India states various ways in which foods may be adulterated by a person, and subsequently

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39 Gibbs CJ in *He Kaw Teh* case quoting from *Sherra* v. *De Rutzen* [1895] 1 Q.B. 918.

40 For further details of the *mens rea* requirement in response to the statutory silence, see *He Kaw Teh* case, *supra* note 35.

41 Staff Correspondent, "Finds a Section of Dist Judges Affecting Judicial System with Their Personal Conflicts" *Daily Star* (Bangl), Dec.31, 2014; Ashutosh Sarkar, "Bail Forgery under Scanner- SC Moves to Stop Faking HC Orders to Get Bail from Lower Courts" *Daily Star* (Bangl), Mar. 18, 2011; Ashutosh Sarkar, "

42 Judges under Scanner" *Daily Star* (Bangl), Oct. 16, 2014.

42 See *Nydam* v. R [1977] V.R. 430 (Austl).

prohibitions and penalties have been described from sections 50 to 67 (both inclusive). The penalties have been prescribed based on the specific conduct of a person, resultant defects in the food and eventual effects on consumers. Section 48(1) provides that a person may render any article of food injurious[43] to human health[44] by means of one or more of the "operations" (the word used in this section) namely: "(a) adding any article or substance to the food; (b) using any article or substance as an ingredient in the preparation of the food; (c) abstracting any constituents from the food; or (d) subjecting the food to any other process or treatment.' All these means of adulteration must be employed 'with the knowledge that it may be sold or offered for sale or distributed for human consumption."[45] All these 'operations' relate to some sort of positive actions in an implicit exclusion of omissions.

To supplement section 48(1), section 48(2) enlists relevant considerations with respect to the determination of "whether any food is unsafe or injurious to health", such as the information provided to consumers, probable cumulative toxic effects of the food, particular health sensitivities, etc. Although section 48 (1) refers to only "actions", section 48 (2) may impliedly include 'omissions' especially when it requires the court to consider:[46]

[T]he information provided to the consumer, including information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods not only to the probable, immediate or short-term or long-term effects of that food on the health of a person consuming it, but also on subsequent generations.

No judicial interpretation of section 48(2)(a)(ii) has been found. However, it could be logically inferred that the court may consider against the accused the misleading or deceptive information caused by "inadequate" disclosure made to the consumer. Therefore, section 48 fairly encompasses all sorts of potential actions as well as "informational omissions" in relation to food safety, which may in effect cause injuries to the health of immediate consumer or even to that of the consumer's descendant in a longer term.[47] However, the conduct part of "omissions" still suffers from ambiguity

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43 'For the purposes of this section, "injury", includes any impairment, whether permanent or temporary, and "injurious to health" shall be construed accordingly': An explanation provided in s48 of the FS&SA-India.

44 FS&SA-India, ss. 3(f) and 3(q). These statutory provisions do not use 'human' but it can be inferred from the definitions of both 'consumer' and 'food safety'

45 S.48 (1) of the FS&SA-India as copied in *M/s Pepsico India Holdings (Pvt) Ltd* v. *State of U.P.*(2010) H.C.A., [20] (India).

46 FS&SA-India, s. 48(2)(a)(ii).

47 As mentioned in *supra* note 44, the term 'human' is not mentioned in the definitional provisions of the FS&SA-India. However, it is mentioned in s. 59 which is a primary concern of this paper.

in that it is not positively added to the *actus reus* component of the offenses, and that the failure to remove harmful elements from a food item is arguably left out completely.[48]

Section 48 is silent about penalties. However, this silence has been addressed separately in section 58 which mentions punishments of contraventions for which no specific penalty is provided. Section 59 of the FS&SA-India prescribes the highest penalties for 'unsafe foods'. An 'unsafe food'[49] item as defined in section 3(zz) of the FS&SA-India is: an article of food whose nature, substance or quality is so affected as to render it injurious to health:-

(i) by the article itself, or its package thereof, which is composed, whether wholly or in part, of poisonous or deleterious substances; or

(ii) by the article consisting, wholly or in part, of any filthy, putrid, rotten, decomposed or diseased animal substance or vegetable substance; or

(iii) by virtue of its unhygienic processing or the presence in that article of any harmful substance; or

(iv) by the substitution of any inferior or cheaper substance whether wholly or in part; or

(v) by addition of a substance directly or as an ingredient which is not permitted; or

(vi) by the abstraction, wholly or in part, of any of its constituents; or

(vii) by the article being so coloured, flavoured or coated, powdered or polished, as to damage or conceal the article or to make it appear better or of greater value than it really is; or

(viii) by the presence of any colouring matter or preservatives other than that specified in respect thereof; or

(ix) by the article having been infected or infested with worms, weevils or insects; or

(x) by virtue of its being prepared, packed or kept under insanitary conditions; or

(xi) by virtue of its being mis-branded or sub-standard or food containing extraneous matter; or

(xii) by virtue of containing pesticides and other contaminants in excess of quantities specified by regulations.

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48 For the weaknesses regarding omission, see the examples provided in section II above.

49 FS&SA-India, s. 48 is still directly relevant to s. 59 because foods are prohibited to be rendered 'unsafe' by using the means mentioned in s. 48.

Several offenses have been created (sections 50-67 both inclusive) based upon the above prohibitions on rendering food unsafe. The highest penalty contained in section 59 of the FS&SA-India relates to unsafe food. Unlike the SFA-Bangladesh, the penalties in the FS&SA-India vary depending on the consequence of the offense committed by the accused. The ethical basis of section 59 thus seems to be utilitarianism (also called 'consequentialism' or consequence-based philosophy) which justifies certain conduct in terms of its consequence (greatest good for the greatest number).[50] It does, however, incorporate the deontological ethics as well. Therefore its ethical basis is hybrid. Section 59 reads:

Any person who, whether by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is unsafe, shall be punishable,-

(i) where such failure or contravention does not result in injury, with imprisonment for a term which may extend to six months and also with fine which may extend to one lakh rupees;[51]

(ii) where such failure or contravention results in a non-grievous injury, with imprisonment for a term which may extend to one year and also with fine which may extend to three lakh rupees;

(iii) where such failure or contravention results in a grievous injury, with imprisonment for a term which may extend to six years and also with fine which may extend to five lakh rupees;

(iv) where such failure or contravention results in death, with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and also with fine which shall not be less than ten lakh rupees.

It shows that conviction does not require any consequence to occur under section 59 (i), which is an inclusion of the ethical principle of deontology. However the prohibited conduct committed without any resultant injuries attracts the lowest penalty, which demonstrates a special emphasis on the relationship between the consequence and legal condemnation. This is akin to the utilitarian principle of ethics. It means the penalty has been attempted to be made proportionate to the consequence of the prohibited conduct.

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50 A discussion of these two dominant ethical theories is beyond the scope of this paper, however, it can be found in Paul Conway and Bertram Gawronski, "Deontological and Utilitarian Inclinations in Moral Decision Making: A Process DissociationApproach" 104 *Journal of Personality and Social Psychology* 216–235 (2013)

51 All figures of fines mentioned in s. 59 have been converted to US dollars later in this paper.

Alongside the provisions of punishment for the first offense, recidivism has been prescribed to be punished even more severely. Section 64 provides punishment for subsequent offenses. It reads:

(l) If any person, after having been previously convicted of an offence punishable under this Act subsequently commits and is convicted of the same offence, he shall be liable to—

(i) twice the punishment, which might have been imposed on a first conviction, subject to the punishment being maximum provided for the same offence;

(ii) a further fine on daily basis which may extend up to one lakh rupees [US$,1617 approx], where the offence is a continuing one; and

(iii) his licence shall be cancelled.

(2) The Court may also cause the offender's name and place of residence, the offence and the penalty imposed to be published at the offender's expense in such newspapers or in such other manner as the court may direct and the expenses of such publication shall be deemed to be part of the cost attending the conviction and shall be recoverable in the same manner as a fine.

There are both shortcomings and niceties in the aforesaid provisions in defining offenses and prescribing penalties as discussed below.

Absolving secondary actors and accessories

If sections 59 and 48 of the FS&SA-India are read together, it is apparent that perhaps the most notable drawback of these provisions is absolving secondary actors and accessories from their criminal liability. This is so because, section 48 does not impose liability on anyone, and section 59 makes only the primary actor liable for his/her own conduct or the conduct of another person carried out on behalf of him/her (the primary actor).[52] It is not justified to forgive the accomplice of, or accessories before the fact to the offense that was later committed by, the primary offender especially where the consequence of the offense can be anything including death of human beings. Section 23 of the SFA-Bangladesh though uses an identical expression; it differs from section 59 of the FS&SA-India based on the distinctive statutory definitions of "person" in that the former does not arguably include individuals, whereas the latter refers to only humans, leaving apart the offenses by business organizations to section 66 as discussed below.

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52 S. 59 begins with "[a]ny person who, whether by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any article of food…"

Confusion created by the lack of a general definition of "person"

The very word "person" is not defined in the FS&SA-India. It generates confusion about potential defendants especially whether only natural persons or corporations or unincorporated other businesses and associations can be held liable. The word "person" has been frequently used in the legislation, such as in defining "business operator",[53] "manufacturer",[54] but it does not define this word. However, assumingly it refers to individuals only because the offenses by "companies" have been stated separately in section 66 of the FS&SA-India. Confusion still persists due to an widely encompassing definition of 'companies' included in section 66(2)(a) stating that for the purposes of this section- company "means any body corporate and includes a firm or other association of individuals; and (b) 'director' in relation to a firm, means a partner in the firm." So, section 66(2) implies that a company includes a partnership as well, which does not have legal personality, quite inconsistently the partners as individuals are presumably liable for the offenses under section 59.

It is worth mentioning that even though the company may be held guilty, individuals who were behind the scene will be concurrently punished for the offense under section 66. Treating both a company and a partnership alike sounds "unrealistic" in a sense that the latter lacks separate personality to bear the liability independently of its partners, though it conforms to the SFA-Bangladesh as alluded to earlier. Virtually partners should and would take the full responsibility for the offense deemed to have been committed by their firm. Therefore, it does not make a real difference between the liability of individuals and that of a partnership firm when it comes to enforcement. Then a question may emerge as to why the 'company' should include other business organizations that lack separate juridical personality. In fact, it offers no visible benefits, but may serves to create confusion amongst its subjects.

Inappropriate use of "failure"

Each of the four subsections of section 59 begins with the phrase – "where such failure or contravention…" Given the specific description of prohibited acts connected to unsafe foods provided in section 59, the word "failure" does not make sense. This is because, a failure generally represents an omission, but all the prohibitions under section 59 pertain to an action ("manufactures for sale or stores or sells or distributes

53 FS&SA-India, s. 3(o) provides "food business operator" in relation to food business means a person by whom the business is carried on or owned and is responsible for ensuring the compliance of this Act, rules and regulations made thereunder."

54 FS&SA-India, s.3 (zd) states that "manufacturer" means a person engaged in the business of manufacturing any article of food for sale and includes any person who obtains such article from another person and packs and labels it for sale or only labels it for such purposes."

or imports"). Notably, section 66 which deals with the offenses by companies mentions only "contravention" excluding the word "failure". Therefore the term "failure" in section 59 begs a clarification of its intended meaning as well as its application, without which it remains out of context, if not practically useless.

Conversely, a clarification of the omission of "failure" from section 66 is necessary in that a company can be held criminally liable for an omission (failure to act) of its own without attribution of someone else's wrongful conduct to it, and that the liability is extended to not only the company but some of the individuals behind it. If an individual can be held liable for 'failure' under section 59 (though unclear as to how), then why companies should not be deemed liable for the same offense under section 66. This opacity is further worsened when asked that why an individual can be held liable for failure under section 59, but the same person for the same conduct cannot be blamed under section 66.

Above all, "omissions" which directly relate to "failure" are not included in defining the conduct elements of the offenses in sections 50 and 66, which is by itself a shortcoming as discussed above with respect to the SFA-Bangladesh.

Silence about *mens rea*

Like the provisions of the SFA-Bangladesh as discussed above, section 59 of the FS&SA-India too is silent about *mens rea* element of the offenses. It has been shown earlier that such statutory silence does not negate the need for *mens rea*, rather the court will presume the requirement of an appropriate fault or mental element of the offense. Nonetheless, this ambiguity may be inhibitive to its efficient enforcement given the fact that unlike the practice in NSW, the common law principles are not yet well established in India and Bangladesh. It has to be mentioned that section 48(1) of the FS&SA-India categorically embraces "knowledge" as a mental element of food adulteration in various ways, but it is unclear what sort of link exists, if there is any, between sections 59 and 48(1).

Maximum and minimum thresholds of penalties

Amongst the different punishments under section 59 of the FS&SA-India formulated based on consequences, the maximum life imprisonment but not less than seven years in prison is the highest penalty which can be awarded only for death of a person. Death is obviously the deadliest consequence of anything. In addition to this term of incarceration, a heavy fine amounting not less than Rs. 1 million (US$16,521approx) can be imposed.[55] Against the backdrop of these maximums, the

55 FS&SA-India, s.59 (iv).

minimums prescribed to penalize the conduct itself which causes no harm as such are a term of imprisonment no longer than six months and a fine of not more than Rs. 100,000 (US$1,652 approx).[56]

> Apart from the above two thresholds of penalties being the highest and the lowest, there are two more different penalties set forth in sections 59(ii) and (iii) based on the extent of harm caused by unsafe foods. Section 59(ii) punishes an offender up to one year imprisonment and also with a maximum fine of Rs. 300,000 (US$4,956 approx) for causing the harm of a non-grievous injury, followed by a term of imprisonment which may extend to six years together with a maximum fine of Rs. 500,000 (US$8,260 approx) when the conduct results in a grievous injury.

The prescription of penalties based on the casualties sound quite logical, however, the legislation proffers an unfettered discretion to adjudicators in penalizing the offenses against subsections (ii) and (iii) of section 59.[57] It is to be noted that section 49[58] offers general guidelines regarding penalties, but none of these guidelines strictly limits such discretion. A minimum threshold of penalties for all of the first three categories of offenses is desirable given the corruption reportedly prevalent in the judiciary of India.[59] Referring to widespread dishonest practices, Berlin-based Transparency International reported several years ago that "[a]lthough provisions for the independence and accountability of the judiciary exist in India's constitution, corruption is increasingly apparent."[60] A recent survey confirms that upward trend continued when reveals that "96% of Indians said corruption was holding their country back,

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56 I*d.*, s. 59 (i).

57 Magistrates and the Food Safety Appellate Tribunal. For details, see FS&SA-India, ss. 68-80.

58 S. 49 reads: "While adjudging the quantum of penalty under this Chapter, the Adjudicating Officer or the Tribunal, as the case may be, shall have due regard to the following:—(a) the amount of gain or unfair advantage, wherever quantifiable, made as a result of the contravention, (b) the amount of loss caused or likely to cause to any person as a result of the contravention, (*c*) the repetitive nature of the contravention, (d) whether the contravention is without his knowledge, and (e) any other relevant factor..

59 "HC Judge Impeached for the First Time in India" *Daily Star* (Bangl), Aug. 19, 2011; Chandrani Banerjee, "Interview: 'Corruption is Rampant in the Lower Courts': Former Chief Justice of India on Corruption in Judiciary" *OutlookIndia.com* (India), Jul. 9, 2012, *available at*:http://www.outlookindia.com/article.aspx?281457, (last visited on Aug. 3, 2014); Transparency International India (TII), "Indolence in India's Judiciary" in *Global Corruption Report 2007: Corruption in Judicial System* 214–217 (Transparency International & Cambridge University Press, 2007).

60 TII, *supra* note 59 at 215.

and 92% thought it has got worse in the past five years."[61] Based on such disconsolate findings, one can safely infer that unscrupulous businesses can cause a lower penalty to be awarded at its best, and may prevent infliction of any punishment at its worst, by offering bribes.

It should be mentioned that India could be, in terms of corruption, comparable with Bangladesh, though not with Australia.[62] Paying heed to numerous corruption allegations which could not be reasonably ruled out by anyone, it would be wise to limit the discretion of adjudicating officers by prescribing a minimal penalty relating to offenses specified in subsections (ii) and (iii) of section 59. [63]

Drawback in the definition of consumer

There is a clear shortcoming in respect of injury when it comes to consumers. The injuries mentioned in section 59 assumingly refer to the effects of unsafe foods on consumers. Section 3(f) of the FS&SA-India defines "consumer" which "means and includes person and families purchasing and receiving food in order to meet their personal needs." This definition seems to be confined to the purchaser and his/her family members, whereas a consumer in reality can be anyone ranging from beggars to friends,[64] who can be given unsafe foods by its purchaser or possessor who might be unaware of the defects in the food. The need for the word "families" with respect to such eligibility is unclear, and it can be deleted in order to encompass everyone who consumes the unsafe food received from anyone in any way, even if obtained by stealing. This is so because a poor hungry person may have to steal food as a life-saving means at a given time, but its legitimate possessor or anyone else must not have any right to kill that hungry life by a poisonous foodstuff.

By contrast, neither the SFA-Bangladesh nor the FA-NSW does have any limitation like this. Although the FA-NSW does not directly define "consumer", it has explained the meaning of a 'consumer' in its s8 while discussing the meaning of 'unsafe' food. Section 8(1) provides:

…food is *unsafe* at a particular time if it would be likely to cause physical harm to a person who might later consume it, assuming:(a) it was, after that particular time and before being consumed by the person, properly subjected to all processes (if any)

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61 "Fighting Corruption in India- A Bad Boom" *The Economist,* Mar. 15, 2014, *available at:* http://www.economist.com/news/briefing/21598967-graft-india-damaging-economy-country-needs-get-serious-about-dealing-it (last visited on Aug. 22, 2014).

62 See Transparency International, Corruption Perceptions Index 2013, *available at*: http://www.transparency.org/cpi2013/results (last visited on Aug. 31, 2014).

63 FS&SA-India, s. 59(i)-(iii).

64 See generally *Donoghue* v. *Stevenson* [1932] A.C. 562 (H.L.) 562 (appeal taken from Scot.).

that are relevant to its reasonable intended use, and (b) nothing happened to it after that particular time and before being consumed by the person that would prevent its being used for its reasonable intended use, and (c) it was consumed by the person according to its reasonable intended use.

Since the clause "who might later consume it" is not qualified by any condition anywhere in the legislation, it can be logically inferred that any affected individual will be regarded as a legitimate consumer.

In addition, the word "consumer" has been defined in the Australian Consumer Law 2010 (ACL) which applies to the FA-NSW. As per section 3 of the ACL, consumers include anyone who acquires goods for "personal, domestic or household use or consumption". This is an objective definition, and the term "acquires" is not confined to any particular method of getting the food or the relation between the purchaser and the end user.

SFA-Bangladesh does not define "consumer", however, it is defined in section 2(19) of the Consumer Rights Protection Act 2009 (Bangl). Pursuant to section 2(19), a consumer in the present context is a person who purchases a food product without having any resale or commercial purposes, or any person who consumes or uses the product with the consent of its purchaser. This definition does go beyond the boundary of family, but is not free from imperfection. It is imperfect because it excludes persons who ultimately consume foods which cause injuries to them or even resultant death, nevertheless, the consequences would be irreprehensible on the premise that they had not obtained the poisonous foods with the consent of its buyer. Of course, a thief can be tried for his/her wrongful act, which must be the stealing itself, rather than the eating of the stolen food. If anything is worth doing, the deprived buyer should first be thankful to such a thief who has saved the buyer's "precious" life by killing himself instead.

Punishing the offenses committed by companies

Offenses by companies are punished separately under section 66 of the FS&SA-India; however, it does not provide any definition of the offenses. So, this lack of separate definition implies that the same prohibitions apply to both individuals and companies. Section 66(1) lays down that:

> Where an offence under this Act which has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly…

Although section 66(1) imposes liability simultaneously on both the businesses and individuals, an added proviso specifies the persons to be held responsible for contravention at a branch level. It stipulates that:

> [W]here a company has different establishments or branches or different units in any establishment or branch, the concerned Head or the person in-charge of such establishment, branch, unit nominated by the company as responsible for food safety shall be liable for contravention in respect of such establishment, branch or unit....

This proviso thus singles out a specific person who shall be deemed to be liable, but is silent about the liability of the "establishment, or branch or unit" itself and other officers/employees who might get engaged with the contravention. The FS&SA-India does not offer any definition of these terms (establishment, or branch or unit) to ascertain whether they are separate entity or just branches or units of a "large" company. This silence creates a disparity between the main provision in section 66(1) and the above mentioned proviso with respect to the liability of both individuals and entities. This is because the main provision makes "every person who at the time the offense was committed was in charge of, and was responsible to, the company for the conduct of the business of the company" liable together with the company; whereas if the wrong is committed at a particular branch or unit, the proviso imposes liability only on a single person at a lower level as it stipulates: "[h]ead or the person in-charge of such establishment, branch, unit nominated by the company as responsible for food safety shall be liable." It means, the person liable may be any employee who was entrusted with the responsibility to monitor or oversee food safety aspects within the relevant unit, and its 'head' can escape criminal liability altogether. This discrepancy and inconsistency would be unhelpful in securing conviction of and creating deterrence for the higher executives of the company. On the other hand, the wider scope of liability would arguably generate greater deterrence amongst the potential contraveners of the legislation.

Ambiguity about persons and punishment

Section 66 does have a shortcoming with respect to penalties. It recommends punishment to be awarded in a general term ("shall be liable to be proceeded against and punished accordingly") in both subsections, but falls short of detailing the penalties to be inflicted. However, a careful reading of sections 59 and s66 together suggests that the penalties mentioned in the former may apply to the potential offenders identified under the latter which begins with "where an offense under this Act which has been committed by a company...." The ambiguity still remains because section 66 refers to the commission of an offense by "a company", whereas section 59 deals with the serious offenses that may be committed by "any person". The complication

heightens in the absence of a statutory definition of 'person' whether it includes both natural and artificial persons, whilst section 66(2)(a) defines "company" restricting to business organizations only. In the midst of such an inconsistency, the reason for separating section 66 from section 59needs to be clarified and justified as well.

IV The most serious offenses and penalties for unsafe foods in NSW

In NSW, the most serious offenses under the FA-NSW are divided into three categories: the handling of food in unsafe manner (section 13), the sale of unsafe food (section 14), and the false description of food (section 15). All these three offenses attract identical punishments as stated in the respective sections which proscribe these *actus reus*, however, different *mens rea* elements make a difference in penalties.

Section 13(1) provides that "[a] person must not handle food intended for sale in a manner that the person knows will render, or is likely to render, the food unsafe." The meanings of the terms used in this legislation are described in its s4. The statutory meaning of the phrase "handling of food" combines several actions together. These include "the making, manufacturing, producing, collecting, extracting, processing, storing, transporting, delivering, preparing, treating, preserving, packing, cooking, thawing, serving or displaying of food." Simply, the handling of any food item at any stage in any way by anyone, except for the end consumer, seemingly falls within the purview of this handling prohibition. However, omissions are not evidently included within this definition.

Section 4 of the FA-NSW relies on its section 8(1), quoted above, for the definition of the term "unsafe" which gives emphasis to the consumption of the disputed food by any person in accordance with its reasonable intended use, and to the fact that it did not become unsafe after a particular time. The extra sensitivity of a consumer has been excluded from this description of unsafe food by section 8(2) which enunciates that food is not unsafe "merely because its inherent nutritional or chemical properties cause, or its inherent nature causes, adverse reactions only in persons with allergies or sensitivities that are not common to the majority of persons." Differently from section 13(1) of the FA-NSW, section 13(2) provides in terms of *mens rea* requirement that "[a] person must not handle food intended for sale in a manner that the person ought reasonably to know is likely to render the food unsafe." Corresponding to section 13, section 14 defines the offense of selling unsafe foods. Section 14(1) prohibits in an emphatic term that a person must not knowingly sell unsafe food, whilst its subsection (2) criminalizes selling food by a person who ought reasonably to know the food is unsafe. A long list of actions (16 acts) constituting sale has been provided in s4 by way of its definition, but again ignoring the conduct of omission.[65]

65 The definition of 'sell' provided in s. 4, *available at:* http://www.austlii.edu.au/au/legis/nsw/consol_act/fa200357/s4.html, (last visited on Oct. 2, 2014).

Section 15(1) of the FA-NSW punishes a person for causing "food intended for sale to be falsely described if the person knows that a consumer of the food who relies on the description will, or is likely to, suffer physical harm", whilst section 15(2) prohibits a person from causing "food intended for sale to be falsely described if the person ought reasonably to know that a consumer of the food who relies on the description is likely to suffer physical harm." Section 15 adds two more offenses within the perimeter of false description. Section 15(3) ordains that "[a] person must not sell food that the person knows is falsely described and will, or is likely to, cause physical harm to a consumer of the food who relies on the description." Section 15(4),the second additional offense, provides that "[a] person must not sell food that the person ought reasonably to know is falsely described and is likely to cause physical harm to a consumer of the food who relies on the description." None of these four offenses clearly makes any mention of omissions, however, some may argue that the concept of this conduct (omission) is entrenched in the crucial expression "must not cause", as used in the first two subsections. In the absence of judicial interpretation of this expression, it is argued that it may go either way, meaning 'omission' as a constituting element of *actus reus* might be or might not be intended to be included by the legislators. However, having regard to the offensive conduct under section 13 and section 14 as defined in section 4 of the FA-NSW, the paper seeks to argue that omissions are not included in section 15. These definitions of offenses are reliant on the deontological ethics as the prohibitions and penalties are unrelated to the actual or potential consequence of the proscribed conduct. Generally and indeed fairly, it is logical to rely on the deontology, rather than on the utilitarianism, in dealing with food safety, which is directly related to human life.

The defined prohibitions apply to both individuals and companies alike. However, the punishments prescribed for individuals and entities are different and are stated separately. Although the offenses are different, the penalties are identical and the punishments correspond to the offenses in all of these three sections (sections 13, 14 and 15 of the FA-NSW). The penalties applicable to individuals vary depending on the *mens rea* element in all of these sections.

This paper focuses only on the maximum penalties from each of these three sections which require the subjective knowledge of the defendants in order for them to be punished. Penalties for handling of food in unsafe manner, the sale of unsafe food, and the false description of food under sections 13(1), 14(1) and 15(1) are "1,000 penalty units [AU$110,000 or US$102,648 approx][66] or imprisonment for 2 years, or

66 In NSW, one penalty unit is currently equal to AU$110: s. 17 of the Crimes (Sentencing Procedure) Act, 1999 (Austl).

both, in the case of an individual; and 5,000 penalty units [AU$550,000 or US$513,238 approx] in the case of a corporation."

However, the definitions or descriptions of the highest penalty offenses as mentioned above are not free from complexities and ambiguities which are discussed below.

Requirement of subjective knowledge

The proof of subjective 'knowledge' is essential for conviction under subsection (1) of all sections 13, 14 and 15, whilst their subsection (2) relies on knowledge to be proven objectively. "Knowledge" is a high degree of fault element of an offense with the onus on the prosecution to prove. This is a contentious requirement especially when it is attached to a "false description" of food as it has been done in section 15(1). Although this high requirement of subjective *mens rea* attracting even greater penalties compared their objective parallels[67] may sound to be somehow reasonable in sections 13 and 14, it should not be attached to section 15(1)[68] which requires the accused to know the likelihood of consumers" harm that may be caused by the falsely described food. Rather a false description itself should be made an absolute liability offense as long as the person knew that the "description was false". The knowledge of falsity by itself should be enough for conviction which should not be contingent upon any likelihood of injury whatsoever. For the same reason, the requirement of objectively proven "knowledge" of likely harm as mentioned in section 15(2) is not supported. The knowledge of falsity of description should be blameworthy on its own merit, and such knowledge itself should be regarded as more important than its consequences with respect to criminality.

Offenses committed by corporations

Although the FA-NSW does not define the word "person" used in all of these three sections (sections 13, 14 and 15), it does prescribe penalties separately for corporations. Also, section 21 of the Interpretation Act 1987 (NSW) provides that the word "person" used in any legislation or instruments in NSW "includes an individual, a corporation and a body corporate or politic." Therefore, the offenses defined in these sections can be committed by both individuals and corporations alike. However, an ambiguity exists in the penalty provisions. Each of these sections

67 See ss. 13(1), 14(1) and 15(1) and compare them with ss. 13(2), 14(2) and 15(2) with respect to requirements and penalties.

68 FA-NSW, s. 15 (1) states "[a] person must not cause food intended for sale to be falsely described if the person knows that a consumer of the food who relies on the description will, or is likely to, suffer physical harm."

adds a note that "[a]n offence against this section committed by a corporation is an executive liability offence attracting executive liability for a director or other person involved in the management of the corporation-see section 122." Section 122 reaffirms that these are executive liability offenses if committed by a corporation, and that the executives (director or other person involved in the management) will be responsible for the offense regardless of the liability of the company itself. A question which needs to be answered is whether those individuals (executives) mentioned in the note would be liable for the penalty prescribed for a corporation or for the much higher penalty declared for individuals within each of these sections. Individuals' penalties are more stringent than those of corporations because the former can be punished with a maximum of 1,000 penalty units or a term of imprisonment not longer than 2 years, or both; whereas the maximum penalty for an offense committed by a corporation is only a fine of 5,000 penalty units as stated above. If it is assumed that the penalties for individuals apply to them, then it gives rise to another question about the utility of the separate corporate punishment. Alternatively, if it is argued that the penalties set forth for their corporation should apply to them, it sounds unfair in that the offenders wearing the veil of incorporation are getting an undue advantage of significantly lower punishment by avoiding imprisonment. Clearly, the pecuniary penalty is significantly higher for corporate offenses compared to that for individuals, but it is overshadowed by the avoidance of incarceration which is generally believed to be more painful than losing of an amount of money. So, this is a critical question which warrants a clarification.

It should be added that lifting the corporate veil to hook up the directing mind is quite justified as the objectives of the doctrine of piercing the corporate veil are, amongst other things, "punishment, deterrence, compensation and avoiding unjust enrichment."[69] But the achievement of these objectives requires a clarification of the ambiguity discussed above.

Conditional definition of unsafe foods

The definition of "unsafe" food is conditional upon the certain role of potential consumers as can be perceived from the description of unsafe food provided in section 8(1) of the FA-NSW quoted earlier.[70]

While it is appreciable that section 8(1) entails consumers to consume the food in accordance with its reasonable intended use and to make sure that it was "properly

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69 Albana Karapanço & Ina Karapanço, "The Piercing of the Corporate Veil Doctrine: A Comparative Approach to the Piercing of the Corporate Veil in European Union and Albania" 2 *Academic Journal of Interdisciplinary Studies* 153, 157 (2013).

70 See section III of this paper.

subjected to all processes (if any) that are relevant to its reasonable intended use", it is to be noted that these are the duties of consumers with the legal burden to prove that the requirements have been complied with.[71]

This may have an adverse effect on the victim consumers to initiate enforcement process and can negatively affect the prosecution of food safety offenses in the one hand, and may also ultimately weaken its intended deterrence on unscrupulous businesses on the other. Crumley comments that "[c]onsumers rarely have the knowledge to pinpoint what item made them sick or which food producer was responsible for that contamination, and they rarely have the resources to investigate similar cases of foodborne illness."[72] Any failure to prove taking "proper care" of the food by the affected consumer may unfairly relieve the defendant from liability.

Conversely, if it is argued that the proving burden is on the defendants, it has two difficulties: (i) how to prove whether or not the victim took proper care, and (ii) why the defendant should take the responsibility if the harm was actually caused by the failure of the consumer. Answering neither of the two is easy, and both the consumer's responsibility and defendant's absolution from liability have merits in such a case. Nevertheless, such a statutory requirement may ultimately favour many defendants especially when it comes to the false description of foods under section 15 of the FA-NSW. Moreover, a question may emerge, what happens if the defendant handled (section 13) or sold (section 14) the food with knowledge that it was unsafe, and also the consumer failed to take 'proper care' of it before eating. There is no guideline in these defining sections about a possible trade-off between such a claim and a counterclaim. It is recommended, from the viewpoint of consumer protection, that consumer's responsibility of taking proper care be removed specifically (at least) when defendant's knowledge of food being unsafe at the time of handling, selling, or providing false description of the food is proved.

Further, section 8(2) stipulates that food is not unsafe "merely because its inherent nutritional or chemical properties cause, or its inherent nature causes, adverse reactions only in persons with allergies or sensitivities that are not common to the majority of persons." Whilst this is a reasonable proviso, it has to be qualified by a condition that all ingredients of food were properly disclosed. Otherwise, this may deprive the affected consumers of remedies despite their innocence especially where the liability provisions at hand do not confer this liability for a wrongful omission on the part of defendant.[73]

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71 FA-NSW, s. 122(3) imposes burden of proof on the prosecution which bears the legal burden of proving the elements of the offense against this section (an offense committed by a corporation).

72 Diana Crumley, "Achieving Optimal Deterrence in Food Safety Regulation" 31 *Rev. of Litigation* 353, 379 (2012).

73 See the wording of FA-NSW, ss. 13, 14 and 15.

An omission may include hiding of facts from the disclosure of ingredients attached to the food product as alluded to earlier.

The phrase "unsafe food" has been defined in section 3(zz) of the FS&SA-India and it covers almost every aspects of substance and process that may render food unsafe.[74] Unlike the FA-NSW and FS&SA-India, the SFA-Bangladesh does not define "unsafe food" as such. Instead, section 2(29) of the SFA-Bangladesh provides a description of "adulterated food" which encompasses roughly all means of food adulteration by using admixtures and colours and employing processes. However, similar to the FS&SA-India, the SFA-Bangladesh does not impose any responsibility on consumers to take proper care before consumption. Interestingly, unlike the other two pieces of legislation which define only "unsafe food", section 2(17) of the SFA-Bangladesh defines, though very briefly, "safe foods" as being the foods which are pure and "healthy" in accordance with their expected use and usefulness for humans. This definition seems too wide to implement merely because a particular foodstuff may be pure and safe, but may not be healthy in its true sense. For example, many, if not most, of the fast food items are believed to be not healthy. Hence, such a broad definition of safe food may have potential to contribute to over- criminalization which by itself is detrimental to the efficacy of the law.

V Conclusions

The preceding discussion presents a critical review of the most serious offenses under the major statutory laws regulating food safety in Bangladesh, India and NSW. This investigation endeavours to find out specific drawbacks of the law of each jurisdiction, and discovers that none of the three statutes is free from flaws. Whilst

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74 S. 3(*zz*) describes that ""unsafe food" means an article of food whose nature, substance or quality is so affected as to render it injurious to health: (i) by the article itself, or its package thereof, which is composed, whether wholly or in part, of poisonous or deleterious substances; or (ii) by the article consisting , wholly or in part, of any filthy, putrid, rotten, decomposed or diseasedanimal substance or vegetable substance; or (iii) by virtue of its unhygienic processing or the presence in that article of any harmful substance; or (*iv*) by the substitution of any inferior or cheaper substance whether wholly or in part; or (v) by addition of a substance directly or as an ingredient which is not permitted; or (vi) by the abstraction, wholly or in part, of any of its constituents; or (vii) by the article being so coloured, flavoured or coated, powdered or polished, as to damage orconceal the article or to make it appear better or of greater value than it really is; or (viii) by the presence of any colouring matter or preservatives other than that specified in respect thereof; or (ix) by the article having been infected or infested with worms, weevils or insects; or (x) by virtue of its being prepared, packed or kept under insanitary conditions; or (xi) by virtue of its being mis-branded or sub-standard or food containing extraneous matter; or (xii)by virtue of containing pesticides and other contaminants in excess of quantities specified by regulations."

each of them can learn from one another, some weaknesses have been found to be in common. The following recommendations are submitted with reasons to address the loopholes in the legislation in order to make the laws more useful for combating the menace of food adulteration in their respective jurisdictions. Some of the major findings are summarised below.

First, an omission is generally an integral part of *actus reus*, but arguably, none of the three statutes criminalizes this conduct in their definitions of the crimes in question. The merits of such omissions have been argued with examples in the present context that warrant this conduct be made a constituent element of these offenses. The recommendations are furnished accordingly.

Second, a moral fault in varying degrees is an essential component of the golden thread of penal law as explained earlier. Both the SFA-Bangladesh and FS&SA-India are silent about *mens rea*, whilst the FA-NSW requires subjective knowledge for the higher penalty and objective knowledge for a lower penalty in all three sections (sections 13,14 and 15) defining three different offenses. Downsides of both the absence and presence of a fault element in all three jurisdictions have been discussed earlier. Regarding absence, the paper has attempted to establish by referring to the relevant common law principles that, statutory silence does not negate the need for *mens rea*, rather a common law court is open to make a legal presumption that an appropriate fault element has to be added to the definition of the crime in dispute. Such a vacuum may generate an undue advantage for wrongdoers especially when the prosecution fails to convince the court that no *mens rea* is required in a particular case. This may happen given the allegations of practice of corruption by both the bench and bar. This can also be attributed to their lack of experience and reliance on common law principles in both Bangladesh and India. Judges and defenses may argue that *actus reus* must be committed with intention to commit the offense, and the prosecution may fail to effectively counter this argument leading to their failure to prove the required intention of the defendant as the fault element of the offense. This will result in an outright acquittal even though the defendant's deliberate conduct has caused serious harm to humans. Hence, either specific fault element has to be added, or its need is to be clearly negatived in defining the offenses in order to make the law unambiguous and succinct. Legislators do have the authority to redefine the law in a manner as they deem appropriate; however, the paper has argued in favor of no, or at best a lower degree of *mens rea*, such as criminal negligence, in the greater interest of consumer protection.

The presence of a fault element in the FA-NSW has also been argued to be problematic especially with respect to falsely described foods. The law requires the prosecution to prove the defendant's knowledge of the likelihood of the harm caused to the victim by the foods sold with a false description. The knowledge of such a

falsity in the food description by itself should be sufficient to convict the accused under section 15(1) of the FA-NSW. The subjective knowledge, though a high degree of *mens rea,* is somewhat acceptable on the premise that an accused can be alternatively convicted based on his/her knowledge of the offense proven objectively even though with a lower penalty. This is acceptable in NSW given the impeccable honesty of its judiciary and the sophistication of its judicial administration.

Third, an ambiguity exists in relation to the identity of potential offenders. Though it may sound absurd, the SFA-Bangladesh does not explicitly impose liability on natural persons in that it imposes liability on any "person", which categorically includes all sorts of business organizations, but arguably not individuals. Clarity in any law is critical to its smooth enforcement. It is therefore suggested to bring natural persons firmly within the scope of the prohibitions to ensure justice for all including their businesses.

Both the FS&SA-India and FA-NSW define liabilities separately for individuals and corporations, nonetheless, some ambiguities and dilemma sexist in relation to their separate penalties mainly because of lack of clarity in the liability and penalty provisions. The paper therefore expresses cpncerns that those legal loopholes may offer an undue advantage to individuals facilitating avoidance of greater penalties by misusing the veil of incorporation.

Fourth, a clear disparity exists in the definitions of consumers who are subject to the statutes at hand. The SFA-Bangladesh does not define "consumer" and applies its meaning from section 2 (19) of the Consumer Rights Protection Act, 2009 (Bangl). This section 2(19) provides that a consumer, in the food safety context, is a person who either purchases the food himself/herself or one who acquires it with the consent of the purchaser. So, this definition is confined to only the legal acquirers of foods, irrespective of any personal relationship between the purchaser and the end user. The definition of consumer provided in section 3(f) of the FS&SA-India suffers from its own limitation drawn based on the family relationship between the purchaser and eaters (actual consumers) of the unsafe food. The most liberal, and perhaps the best, definition of "consumer" is provided in section 3 of the Australian Consumer Law which applies to the FA-NSW It includes anyone who acquires foods for consumption. The paper has advanced a critique of the definitions applicable in Bangladesh and India by arguing that the limitations should be eliminated because a consumer can be anyone ranging from a friend to a foe or even a beggar or thief. All of these persons must be protected from the danger of unsafe food even if it is stolen. However, a thief can be tried for his/her larceny, but yet is entitled to be protected from poisonous foods.

Fifth, a further inconsistency is apparent in the penalties under these statutes. The highest penalty of life imprisonment with a minimum of seven years has been

prescribed under the FS&SA-India, albeit for the deadliest consequence of death. In addition, a fine of not less than US$16,521 (approx) can be imposed for the same offense. These penalties are significantly higher than those ordained under the SFA-Bangladesh and FA-NSW. The SFA-Bangladesh empowers the court to punish the convict with the imprisonment of a term between five and four years, or a fine between US$12,820 and US$6,410 (approx), or both. However, the penalties for a reoffender are strictly five years of incarceration or a fine of US$25,640 (approx), or both, whereas the other two pieces of legislation are silent about the reoffenders. The punishments under the FA-NSW are further softer as it prescribes a fine of US$102,648 (approx) or two years imprisonment or both for individuals and US$513,238 (approx) for corporations,[75] whilst no minimum penalty has been suggested.

These significant differences can be justified on the ground that the above mentioned penalties in India can be awarded for the most fatal consequences, whereas their equivalents in Bangladesh and NSW do not require any injuries to be inflicted upon the victim, and the offense can be even victimless. It is not clear in the statutes whether the food safety offenses with consequences in Bangladesh and NSW would be tried under different laws. The incumbent chairman of the Law Commission – Bangladesh, who was formerly the Chief Justice of the country has recently said that "there's no difference between sudden murders and the deaths caused by slow poisoning of food adulteration. Both are punishable crimes' he told the discussion."[76] An inclusion of those offenses in the respective food legislation at hand is recommended with higher penalty in line with their Indian counterparts, or at least, the statutes should refer to a separate law for the trial of those offenses.

Sixth, a partial commonality has been found amongst these three jurisdictions with respect to the requirement of consequences of unsafe foods. While neither the SFA-Bangladesh nor the FA-NSW requires any consequence or injury to occur so as to attract penalty, the FS&SA-India prescribes punishments commensurate with the nature and extent of injuries caused by the proscribed acts. As advocate for consumer protection, it is submitted that any unlawful conduct by itself merits punishment regardless of its consequences because it would be undesirable to wait for the harm to occur as a prerequisite for punishing the evil. However, it seems reasonable that greater injuries attract higher penalties.

Seventh, another commonality is evident with regard to the ethical basis as they all appear to rely on the principles of deontological ethics in criminalizing the conduct and stipulating their penalties. However, the Indian statute shows its adherence to the

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75 The SFA-Bangladesh and the FS&SA-India do not provide different penalties for corporations.

76 "Enforce Safe Food Act-2013 Strictly to Ensure Public Health: Speakers" *Financial Express* (Bangl), Nov. 9, 2014

utilitarianism as well in setting apart the penalties centred on the consequences of the designated offenses, which sounds a logical segregation.

The law is made to cater for the contemporary needs of its society, which instigate legal reforms to be brought about in due course. Given the magnitude of harm being inflicted by unsafe foods worldwide,[77]

[77] World Health Organisation (WHO) reports that "[e]ach year, unsafe food is responsible for illness in at least 2 billion people worldwide and can result in death'.... 'some 700,000 people die every year in Asia alone due to individual cases of food- and water-borne disease...." See Joint News Release WHO/FAO, Food safety regulators from more than 100 countries Meet in Global Effort to Reduce the More than 2 Billion Cases of Foodborne Illness, (WHO, 2014), available at: http://www.who.int/mediacentre/news/releases/2004/pr71/en/ (last visited on Oct. 8, 2014). For a simple example of foodborne illnesses in Bangladesh, see MS Rahman et al, "A Short History of Brucellosis: Special Emphasis on Bangladesh" 4 Bangladesh Journal of Veterinary Medicine 1, 4 (2006).

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