2013

Manufacturing unsafe foods in Bangladesh: a legal and regulatory analysis

Abu Noman Mohammad Atahar Ali

University of Wollongong

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Manufacturing Unsafe Foods in Bangladesh: A Legal and Regulatory Analysis

A thesis submitted in fulfilment of the requirements for the award of the degree of

Doctor of Philosophy

From

Faculty of Law

University of Wollongong

by

Abu Noman Mohammad Atahar Ali

LLM, LLB (Hons) (IU)

December 2013
I, Abu Noman Mohammad Atahar Ali, declare that this thesis is my own work, unless otherwise referenced or acknowledged, and has been submitted for the award of Doctor of Philosophy from the Faculty of Law of University of Wollongong and no other academic institution.

Abu Noman Mohammad Atahar Ali

December 2013
To

The memory of my father, who left me in my boyhood, bequeathing me the lessons of honesty and gratitude,

&

My mother, the dearest of all dears ...
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<td>ACCC</td>
<td>Australian Competition and Consumer Commission</td>
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<td>Australian Consumer Law (NSW)</td>
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<td>AD</td>
<td>Appellate Division</td>
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<td>AEFFSL</td>
<td>Administrative Enforcement Framework of the Food Safety Laws</td>
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<td>ANZFREG</td>
<td>Australia &amp; New Zealand Food Regulation Enforcement Guideline</td>
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<td>ANZFSC</td>
<td>Australia New Zealand Food Standards Code</td>
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<td>AQIS</td>
<td>Australian Quarantine and Inspection Service</td>
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<td>BAEC</td>
<td>Bangladesh Atomic Energy Commission</td>
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<td>BFSA</td>
<td>Bangladesh Food Safety Authority</td>
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<td>BPFR 1967</td>
<td><em>Bangladesh Pure Food Rules 1967</em></td>
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<td>BSM</td>
<td>Bangladesh Standards Mark</td>
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<td>BSTI</td>
<td>Bangladesh Standard Testing Institute</td>
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<td>CAB</td>
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<tr>
<td>DAE</td>
<td>Department of Agricultural Extension</td>
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<td>DDT</td>
<td>Dichloro Diphenyl Trichloroethane</td>
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<td>DFT</td>
<td>Department of Fair Trading</td>
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<td>DGF</td>
<td>Directorate General of Food</td>
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<td>DGHS</td>
<td>Directorate General of Health Services</td>
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<td>DNCRP</td>
<td>Directorate of National Consumer Rights Protection</td>
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<td>DOH</td>
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<td>PO 1971</td>
<td><em>Pesticides Ordinance 1971 (Bangladesh)</em></td>
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<tr>
<td>PPW</td>
<td>Plant Protection Wing</td>
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<tr>
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</tr>
<tr>
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<td>SPL</td>
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ABSTRACT

Bangladesh has long faced a serious food safety problem. Food manufacturers are producing many unhealthy and adulterated food products, ignoring the regulations deliberately. There are numerous laws as well as several regulatory bodies which deal with this alarming issue but with minimal effectiveness. The current study intends to investigate the relevant food safety regulations in regard to the manufacture of unsafe foods in Bangladesh.

This study observes that the existing regulatory philosophy of the enforcement of the regulations is ineffective in practice. This is because the regulations only offer direct criminal penalty for any kind of contravention. There are no other enforcement tools — such as the use of persuasion or an improvement notice or civil penalties — for authorities to impose upon the food manufacturers prior to directly applying the criminal penalties. From that perspective, this study has chosen the responsive regulation theory to evaluate the food safety regulatory regime of Bangladesh and apply to it. In order to do that, the present research has chosen the equivalent food safety regulatory framework of NSW, where the responsive regulation theory has been successfully applied. The qualitative method of research has been used in this research to analyse the major relevant literature of Bangladesh and NSW with a view to suggesting the possible solutions for Bangladesh in light of the equivalent mechanisms applied in NSW, where appropriate and necessary.

Besides applying the responsive regulation theory to the food safety regulatory regime of Bangladesh, this thesis has offered several recommendations to improve the effectiveness of the current food safety regulations of Bangladesh. The key issues of the thesis are divided between six main chapters. Firstly, it has presented the way in which to adopt the responsive regulation theory in the food safety regulatory regime in Bangladesh, which is a least developed country. The current study has recommended some moderation of and adaptations
to the original theory of responsive regulation when introducing the grading system in the manufacturing food industry in Bangladesh. Secondly, this thesis has depicted the existing legal framework of the food safety regulations of Bangladesh. It is observed that the food safety legal framework in Bangladesh has been crowded with numerous unnecessary, confusing and overlapping regulations which this study has suggested should be minimised by the introduction of a single law encompassing all the food safety issues. Thirdly, the investigation into the food safety regulatory framework in Bangladesh revealed that the regulatory bodies that deal with the regulations are also quite large in number which makes the entire regulatory regime burdensome and ineffective. The present study has recommended a single regulatory body for coordinating all food safety activities, so ensuring the greater transparency and increased accountability. Fourthly, this study reveals that affected or injured consumers do not obtain damages entirely commensurate with their injuries under the current civil liability regime. In order to address this concern, this thesis has suggested that the current statutory laws be updated by introducing adequate and effective provisions as well as codifying the product liability of food manufacturers under the law of torts. Fifthly, the imposition of criminal liability on food manufacturers is also not effective as the current regime provides unstructured mens rea, narrow actus reus, and unrestricted defences of the offences. This study suggests introducing a Three-Tier model of offences, where offences with subjective mens rea, offences with objective mens rea and absolute liability offences will be available to try contraventions of food safety regulations. This dissertation also argues for the broadening of the actus reus of the offences and narrowing the defences for food manufacturers. Finally, this research offers a way in which to adopt the responsive regulation theory to the enforcement regime of the food safety regulations in Bangladesh and also analyses a number of other enforcement problems.
It is believed that if all these recommendations of this thesis are adopted, the food safety situation in Bangladesh can be improved by having regulations that are effective. In addition, the findings of the thesis could have implications and usefulness in the global context, particularly in the developing and least developed countries.
LIST OF PUBLICATIONS, CONFERENCES AND PRESENTATIONS

A. Publications


5. Abu Noman Mohammad Atahar Ali (Co-authored with S M Solaiman), ‘Rampant Food Adulteration in Bangladesh: Gross Violations of Fundamental Human Rights with Impunity’(2013)Asia-Pacific Journal on Human Rights and the Law (Forthcoming).(This article is not directly a part of this dissertation; however, it reflects on the main thrust of the whole thesis).

B. Papers Presented


4. Abu Noman Mohammad Atahar Ali, ‘Food Related Chronic Diseases and Mortality in the World: A Wake-up Call for Food Regulators’ (Paper presented at Faculty of Law Seminar Series, 12 October 2011, University of Wollongong, Australia).
Chapter 1: General Concept and Terminology

1.1 Introduction

The study of food safety regulations is of significant importance to the current situation of Bangladesh. This research task is an enormous one and it necessitates looking into the various food safety issues, related regulatory problems along with other perspectives that influences one another and are greatly related to the food safety regulatory framework of Bangladesh. Thus the first chapter of this dissertation will concentrate on various aspects of Bangladesh, its cultures and traditions that have impacts on food production, adulteration and consumption.

The chapter is divided into nine sections. Following the introduction in section 1.1, section 1.2 will outline ‘food’ and ‘food safety’ as general concepts. Section 1.3 will discuss the classification of food from a Bangladeshi and international perspective to the extent to which that is related to the current study. Bangladesh is enriched by various distinct cultures and naturally there are a number of foods and food habits and practices that are characteristically related to those cultures. Having regards to the significance of the role of culture, section 1.4 will explain the traditional food cultures and food habits of Bangladesh. Additionally, section 1.5 will identify the cultural names of the traditionally manufactured foods relevant to the study while some terminologies related to the food industry in Bangladesh will be clarified in section 1.6 of this chapter. Section 1.7 will look into the various impacts of party politics on the campaign for food safety and section 1.8 will focus on the press and electronic media and their impacts on food safety in Bangladesh. Finally section 1.9 will present a summary and conclusions.
1.2 Definition of ‘Food’ and ‘Food Safety’

Generally food is any substance whether unprocessed, processed, or partially processed which is to be consumed by eating or drinking and is reasonably expected to be consumed by humans or animals for any nutritional purpose or otherwise.¹ The Pure Food Ordinance 1959 (PFO 1959), an important food safety law in Bangladesh, states, ‘food’ means any kind of edible fish, fruit, meat or vegetable … drinking water or any other drink used for human consumption … or any substance whether processed, semi processed or raw which is used in the ‘manufacture, preparation or treatment of food’² or ‘intended for use in the composition or preparation of food’ and includes spices, permitted food colours and flavours, and other food additives.³ Food can be a ‘thing of a kind used, or represented as being for use, for human consumption’.⁴ There are different types of foods,⁵ but all foods are expected to be safe for consumption by living beings. Unfortunately, today not all foods are safe; foods can be contaminated, adulterated, poisoned, rotten, date expired or unsafe in various other ways.

The term ‘food safety’ offers an assurance that the particular food will not cause any injury to the consumer when it is made and or consumed as per its expected use.⁶ Food safety naturally involves ‘food hygiene’, that is, all conditions and measures that are essential throughout the manufacture, processing, storage, delivery, and preparation of food to ensure that such food

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¹ See generally Food Act 2003 (NSW) s 5 (FA 2003); Food Safety & Standards Act 2006 (India) s 3 (1) (i); Word IQ, Food-Definition (2010) <http://www.wordiq.com/definition/Food#Legal_definition>.
² Pure Food Ordinance 1959 (Bangladesh) s 3(5) (‘PFO 1959’). Note: The text as it here appears is an amendment. Section 2 of PFO 1959 amended clauses 5, 5A and 5B of the original PFO 1959.
³ Ibid s 3(5)(A). For the complete definition of food, see PFO 1959 (Bangladesh) s 3(5).
⁵ See classification of foods in section 1.3 of this chapter.
Chapter 1: General Concept and Terminology

will be safe for human consumption. However, food should not be unsafe simply due to its inherent nutritional or chemical properties.

1.3. Classification of Foods

Numerous types of foods and food products are available across the world; some may be recognised in the literature, some are not. Food can be classified based on its nutritional ingredients, such as proteins, carbohydrates, fats, minerals, water and vitamins. There are foods that are naturally cultivated or raw and directly consumed from the field. Some people cook food at home and some manufacture it by setting up a factory or manufacturing unit. In fact, industrial manufacturing of food has made food a significant industry now-a-days. A food or food product can be totally manufactured, or only processed after collection from the agricultural field; it can be semi-processed, or manufactured and then processed. Food also can be unprocessed. Some foods are genetically modified, some are natural. Foods can be purely ‘organic’ or non-organic. The latter is grown with the use of non-organically derived fertilizer or the aid of many other synthetic agricultural chemicals (pesticides, insecticides, fungicides and so forth). Foods can be made for consumptions by human beings, animals, and birds or by other living creatures. Foods can be solid substances, liquid substances or semi-liquid materials. Food can be a kind of meal, medicine or even poison (depending upon mode of administration and concentration). Some foods are home grown; some are supplied or retailed, imported or exported. Considering the health benefit, foods may be considered to be healthy, unhealthy or ‘junk’. From the point of view of a consumer’s buying capacity, foods can be cheap or expensive. Some foods are seasonal; others grow all year round.

7 Ibid.
8 For example, MFA 2000 s 6(2).
9 Tanis Furst et al, ‘Food Classification: Level and Categories’ (2000) 39(5) Ecology of Food and Nutrition 331, 339. Note: In developed countries or to high income persons in less developed countries, foods that are available all year round may have been grown under special conditions, eg, hothouses or hydroponically to extend the
The current study will discuss the manufactured and processed foods of Bangladesh. The following parts of this section will discuss the general understandings or concepts of manufactured and processed foods together with their historical background and development. In addition to manufactured and processed foods, some of the relevant classifications mentioned above have been further defined below as have the concepts within the two categories for a broader understanding of the manufacturer and processed foods.

**Manufactured Food**

The foods made outside of the home kitchen in an industrial process that people consume today are ‘manufactured foods’. In the second half of the 19\textsuperscript{th} century and as part of the industrial revolution, the food manufacturing industry began its journey. Many large food producing firms started their business at this time around the world. Practically speaking, manufactured food has been a blessing to civilisation as many people have taken this opportunity to avoid time consuming meal preparation. Consumers save their time by using pre-prepared food products ready to be cooked or ready to be consumed. Manufactured foods are produced with different raw materials that are collected together in a manufacturing unit for processing in an extensive engineered procedure which finally results in these all raw materials taking on the shape of the finished product. Given the large population in a geographically small country and the industrial revolution that has occurred over last couple of centuries, the number of food industries has significantly increased in Bangladesh. This is why food manufacturing has become an important business in the Bangladeshi food cultures. Manufactured foods are popular among the consumers, not only because they are mostly readymade, but also because the consumers can select the products based on their own choice.

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natural growing period. Others are stored and available all year round despite a shorter growing period — or are imported from countries where the growing season counterbalances the off-season of the importing country. 
10 For details, see the section 2.11 (scope of the study) of chapter 2 of this thesis.
11 E J T Collins, ‘Food Adulteration and Food Safety in Britain in the 19\textsuperscript{th} and Early 20\textsuperscript{th} Centuries’ (1993) 18(2) Food Policy 95, 105–6.
Processed Food

In the ordinary sense, processed food is when any kind of method or technique is used by food industries to alter or change the particular fresh foodstuff so that it is ready for human consumption. General food processing has been in existence from pre-historic times. But the rise of the modern processed food industry as we know it originated in the late 19th century. The US Department of Agriculture, US Department of Health and Human Services, defines processed food in its Dietary Guidelines Advisory Committee 2010 report. According to the report processed foods are,

any food other than a raw agricultural commodity, including any raw agricultural commodity that has been subject to washing, cleaning, milling, cutting, chopping, heating, pasteurizing, blanching, cooking, canning, freezing, drying, dehydrating, mixing, packaging, or other procedures that alter the food from its natural state. Processing also may include the addition of other ingredients to the food, such as preservatives, flavors, nutrients, and other food additives or substances approved for use in food products, such as salt, sugars, and fats. Processing of foods, including the addition of ingredients, may reduce, increase, or leave unaffected the nutritional characteristics of raw agricultural commodities.

The above definition includes all kinds of processed foods. But considering all of these food products from the processing point of view, Monteiro et al further classifies processed food products into three categories, namely, ‘minimally processed food’, ‘processed culinary or food industry ingredients’ and ‘ultra-processed food products’. These three kinds of processed food products are detailed below.

Minimally Processed Foods

15 Monteiro et al, above n 12, 2040–1.
Some foods are neither natural nor completely or extensively processed. These foods keep most of the values (and sometimes the appearance) of the ingredients, materials and nutritional substances while processing. For this reason, these foods retain most of their nutritious benefits like natural or unprocessed foods.\textsuperscript{16} Minimal processing of foods is generally done for the purpose of preserving them or making them more safe, easy to use or more palatable (even delicious) and so on. Minimal processing includes ‘cleaning, portioning, removal of inedible fractions, grating, flaking, squeezing, bottling (of the foodstuff), drying, chilling, freezing, pasteurisation, fermentation, fat reduction, vacuum and gas packing, and simple wrapping’.\textsuperscript{17} Some examples of the minimally processed food are, ‘…dried and packaged grains, pasteurised milk, plain yogurt, frozen meat…’\textsuperscript{18} and the like.

\textit{Processed Culinary or Food Industry Ingredients}

Sometimes food products are processed in order to make them suitable for cooking, or often it is done to produce ingredients for the food industry. This kind of processing is conducted by removing or purifying the raw or minimally processed food products in a way which fundamentally changes the characteristics of the original foods. Processing includes corporal or chemical changes using pressure, milling or the use of any kind of additives and so on. For example, salt collected from the sea is processed by using various methods for consumption; flours are made from wheat by certain processing for cooking which fall under this type. Food ingredients made for industries under this type are corn syrup, lactose and so on.\textsuperscript{19}

\textit{Ultra Processed Foods}

\textsuperscript{17} Monteiro et al, above n 12, 2040.
\textsuperscript{19} Monteiro et al, above n 12, 2040.
Ultra processed foods are usually ‘ready to eat’ food. Sometimes they can be consumed directly or sometimes it can be eaten after providing some heat.\textsuperscript{20} For example, they are often extensively processed and many chemicals may be used during manufacture (for example, the addition of sodium nitrite and other chemicals in the production of ‘smoked’ or processed meats, as well as preservatives and other various meat products (offal as well as muscle and so on); or a combination of flours, powdered egg, raising agents, synthetic colours, artificial flavourings, anti-mould agents, emulsifiers, stabilisers, thickeners and so on in the production of various foods such as cakes or breads or cereals. A cup of pasteurised and homogenised milk can be drunk immediately or after heating it for a few minutes in the microwave oven is a simple example of an extensively processed (yet ‘natural looking’) food product. Processes that are used in regard to the ultra-processed foods include deep-frying the food, or baking them for a few minutes, or adding some sugar (as with prepared cereals), so forth.\textsuperscript{21}

**Fast food**

Due to the extremely busy lifestyle in modern times, consumers prefer readymade foods that are available for consumption. The fast food industry is managing this huge demand for readymade, ‘ready to eat’ foods. Whilst in the developed world these frequently calorie dense, high fat, high sugar, high salt foods (compared to their home-made equivalents) are often found served as ‘meals’ in fast food ‘restaurants’, in developing and least developed countries (LDCs) these foods are generally found in street food stalls. The health impacts of the consumption of fast foods are highly debated and the high demand for such foods and their overconsumption a subject of criticism, particularly in developed countries.

**Functional Food**

\textsuperscript{20} Ibid

\textsuperscript{21} Ibid.
Functional food is that food which provides a health or performance benefit beyond providing basic nutritional value.\textsuperscript{22} The development of functional food emerged in Japan in the 1980s and the term ‘functional food’ was first used in the well-known ‘Nature’ news magazine in 1993.\textsuperscript{23} The idea of functional food can be considered to exist within a significant historical context as it is referred to in the ancient Indian Vedic texts, and in the traditional medicine of Chinese civilisation.\textsuperscript{24} Functional foods, sometimes also called ‘phoods’ (from the combination of the words ‘foods’ and ‘pharmaceuticals’), are foods made with nutraceuticals or a bioactive ingredient in order to have certain health benefits for consumers. These foods sometimes claim to lower fats, sugars and so on. Functional foods can supposedly cure human disease or illness and prevent certain diseases.\textsuperscript{25} It is worth mentioning that functional foods are not familiar in Bangladesh, though there are a few cases where some foods, such as processed mushrooms, are regarded as particularly ‘healthy’.\textsuperscript{26}

Genetically Modified Foods

Genetically Modified Food (GM food) is also called genetically engineered foods or GE foods. GM foods are also sometimes known as biotech foods. In early 1990s the first genetically modified tomato was created;\textsuperscript{27} and sale of the GM tomato was permitted in the


USA in 1994. The value of GM food is still a matter of some dispute among scientists, with concerns expressed about the various risks and benefits involved; and whether ultimately the benefits outweighed the risks. An example of possible risks is illustrated by the 1998 findings of a food scientist named Arpad Pusztai who published his research outcome in which he suggested that genetically engineered potatoes stunted the growth of animals.

However, it is worth mentioning that, whether consumers are aware of it or not, many foods that people consume today do include genetically engineered ingredients. For example, Bangladeshi people consume huge quantities of rice and soybean oil each year and Bangladesh imports rice to fulfil the demand. To satisfy the huge demand, Bangladesh imports both GM rice and GM soybeans from various countries. Yet GM food is not very well-known in Bangladesh and few consumers are aware of it and of those that are, many hardly know anything about it. Finally, as the safety of GM foods has continued to be debated, many around the world generally still have concerns about consuming GM foods. Nevertheless, only accurate labelling allows such consumers the ability to distinguish between GM and GM-free products and exercise any choice in the matter.

Natural Foods

30 Rice is the main food in Bangladesh; see section 1.4 of this chapter of this thesis.
The word ‘natural’ is treated as a dubious one in relation to the food industry. In practice, there is no recognised or universal definition of ‘natural’ food. Foods produced without the use of chemically synthesised ingredients may be termed ‘natural food’. The term ‘natural food’ signifies the foods that are naturally grown and foods that are not processed or minimally processed in general. Natural foods also do not contain any artificial colours, added hormones or any added flavours or non-natural sweeteners. Natural foods are not recognised as a category, however, by the Codex Alimentarius Commission, an important organisation which ‘develops harmonised international food standards, guidelines and codes of practice and guidelines to protect the health of consumers’ and operates under the United Nations Food and Agricultural Organisation (FAO).

**Organic Food**

Organic foods are derived from farms and growers, who embrace certain principles of sustainable farm management, pesticide and fertiliser use and the humane treatment of animals. Organic foods are grown without the use of synthetic agrochemicals such as insecticides, herbicides, fungicides, artificial fertilisers and so forth. They are stored and processed without using any preservatives, or synthetic chemicals to enhance appearance. To claim a food as organic in its food label, a food must be ‘produced without synthetic fertilizers, sewage sludge, irradiation, and genetic engineering’. Organic processed red meat

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34 Wrick, above n 22, 6.


36 Codex Alimentarius Commission is the international food standards setting authority. See the details Codex Alimentarius, *Welcome* (10 May 2013) <http://www.codexalimentarius.org/>. The Codex *Alimentarius* comprises the standards which that body sets.


38 Wrick, above n 22, 6.

39 Franklin, above n 33.
or poultry should composed of meat that is from animals that have been be reared without the use of any antibiotics or growth hormones; these chickens or any other meat producing animal should be reared on completely organic feed. Organic foods can be produced, manufactured, processed, or semi-processed. But whatever is done to these foods, it should be done while maintaining the use of exclusively organic means as defined by the regulations of the respective regime. There is an increasing demand for organic foods all over the word due to their reputed ‘health benefits’. In 2007, Sahota noted ‘global organic food & drink revenues have increased by 43 percent from 23 billion US-Dollars in 2002.’ However, a recent study asserts that organic foods can scarcely be claimed to be better than conventional foods.

Finally, despite having numerous classifications of the food products, the foregoing section of this chapter discusses only a few that are more closely related to the scope of the current study. But amongst all the foods mentioned only the manufactured and processed foods will be mainly discussed in subsequent chapters of the research.

1.4. Traditional Food Cultures and Food Habits in Bangladesh

This section aims to describe the food cultures and eating tendencies of the consumers of Bangladesh as evident in practice. It should be noted that only the common food cultures and food habits that are more relevant with this study will be covered.

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40 Ibid.
1.4.1. Historical and Geographical Influence on Food Cultures and Habits

Food habits and cultures of any particular jurisdiction are generally associated with its geography, climate, topography and soils, socio-economic, religious and even political features. Bangladesh is a relatively new country which emerged as an independent nation in December 1971. However, its culture, heritage and overall cuisine is not that new; rather, Bangladesh has a cultural history of over 3000 years.

The area now known as Bangladesh had initially been the homeland of the Austro-Asian people as well as the Dravidians, Indo-Aryans and the Mongolians. Alexander the Great also invaded this place. From the fourth century to the 2nd century Before Christ (BC) Bangladesh had been part of the Mauryan Empire. After that Bangladesh was part of the Gupta Empire, then the Sen Empire for next couple of centuries. The Mauryan, Gupta and Sen empires basically nurtured Hinduism and Buddhism and with these faiths came their various dietary traditions. In the early 13th century Islam increased in this land until the end of Mughals Empire in 1707. After that it became a British colony that lasted for nearly 200 years. Thus, the entire history suggests that anthropologically Bangladeshi people have been influenced by various cultures. Therefore, it is argued that the food culture and food habits of consumers in Bangladesh have been ‘influenced by many conquerors who have passed through this land over the centuries’.

Geographically Bangladesh is bounded by India and Burma (Myanmar) on its three sides; thus the food cultures and habits of Bangladesh are influenced by both Indian and Southeast

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47 For details of the Bangladesh and Its Legal System, see section 2.2 of this chapter.
48 Whyte and Lin, above n 46, 123.
Asian cultures. Bangladeshi people eat rice and curry based meals, most of which are prepared by mixing various meats or vegetables with numerous types of herbs and spices. It is an ancient (locally known) proverb that Bangladesh is a ‘river-mothered’ (riverine) country having ‘about 700 rivers including tributaries, which have a total length of about 24,140’ kilometres. Bangladesh is situated in the delta of three significant rivers, the Ganges, the Brahmaputra and the Meghna. This massive delta has made the land of Bangladesh extremely fertile and thus blessed with numerous varieties of food and fruits. There are many canals throughout the country that are connected with the rivers and their tributaries which essentially made the fertile lands suitable for cultivating various types of rice and other seasonal foods throughout the year. Moreover, rivers and canals are also a source of fish. For this reason, the main foods of the people of Bangladesh are rice and fish. It is commonly said in Bangladesh that ‘fish and rice makes someone a Bengali’. Rice especially is the most common and important food for all and one which someone would hardly like to miss in their daily meal. Currently ‘rice comprises 60% of the food consumption’ in Bangladesh and it provides ‘70 per cent of the calorie intake of the average Bangladeshi — higher than any other country where rice is a staple food.’ Generally rice is consumed with various types of curries, locally called as tarkari (or ‘torkari’), a ‘spicy side-dish’. Butler states this even more lucidly:

[A] typical Bangladeshi meal includes a curry made with vegetables, either beef, mutton, chicken, fish or egg, cooked in a hot spicy sauce with mustard oil and served with dal(cooked

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51 Willem van Schendel, A History of Bangladesh (Cambridge University Press, 2009) 263.
52 Banglapedia Food Habits, above n 45.
53 Van Schendel, above n 51, 263. The people of Bangladesh are called as ‘Bengali’ or ‘Bangali’.
54 Whyte and Lin, above n 46,124.
55 Food Australia (September–October 2012) 5.
56 Van Schendel, above n 51, 233.
57 Ibid 263.
yellow lentils) and plain rice. Rice is considered a bigger status food than bread — therefore, at people’s homes you will generally be served rice.\textsuperscript{58} It is significant to mention that using spice is an essential issue in the Bangladeshi food culture and food habits. Most of the curries of meat, fish, \textit{dal} or vegetables are cooked with mixing numerous spices, such as, hot chillies, cumin, coriander, cloves, cinnamon, garlic, and other spices.\textsuperscript{59} The following discussion will expose how the historical and geographical issues have influenced the daily food habits of Bangladeshi consumers.

1.4.2. Daily Food Habits of Bangladeshi Consumers

People of Bangladesh commonly eat three times a day. Traditionally the morning breakfast (called as ‘\textit{nashta}’) is normally lighter. But both lunch and dinner are considered main meals. In a Bangladeshi \textit{nashta}, people eat small flour based breads (called as \textit{chapatti}) with \textit{bhaji} or \textit{dal}.\textsuperscript{60} \textit{Bhaji} is a mixed Bangladeshi snack made with various vegetables fried in oil with assorted numerous herbs, spices and chillies. Many rural people eat \textit{pantha vat} as their \textit{nashta} in the morning. \textit{Pantha vat} is ‘plain boiled rice soaked overnight in water and allowed to ferment a little’\textsuperscript{61}. In fact, this is leftover rice which is lightly fermented and, sometimes, it is served with salt and an onion or lime.\textsuperscript{62} Occasionally many people eat \textit{pantha vat} with the green hot chilli or with palm sugar and yoghurt. Eating \textit{pantha vat} is a significant tradition in Bangladeshi food culture. People think that wasting leftover food is not a good sign for a family.

\textsuperscript{58} Stuart Butler, \textit{Bangladesh} (Lonely Planet, 2008) 40.
\textsuperscript{59} Countries and Their Cultures, \textit{Bangladesh} (2013) <http://www.everyculture.com/A-Bo/Bangladesh.html> (‘Countries and Their Cultures’). Spelling variations in translation are \textit{dahl} and \textit{daal}.
\textsuperscript{60} Butler, above n 58, 41.
\textsuperscript{61} Banglapedia Food Habits, above n 45.
\textsuperscript{62} Van Schendel, above n 51, 264.
Food habits of each cultural group are also often associated with religious beliefs. Hence, in Bangladesh, a country with mostly Muslim and Hindu inhabitants, the habit of eating pantha vat in fact is influenced by some religious beliefs. Muslims consider someone who wastes any food as the ‘brother of the devil’. So, in rural areas, Muslims are often afraid of wasting any foodstuffs. Wastage is also prohibited in Hinduism because Hindus consider the rice especially precious: unhusked rice as being able to be an embodiment of the Goddess Lakshmi (the Goddess of Wealth); rice as an offering in the daily puja ritual; that is, overall a precious gift from their deities. But unfortunately the author is able to say that in most cases leftover rice become rotten by the following morning; and consumption of this rotten pantha vat is a significant cause of diarrhoeal diseases in Bangladesh, especially in summer season.

Apart from the pantha vat, some people take their breakfast with flatbread especially roti and parata. Roti is a traditional food made by mixing flours with water and baked at a low temperature. Parata is a different version of roti that it is baked with cooking oil or butter. Roti and parata (both manufacture commercially now-a-days) are eaten with different kinds of bhaji and tea and so on. Some people take their nashta with the cheera (flattened rice) or moodi (puffed rice) (see section 1.5 of this chapter) mixing it with milk or yogurt and the like.

At lunch and dinner time, people typically start their main meal with a plate of rice along with a little amount of ‘bhorta’ or ‘bhaji’ that are famous as starters among the middle or high income people in Bangladesh. Bhorta is made with various items. For example ‘alu bhorta’ is made with by smashing or grinding potatoes and mixing them with green chilli or

63 Pamela Goyan Kittle and Kathryn Sucher, Food and Culture (Thompson, 2004) 4. See also Penny Van Esterik, Food Culture in Southeast Asia (Greenwood Press, 2008) 45. Re Islam and the waste of food, see the Holy Qur’ān, Surat Al-Isra 17: 27.
64 For an idea of the acuteness of diarrhoea in Bangladesh, see section 2.5 of chapter 2 of this thesis.
65 Van Schendel, above n 51, 264.
66 Banglapedia Food Habits, above n 45.
red chilli and raw salt; sometimes different types of mustard oils are used in *alu bhorta*. ‘*Sutki bhorta*’ is prepared in the same way as *alu bhorta* but with dried fried fish. There are numerous other types of *bhorta* that are made with various vegetables, such as beans, carrots, papaya, eggs, or even with various meats. After the ‘starters’, people dine on any meat or fish based curries in the middle stage of the meal. Generally, curries are soup based. They are cooked with lots of onions, garlic, ginger, red hot chilli powder and with many other unnamed herbs and ‘*gura masala*’ (powdered spice). If the meal is served at a special event (like a marriage or birthday ceremony), people eat vegetable salad or sometimes a glass of ‘*borhani*’, a yogurt and herb based juice especially served with fried rice or *polao, biriyani* and so forth. At the end of the meal people on low incomes rarely have any dessert. But in urban societies, many high income people have *misti* (sweetmeat), fruits, *finni* (a sweet and milk based semi-liquid food made with finely ground rice) or various other sweet based foods as desserts. It is important to mention that, in general, the people of Bangladesh like to eat various sweet and milk based foods for dessert at different festivals and special occasions. Especially *misti*, which is an illustrious food in Bangladeshi culture. People carry various types of *misti* while travelling to relatives or friends’ houses. Only a few people like to cook and prepare these above mentioned sweet based foods at home. For the purpose of the current study, it is relevant to mention that, due to growing consumer demand, most of these sweet based foods have long been manufactured commercially by the local food industries.

### 1.4.3. Impact of Religion and Region on Food Habits

As suggested above (see the discussion on *pantha vat* issue), religious influences on food habits cannot be ignored. In Bangladesh, Muslims do not consume pork and alcohol as it is

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67 See generally ibid.
68 See the details of ‘*gura masala*’ in section 1.5 of this chapter.
69 *Banglapedia Food Habits*, above n 45.
70 See section 1.5 of this chapter.
prohibited in Islam.\textsuperscript{71} Similarly, Hindus do not eat beef as they consider cattle as their sacred animal.\textsuperscript{72} Except for Muslims and Hindus, there are Christians, and Buddhists who have particular food habits as well.\textsuperscript{73} Further, as a religious guideline and practice, Muslim people eat with their own hand, especially with their right hand, in most cases. In some cases, high income people in urban society eat with spoons and forks.

Apart from the dominant influence of religious faith, the food habits of Bangladeshi people also vary from region to region, community to community, class to class or even from family to family. For example, the people who live in the coastal parts of Bangladesh (such as, the Chittagong, Cox’s Bazar, Barishal, and Khulna districts) like to eat fish and sutki (the dried sea fish)\textsuperscript{74} very much indeed.\textsuperscript{75} But people of the northern part of the country do not like sutki to the same extent; some even detest that food due to its extreme odour. People of the Khulna, Satkhira, and Jessore districts like to eat shrimps and lobsters in their daily meals because the people of these areas cultivate shrimp and lobsters as family businesses. But many people in the other parts of Bangladesh hardly get the chance to eat shrimp and lobster as these are expensive food items for poor and middle class consumers. Dhaka, as the capital of Bangladesh for more than four hundred years, has become a truly cosmopolitan city. Several rulers from different cultures ruled the whole country from this city. People of Dhaka like to eat spicy meat and vegetable based curries together with rice.\textsuperscript{76}

Despite ongoing poverty, as well as many other socio-economic and enduring political problems, the people of Bangladesh are cheerful and festive minded. Festivals and cultural or religious occasions are important causes of making foods and eating or buying large amount

\textsuperscript{71} Whyte and Lin, above n 46, 127–8.
\textsuperscript{72} Ibid 128.
\textsuperscript{73} For example, Christians eat both pork and beef, and Buddhists discourage killing animals and eating meat.
\textsuperscript{74} See section 1.5 of this chapter of this thesis.
\textsuperscript{75} Van Schendel, above n 51, 263. See also Whyte and Lin, above n 46, 129.
\textsuperscript{76} Whyte and Lin, above n 46, 129.
of foodstuffs. People like to participate in various types of celebrations. Firstly, there are some religious celebrations, such as, Eid-ul-Fitr, Eid-ul-Azha, Durgapuja, Sab-e-Barat and so on. At Eid-ul-Azha, Muslims sacrifice many animals (such as, cows, goats, and so on) in the name of Allah. On that very day huge amounts of meats are consumed by Muslim people in a celebration that honours the willingness of Ibrahim to sacrifice his only son Ismail in obedience, and Allah’s provision of a lamb in the son’s stead. Feasting also occurs at Eid-ul-Fitr, which follows the end of Ramadan (a month of abstinence and fasting during daylight hours). Likewise, Hindus (the world’s second largest population of Hindus live in Bangladesh despite their being a minority in the country) have their celebrations too, such as Durga puja. Christian Bangladeshis celebrate Christmas (Borodin) and Easter, again often feasting with family and friends. Buddhist Bangladeshis likewise have their festivals where dietary observances form part of the expected rituals (Buddha purnima). In addition, tribal groups also have specific festivals.

Besides the religious festivals, there are some festivals which are observed by all the Bengali people, like the marriage ceremony, birthdays, pohela boishakh (first day of the Bengali new year, generally 14 April of the Gregorian calendar year), pohela falgun (first day of spring, generally 14 February), nobanno utshab (a harvest festival celebrated with cakes when the new rice is brought in from the agricultural fields) and so on. For these festivals people make, bake or buy lots of foods for themselves or for giving as gifts to others or to enjoy in groups.77

1.4.4. Food Cultures in Social Networking

Bangladeshi people are always fond of festivals and getting together with others. Food is an important part of this joy. People use food as a way of social networking, making different

77 Countries and Their Cultures, above n 59.
business deals and offering hospitality. Frequently a family invites other families or community members or friends for dinner or lunch (*daoyat*) just for a ‘get together’ or to have a chat. Hosts always try to impress the guests by presenting numerous kinds of food items, especially various *misti*, fruits and so forth. Traditionally, the number of dishes or food items that they have cooked and served for the guests is seen to represent the aristocracy and dignity of the particular host family. Generally, the hosts are happy if all the foods are tasted by the guests and if they eat many of the foods in quantity.\(^78\) It is an important tradition in Bangladesh that people make different kinds of cakes (locally known as *pitha*\(^79\)) for the festivals or other occasions to offer to their guests.

### 1.4.5. Other Food Cultures and Habits

#### Boiled and Fried Foods

Consumers of Bangladesh usually do not eat any unboiled meats or fish. Vegetables are also eaten after boiling except where used as salad. The problem is that in the majority of cases, people boil food at an extreme level (destroying some of the nutritive value as well as any harmful bacteria and so on). Consumers have a tendency to eat different fried foods too, which are made from various materials, such as *somocha* or *singara* (made with flour and potato), *moglai parata* (made with flour, egg and onion), *puri* (made with flour and *dal*) and others similar foodstuffs. In general these flour based foods are found in local rural or urban streets stalls. Today many of the mentioned foods are also manufactured commercially and found in grocery stores.

#### Street Foods

\(^78\) Van Schendel, above n 51, 263.  
\(^79\) See section 1.5 of this chapter of this thesis.
Street foods play a significant role in the food culture and habits of the people in Bangladesh, as street foods are reasonably inexpensive and easily accessible. In addition, street foods reflect the local cultures and traditions that have existed for centuries. These foods vary in respect to their raw materials and preparation methods. Street foods are commonly seen in the urban areas rather more than in rural areas. In rural areas there is a considerable number of small tea stalls in the streets. It is a widely observed trend in village that many of the rural men do not go to sleep unless they have a cup of tea from the street shop or mobile food stall. Unfortunately, at these street tea stalls the same tea cup is used for copious numbers of persons and this is a cause of diarrhoea, typhoid and different types of hepatitis or jaundice. Some vendors ferry various types of small food items from door to door. They sell these food products in exchange for raw rice that is collected from the fields, or for broken or waste metals or sometimes cash. In practice the situation of street food is not adequately hygienic in Bangladesh. The vendors hardly have any knowledge about food safety. Sometimes the vendors themselves even carry different infectious diseases and other microbiological pathogens. Every so often, the street food vendors let customers take away the foods in newspaper, banana leaves, and plastic bags that are considered a dangerous risk to food safety.

Foreign Foods

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81 See Van Esterik, above nn 63, 84, 85.
In addition to all the local cultural foods, many foods from foreign cultures — such as Western foods, Chinese food, and Thai foods — are also well-known in Bangladesh. They are available in the hotels and restaurants of most districts and divisional cities. However, among all the foreign foods, it is ‘Chinese food [that] has made its presence strongly felt…’.  

**Cooking Style**

In the urban areas, people generally use electric or gas ovens for cooking foods at home. But in rural areas not all people have access to electricity or gas and they therefore use ovens made with a mud floor. Different types of tree branches, straws and other tree leaves or dried cow dung are used as the fuel in these mud ovens to create fire and cook the foods. These cooking styles are sometimes unhygienic but people hardly have a choice to do otherwise.

Finally, in the above discussion of the food cultures and habits of the peoples of Bangladesh, many of the food related terms and special food names has been thoroughly discussed and defined. In addition to these, there are some remaining terminologies that necessitate discussion for the sake of this study. The following section will discuss some important terminologies related to food products in the context of Bangladesh.

### 1.5. Traditional Manufactured Foods Relevant to This Study

The following section will discuss the names of some popular manufactured and processed Bangladeshi foods, generally known by their local names. The number and name of the following foods has been selected considering their local popularity and the extent and

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83 Whyte and Lin, above n 46, 128.
84 Butler, above n 58, 40.
85 Whyte and Lin, above n 46, 126.
gravity of the adulteration that is happening to these foods. Another reason for defining and introducing these foods and their local names in this thesis is that in the news and other reports of the adulteration of the below mentioned food products, they are generally reported in the newspapers by their local names. Some of these food products have their own English names but these are barely known to ordinary consumers in Bangladesh. It is to be noted that, despite a general and overall discussion on the ‘major problems concerning food safety in Bangladesh’ in section 2.4 of chapter 2 of this thesis, newspaper reports regarding the adulteration of the below mentioned particular food products are cited in some cases.

Chanachur (Spiced Snacks)

Chanachur is a kind of snack manufactured using a mix of flour, peas, cereals, peanuts, oil and various spices. Among the spices (gura masala\textsuperscript{86}) either chilli or sweet spices are used for flavouring. In common Bangladeshi culture, this food is normally eaten mixed with moodi or ‘puffed rice’, green chilli and mustard oil as an evening snack during the ‘gossip time’ or in leisure time. Because of its popularity, chanachur is frequently produced in local food factories around the country. Unfortunately, lots of adulterated chanachur are now available in the market.\textsuperscript{87} The manufacturers not only produce them in an unhygienic environment,\textsuperscript{88} but also they produce this well-known food product using spent oil from cars or buses,\textsuperscript{89} textile colourings and various harmful chemicals\textsuperscript{90} to make it attractive,\textsuperscript{91} and crisp. The

\textsuperscript{86} See section 1.5 of this chapter.

\textsuperscript{87} For example, see Own Correspondent, Chittagong, ‘Adulterated Shemai, Chanachur and Mustard Oil Forfeited’, Prothom Alo (online), 31 August 2009 <http://www.prothom-alo.com/detail/news/2206> [author’s trans].


\textsuperscript{89} Shafikul Islam, ‘PublicAwareness is Primary Combat Adulteration’, Kaler Kantha (online), 1 September 2012 <http://www.kalerkantho.com/index.php?view=details&type=gold&data=Loan&pub_no=989&cat_id=2 &menu_id=87&news_type_id=1&index=4&archive=yes&arch_date=01-09-2012#.U1inqO8hI0> [author’s trans].


adulteration not only occurs in the less well known or unknown *chanachur* brands from the rural or local factories, but was detected in an incredibly famous and widely consumed *chanachur* brand in Bangladesh named ‘Bombay Sweets’ when that factory was also detected and prosecuted for adulteration in the production of their *chanachur* a few years ago.

**Semai (Vermicelli)**

*Semai* is popularly manufactured in Bangladesh ‘cooked in milk and sugar’. Basically it is a sweet type snack that can be treated as ‘vermicelli’. *Semai* is usually made with flour, milk, sugar and oil. There are various types of *semai*, such as *laccha semai*. It is a popular manufactured food in Bangladesh which is widely consumed at the time of *Eid-ul-Fitr* and *Eid-ul-Azha*, the two major Muslim religious festivals. It is served at various festival and occasional celebrations (mentioned in section 1.4.4 of this chapter) as starter or as dessert. Many manufacturers produce this food in various urban suburbs and rural areas in Bangladesh. In many cases *semai* is made in an extremely *unhygienic* and unsafe

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92 See the webpage of *Bombay Sweets* at <http://www.bombaysweetsbd.com/>.
94 Butler, above n 58, 45.
95 *Bangladesh Pure Food Rules 1967* (Bangladesh) Schedule Standard 53 (‘BPFR 1967’).
environment, in total disregard of the regulatory requirements.\textsuperscript{97} Not only this, these products are also often grossly adulterated, ignoring the national standard.\textsuperscript{98}

\textbf{Misti (Sweetmeats)}

\textit{Misti} is a milk-based sweet famous in Bangladesh. People of Bangladesh love \textit{misti} or sweet based foods and some people are even addicted to it.\textsuperscript{99} \textit{Misti} has been made in Bangladesh for centuries. Some Hindu businessmen have manufactured this food for generation after generation as their family business and continue to do so. Traditionally, offering such a sweet to visitors is highly regarded in Bangladesh. On different religious festivals or other occasions the guests are generally accorded respect with an offering of \textit{misti}. Numerous types of \textit{misti} are available in Bangladesh. Some of them are mentioned below.

\textit{Rosgolla}: These are ‘sponge curd balls boiled in sugar syrup’.\textsuperscript{100} \textit{Rosgolla} is considered highly enjoyable and an appealing food to the people of Bangladesh.\textsuperscript{101}

\textit{Jilapi}: These are sometimes called ‘sweet rings’.\textsuperscript{102} They are ‘coil like sweets’\textsuperscript{103} made with flour and sugar (and water) fried in boiling oil.


\textsuperscript{99} Van Schendel, above n 51, 265.

\textsuperscript{100} Ibid.

\textsuperscript{101} A Haque et al, ‘Comparison of Rasogolla Made from Fresh Cow Milk, Fresh Buffalo Milk and Mixture of Cow and Buffalo Milk’ (2003) 2(5) \textit{Pakistan Journal of Nutrition} 296, 296.

\textsuperscript{102} Quazi Faruque et al, ‘Institutionalization of Healthy Street Food System in Bangladesh: A Pilot Study with Three Wards of Dhaka City Corporation as a Model’ (National Food Policy Capacity Strengthening Programme, 2010) 58.

\textsuperscript{103} Van Schendel, above n 51, 265.
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Jorda: It is a kind of ‘yellow sweet rice with saffron, almonds and cinnamon’.  \(^{104}\)

Sandes: These are ‘dry curd-paste squares’, \(^{105}\) a type of sweet.

Kachagolla: It is a bunch of dry sweetened milk curd paste without any particular shape.

Gaja: This is flour and sugar based food fried in boiling oil and then served with a small quantity of sweet syrup. Gaja is also made without any sweet syrup in some cases.

Rasmalai: These are ‘sweet card balls in thickened milk’. \(^{106}\)

Raskadam: It is a ‘curd balls covered with large white beads of sugar’. \(^{107}\)

Kaloojam: It is a ‘fried milk and flour balls soaked in [sweet] syrup’. \(^{108}\)

Large cities have large misti factories. But misti is so famous that it may be difficult to find a small town or village bazaar where there is not at least one misti retailer or wholesaler together with its manufacturing and processing unit. The popularity of (and almost insatiable demand for) misti has opened the way for manufacturers to adulterate this food product to generate greater profit. Numerous newspapers and other public media reports are available concerning the adulteration of misti in Bangladesh. \(^{109}\) These reports reveal that most of the misti factories produce misti in an unhygienic and unsafe environment. \(^{110}\) It is unbelievable that these reports refer to the fact that factory owners adulterate misti by manufacturing them

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\(^{104}\) Butler, above n 58, 45.

\(^{105}\) Van Schendel, above n 51, 265.

\(^{106}\) Ibid.

\(^{107}\) Ibid.

\(^{108}\) Butler, above n 58, 45.


with ‘formalin mixed milk’,\textsuperscript{111} or ‘expired and artificial milk powder’,\textsuperscript{112} instead of using pure milk [emphasis added]. Manufacturers use artificial textile dyes and burned engine oil in the production of some types of misti, for example, kalajam, and jilapi.\textsuperscript{113}

\textit{Gura Masala (Cooking Spices)}

The gura masala is generally the Bengali version of the collection of many types of herbs and spices used in Bangladeshi food culture. Generally the packets are labelled with the name of a particular ‘gura masala’, for example, chilli gura masala, turmeric gura masala and the like. As suggested above, Bangladeshi people eat foods with curries; and curries are cooked using a variety of spices. Among these spices, chilli, turmeric, coriander, cumin, cinnamon, and cardamom are variously used. These spices have been used to prepare foods and curries for thousands of years in Bangladesh. But regrettably, manufacturers now-a-days adulterate these spices unrestrainedly by using numerous types of husks, artificial colours and chemicals in the spices.\textsuperscript{114} The chilli spice (generally red in colour and thus called as ‘red chilli powder’) is mostly claimed to be adulterated by the addition of red brick dust.\textsuperscript{115}

\textit{Moodi (Puffed Rice)}

\textsuperscript{111}Md Saiful Alam, ‘Adulteration and Poison in Food: Dangerously Increasing the Number of Cancer, Kidney Disease and Heart Attack’, \textit{Satkhira Khabar} (Satkhira), 20 October 2012, 1 [author’s trans].

\textsuperscript{112}Masud Khan, ‘Subject: Chemical Terrorism in Food and Some Leaked Information’ on \textit{Bodle Jao Bodle Dao} (15 July 2012) <http://www.bodlejaobodledao.com/archives/22334> [author’s trans].


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*Moodi* is generally known as rice cereal or ‘puffed rice’ in English speaking countries. It is also pronounced as ‘moori’ in some localities in Bangladesh. *Moodi* is popularly used with *chanachur*, and most importantly, Muslim people eat *moodi* in the month of fasting (*Ramadan*) after breaking their fasting in the evening (*iftar*). Due to growing demand for this food, *moodi* is now made and processed commercially by many small and large food manufacturers. Commercialisation brings the opportunity for adulteration to this food product. *Moodi* has long been being adulterated, and manufacturers use urea fertilizer or sodium hydrosulfide for making it whiter and bigger in size. Urea is dangerous for human consumption as it can create cancer and various ulcers. A recent research study found that the level of cadmium in the puffed rice is nearly double that than that of uncooked rice in Bangladesh, which the writer suggests may be the result of using urea for whitening the puffed rice. The author mentions ‘exposure to cadmium is linked with kidney disease and over 20 million people in Bangladesh suffer from chronic kidney disease.’

*Ghee* (Clarified Milk Fat)

In Bangladesh ghee is a popular food. It is a kind of clarified butter made from pure milk. Cow and/or buffalo butter is melted in medium heat. After a certain time, white froth is visible on the top of the liquid butter in the saucepan. When the froth is taken away, the liquid under the froth is collected in the container. This is the ghee. Section 10 of the *PFO 1959* states that ghee shall contain only substances which are prepared exclusively from the milk of cows or buffaloes or both. Ghee is generally golden in colour. It is widely used to cook

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various curries and especially to cook *polao* rice. In the rural culture children are encouraged to eat hot rice mixed with ghee and palm sugar in the morning as their breakfast. Ghee is now adulterated in most cases, and adulterated ghee is made by using soybean, vegetable fat, potato paste, and artificial colours and flavours.

**Sutki or Chapa Sutki (Dried Fish)**

*Sutki* normally refers to semi-fermented fish or dried fish in Bangladesh. They are dried in the sunlight. *Sutki* or *chapa sutki* is considered a relatively economical source of protein in Bangladesh. There are various types of *sutki* found in Bangladesh based on the local names of the various fish. These include *loittya sutki, chhuri sutki, chinigri sutki, rupchanda sutki, lakhua sutki* and the like. *Sutki* has been subject to adulteration with the use of the dangerous DDT powder.

**Fuchka/ Phuchka**

These are kind of ‘lentil balls filled with potato mix and tamarind sauce’ made and sold in the streets of Bangladesh. The *fuchka* are called *chatpati* when the balls are smashed into pieces and mixed with egg pieces and sauce on a plate. *Fuchka* and *chatpati* type foods are

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119 Staff Reporter, ‘3 Persons are Arrested with Adulterated Ghee and Its Manufacturing Ingredients’, *Amar Desh* (online), 31 July 2012 <http://www.amardeshonline.com/pages/details/2012/07/31/157047> [author’s trans].


123 See details of DDT in section 2.4 of chapter 2 of this thesis.

commonly available in restaurants and street food stalls. It is evident that these foods are handled in very unhygienic conditions in Bangladesh.125

**Singara**

This is an oil fried food that is made of flour and potato. Sometimes producers add beef livers or chicken livers while making it. Singara is basically a street food but due to growing demand, it is commercially manufactured now-a-days.

**Piaju**

The word *piaju* derives from the Bengali word ‘*piaj*’, which mean onion. *Piaju* is made by chopping the onions into pieces and mixing them with flour and then frying the resulting fritters in boiling oil. It is generally eaten while hot.

**Beguni**

The word *beguni* comes from the Bengali word ‘*begun*’ which means brinjal or eggplant. Brinjal is cut into pieces and then every piece is mixed with the various herbs and flours. After that they are fried in hot oil. *Beguni* is extremely popular in Ramadan (the fasting month) as it is regarded as an essential item to break the fast.

**Kabab**

*Kabab* is generally the piece of meats mixed with various spices and herbs and then roasted over a light fire or other heat source.

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Pitha (Cake)

Pitha can be termed a ‘cake’ although it may not be totally similar to the concept of cakes of Australia or any other western countries. Pitha is made from finely ground rice in general, although some are made from other flours. Some traditional pitha— such as bhapa pitha— is cooked by steaming and made with mashed rice mixed with coconut pieces. Patisapta pitha is made with liquid mashed rice and palm sugar. Poa pitha (also known as doba pitha in some parts of Bangladesh) is made with rice or flour mash and palm sweet or sugar; the resulting rice cakes are fried in boiling oil. Puli pitha is prepared by steaming and made with plain sheets of rice mash and desiccated coconut. Naksha pitha is made of ground rice where different shapes are made and decorated and these rice cakes are then offered on the plate with palm sugar or date liquid. Though in general most of the pitha(s) are made with sugar, milk, desiccated coconut and so forth, but not all pitha are not sweet based. Some pitha are chilli based — they are made with green chilli or red fried chill or with the chilli powder. Among them sutki pitha, chota pitha are worth mentioning. In modern times manufacturers produce these pitha(s) commercially due to high consumer demand and supply them locally in different confectioners and grocery stores.

1.6. Terminologies Related to This Study

The following section will discuss some food and food safety related terms relevant to this dissertation. These terms are significant and need to be discussed in this chapter since they will be frequently utilised while talking about various issues in the succeeding chapters.

Food Manufacturer

The PFO 1959 states that “manufacture” means the manufacture of [any food] for the purpose of sale or for preparation for sale, and the expressions “manufactured” and
“manufacturers” shall be construed accordingly’. 126 The manufacturers of food products in Bangladesh are not always quite the same as food manufacturers of developed countries. In Bangladesh, sometimes a ‘food manufacturer’ simply may start a business at their home. They collect some necessary machinery, either used or new, and set it up in a simple shed, which they often call a factory or manufacturing unit. These kinds of food factories are found basically in villages, small towns, suburbs, and in large cities as well. There are also plenty of large food manufacturers with all the proper equipment like those in developed countries.

Food Retailers

Food retailers are the last station in a food supply line and are ‘where firms interact with final consumers as customers’. 127 In Bangladesh food retailers are seen in nearly every place, including rural and urban areas. Retailers use various traditional ways of selling foods. Often food retailers use particular outlets similar to a shop or they may use any permanent cottage where they may decorate foods for selling. Sometimes they sell food in a temporary place, such as at village fairs or any festival occurring in an area. Street stalls may be temporary or permanent. Retailers also may ferry food in street vans and sell them to customers. In many cases retailers visit ‘door to door’ with their foods in baskets and make sounds to attract customers to come out of their houses.

Food Adulteration

Food adulteration is defined in diverse ways in different literatures and in different systems. The subsequent chapters of the dissertation will define and explain ‘food adulteration’ mainly in light of the Bangladeshi regulations. Food adulteration is not a new concern from a global perspective. Hart mentioned, ‘as commerce developed and knowledge spread, adulteration

126 PFO 1959 s 3(8).
grew more subtle’. Usually, food adulteration happens when anything inferior or anything harmful is added to the original food that is supposed to be provided while that food is being processed or manufactured. In general, people adulterate food by degrading the ingredients, or by reducing the quantity of certain substances within the product, or by substituting ingredients; and everything they do is for their economic benefit. Finally, the word ‘adulterated’ is clarified in the *PFO 1959* (Bangladesh) in the following terms.

(1) An article of food shall be deemed to be ‘adulterated’ if-
(a) any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength, or
(b) any substance has been substituted wholly or in part for it, or
(c) any of the normal constituents has been wholly or in part abstracted so as to render it injurious to health, or
(d) it is mixed, coloured, powdered, coated or stained in a manner whereby damage or inferiority is concealed, or
(e) it does not comply with any standard provided by or under this Ordinance or any other law for the time being in force, or
(f) it contains or is mixed or diluted with any substance in such quantity as is to the prejudice of the purchaser or consumer or in such proportion as diminishes in any manner the food value or nutritive qualities which it possesses in its pure, normal, undeteriorated and sound condition, or
(g) it contains any poisonous or deleterious ingredient including radiation] which may render it injurious to health, or
(h) it is not of the nature, substance or quality which it purports to be or which it is represented to be by the manufacturer or the seller.

**Food Colouring**

Food colouring is an ancient system of making foods attractive. As early as 1500 BC in ancient Egypt the art of colouring candy was known as it is shown in tombs surviving from that period. Even wine, spices and condiments were coloured in ancient times. Yet it is considered a broad (but still debated) misconception among scientists and technologists that a

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129 See the definition of ‘adulteration’ given in the ninth (1875) edition of *Encyclopaedia Britannica* as quoted in Collins, above n 11, 95.
130 *PFO 1959* s 3(1).
consumer’s selections are influenced by food colours. Not only this, the use of food colours in the food industry is also debated. The Codex Committee of Food Additives on 1966 decision in regard to the use of food colour reflected this when it stated that,

…the use of colouring matters should be limited to specified foods, that specifications of identity and purity should be laid down and that the use of colour diluents and solvents should be controlled. The Committee did not agree upon whether specified colours only should be permitted in the case of certain foods or whether maximum levels should be prescribed… With regard to colour-marking of foods for identification purposes the Committee was of the opinion that specified colours, other than permitted food colours, should be allowed.

Despite the international standard existing for the use of food colours in food products, the experience in Bangladesh evidences an extremely poor usage of food colour. Instead of using the authorised food colours, many food manufacturers use deadly (toxic) food colours (especially textile dyes) in foods. Food manufacturers use textile colours for producing ‘candy, chocolate, cake, chewing gum, ice cream, biscuit, chanachur, crisps and various colourful sweetmeats especially kalojam, chamcham etc.— favourites among children.’

### Foodborne Illnesses

Foodborne illnesses include diseases that spread to people via food and drink. They may be fatal in nature. Various micro-organisms are the cause of illness, infection and disease and many of these micro-organisms enter the human body through foods; hence, the resulting illnesses are called foodborne illnesses. Among the pathogenic microorganisms are various

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134 For example, see Faridpur Office, ‘Poisonous Colours Used to Manufacture Jilap, Beguni and Crushed Brick Dust Used in Chilli Spices’, *Prothom-Alo* (online), 20 August 2011 <http://www.prothom-alo.com/detail/news/179577> [author’s trans].

135 Munim, above n 90.
types of bacteria (such as *salmonella* species), viruses (such as rotaviruses or hepatitis), or parasites (including various parasitic platyhelminthes and nematodes) are liable to contaminate the food products. Other sources of foodborne illnesses can be naturally occurring toxins, such as are present in some fungi, shellfish and so on. Contamination may allow an animal disease to reach a human host (as is the case in brucellosis, for example) or aid the spread of human to human disease (various, see further below). This generally occurs through contact, for example via contamination through the presence of faecal matter (animal or human) in food or drink, for example, due to poor hygiene practices. Additional contaminants — such as incorrect chemicals or incorrect quantities of correct chemicals being added during processing — can also result in severe illness, even death.

The reasons that these contaminations occur are in general the improper treatment, preparation, or storage or handling of foods. Although it is difficult to accurately measure the number of incidents of foodborne illnesses in the world, but in 2005 at least 1.8 million people died from diarrhoeal diseases around the world. The specific statistics cannot be found regarding the number of people affected by foodborne illnesses in Bangladesh, but the figure for those affected by diarrhoea is available in section 2.5 of the chapter 2 of this thesis. Foodborne illnesses cause significant economic loss, particularly when medical and pharmaceutical costs are included together with loss of productivity due to illness (and premature death). As Adams and Moss observed, ‘a foodborne disease is perhaps the most

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widespread health problem in the contemporary world and an important cause of reduced economic productivity.\footnote{Martin R Adams and Maurice O Moss, \textit{Food Microbiology} (RSC Publishing, 3rd ed, 2008) 4.}

1.7. Impacts of Party Politics on the Campaign for Food Safety in Bangladesh

Party politics in Bangladesh is no better than in any other LDC in the world. Bangladesh has been suffering from certain political inadequacies for a long time. Although there are numerous political parties in Bangladesh, basically two big parties have been ruling the country alternatively since its inception (apart from the period of unconstitutional military rule). The two parties are the ‘Awami League’ (the current ruling party) and the Bangladesh Nationalist Party (BNP) (the present main opposition party). Unfortunately, none of the parties include the issue of food safety in their election manifesto. But it is indeed food safety that is a severe public health concern in Bangladesh as demonstrated above (and also in chapter 2). Thus, it is somewhat surprising that political parties do not campaign for votes by promising to address the existing food safety problems of the country,\footnote{‘Political Parties Should Focus on Safe Food’, \textit{Bdnews24.com} (online), 13 October 2012 <http://ns.bdnews24.com/details.php?id=234252&cid=13>.} nor address them in a meaningful way when in power.

The two major parties promise many things in election campaigns, but they hardly ever fulfil these promises when they are elected and have the opportunity to rule the country. The national food and nutrition policy emphasises the eradication of food adulteration and the maintenance of food safety in Bangladesh; but the political parties in Bangladesh lack a strong commitment to combatting food safety issues and implementing the overall food policies for Bangladesh.\footnote{M A Mannan, ‘An Evaluation of the National Food and Nutrition Policy of Bangladesh’ (2003) 24(2) \textit{Food and Nutrition Bulletin} 183, 187.} If the Government and political parties (along with their leaders) had been committed to the welfare of the country, the food safety problem would not have
reached the situation it has today.\textsuperscript{140} Therefore, the political leaders need to not only make promises before elections and during party campaigns (which they need to do particularly in regard to food health) but also then maintain their will and act on those commitments. In fact, it is only ‘if political commitments are available and the policy is part of a political agenda, implementation becomes feasible’.\textsuperscript{141} Thus, it is argued that political parties should focus strongly on the food safety agenda. And, in addition, once they are elected, they should not alter or stop a prior government’s food safety related policies and ongoing works out of a desire to take revenge. Such senseless actions hurt not the outgoing government but the people.

1.8. Press and Electronic Media and Their Impacts on Food Safety in Bangladesh

The 21\textsuperscript{st} century has seen an extraordinary advancement in print and electronic media (PEM). Consumers now wake up in the morning to their breakfast table with plenty of newspapers, journals, weeklies, and television news updates. In fact, for the last few decades there has been a rapid increase in the availability of information through these PEM.\textsuperscript{142} In the world of communication now-a-days, these media play a significant role in every public issue. It is evident around the world that the publications of the news and images concerning food safety issues in newspapers and electronic media can play an important role.\textsuperscript{143} In Bangladesh, the public have come to know the gross violations of food safety only through the PEM. The influence and impact of the media on the concern for food safety in Bangladesh has been recognised by the delegate of the Government of Bangladesh (GoB). A recent food safety

\textsuperscript{140} See generally ibid 189. Note: For the severity of the food safety problems in Bangladesh, see sections 2.4 and 2.5 of chapter 2 of the thesis.

\textsuperscript{141} Mannan, above n 139, 190.

\textsuperscript{142} Johan F M Swinnen, Jill McCluskey and Nathalie Francken, ‘Food Safety, the Media, and the Information Market’ (2005) 32(1)\textit{Agricultural Economics} 175, 175.

seminar report reported the words of the advisor of the Prime Minister of Bangladesh in the following terms:

…[T]he media as a very important partner for improving food safety in Bangladesh, since the media has a great impact on people’s behaviour, as well as on policy maker’s awareness of the impact of food safety incidents in the country. The media can be used as a vehicle for transferring information about food safety to the public…. 144

In many newspapers the reports related to food safety issues are published on the front pages, highlighting the significance of the issue in Bangladesh. Thus, it would not be an exaggeration to argue that the Bangladeshi PEM are now indirectly advocating greater food safety by revealing the shortfalls in this regard in their ‘food journalism’. 145

There is a significant dearth of research into the regulatory problems of food safety issues due to a lack of adequate literature published on this subject in Bangladesh. For this reason, a few minor research projects that have been conducted are mostly based on the reports of the PEM. More importantly, many consumers would have remained ignorant if the PEM had not been brave enough to publish the news of food adulteration and unsafe foods. Frequent reports based on food safety problems are published every day in the newspapers. Some of the relevant reports have been mentioned in section 1.5 and section 1.6 of this chapter and some will be noted in the succeeding chapters, especially in sections 2.4 and 2.5 of chapter 2 of the thesis. The GoB has long been aware of the food safety issues regarding how severely food manufacturers are adulterating the food products. But the government may well have ‘fallen asleep’ in regard to taking care of this problem, for they have largely failed to either strengthen the legal and regulatory regime or change the regulatory enforcement philosophy.

It should be admitted that due to the ongoing reporting in the PEM, the government is

144 ‘Improving Food Safety, Quality and Food Control in Bangladesh: Report - Seminar on Food Safety Challenges in Bangladesh’ (Food and Agriculture Organization of the United Nations, June, 2010) 2 (‘FAO Report - Seminar on Food Safety Challenges in Bangladesh’).

sometimes bound to make new laws, for example, the Consumer Rights Protection Act 2009, which has actually been enacted due to the high public demand throughout the country. However, the effectiveness of this law is debatable. This will be discussed in several sections of the subsequent chapters of this thesis. But, overall, it is hard to ignore that a problem exists, and the size of that problem, if a large number of food safety problems are reported and published by the PEM. This growing awareness of the extent of the problem will certainly be reflected in the future strength of the food safety regulatory regime.

1.9. Summary and Conclusions

The present chapter defines the basic concepts of food and food safety along with the classification of the foods generally relevant to this study. It shows that the cultural food habits and food traditions of Bangladesh are influenced by a number of historical, geographical and religious factors. Adulteration of popular foods has been commonplace and despite it being of such critical concern to human life, the matter has long been disregarded by the political parties. However, the various PEM are playing a positive role in portraying the seriousness of this food safety issue, which has resulted in growing public concern and an increase in the demand for the government to enact effective laws. Finally, the names of the various cultural foods and the terminologies covered in this chapter revealed their significance in relation to this thesis, and will assist readers to conceptualise the discussions in the following chapters of this study.

Chapter 2: General Introduction

2.1. Introduction

This chapter discusses the fundamental and general concepts about Bangladesh, its food safety concerns along with a detailed overview of the conduct of this research. The chapter is divided into several sections and sub-sections. Section 2.1 is the introduction. The legal system of Bangladesh will be briefly discussed in section 2.2, focusing on the three main parts of the government, namely the executive, legislature and judiciary. The historical background of food safety and its regulatory approaches will be explored in section 2.3 to portray how food safety has gradually deteriorated to the present dreadful situation. Section 2.4 will look into the major problems of food safety in Bangladesh while section 2.5 will depict the impact of unsafe food upon public health. Section 2.6 will examine how rampant food adulteration and other food safety issues are violating human rights as well as the fundamental constitutional rights of the people of Bangladesh. Section 2.7 will concentrate on the circumstances and major reasons that are argued to be responsible for the current food safety problems in Bangladesh. The aims of this study will be described in section 2.8 while section 2.9 will contain the research questions. Section 2.10 will explain the rationale of the study. The scope of the research and the research methodology will be included in section 2.11 and section 2.12 of the chapter respectively. Section 2.13 will provide on an overview of the succeeding chapters in this thesis. Finally section 2.14 will summarise and conclude the preceding discussions.

2.2. Bangladesh and Its Legal System

Bangladesh does possess an eventful historical background. The territory of Bangladesh had been under Muslim rule for over five and a half centuries from 1201 to 1757 AD (which had
included periods of Turkish and Mughal rule). Bangladesh further became a British colony ‘after the defeat of the last sovereign ruler of Bengal, Nawab Sirajuddowla, at the Battle of Palashi on the fateful day of June 23, 1757’. Later it achieved freedom from colonialism in 1947 with the Partition of India when India and Pakistan were created. The Dominion of Pakistan was comprised of what is now modern Pakistan to the North-West of the Indian subcontinent and territory that was initially known as East Bengal (later named ‘East Pakistan’) to the North-East. The experience of what is now Bangladesh under the rule of Pakistan was to say the least unfortunate. In December 1971 after a nine month long civil war, it earned independence and emerged as an independent state named the ‘Peoples Republic of Bangladesh’.

It is a small country with an area of 147,570 square kilometres situated in South Asia. As per the government’s most recent statistics, the total population of Bangladesh in 2011 was nearly 150 million (or more precisely, 149,772,364).

Bangladesh has a parliamentary form of government. Under Article 48(2) of the Constitution of the People’s Republic of Bangladesh (‘Constitution’) the President is the head of State. However, because of the parliamentary form of government the Prime Minister possesses all the executive power as the head of the Government of Bangladesh. The country is divided into seven administrative divisions, namely Dhaka, Chittagong, Sylhet, Barishal, Rajshahi, Rangpur and Khulna. Each division is further sub-divided into Districts; there is a total of 64 Districts. For the convenience of administration, the administrative role has been further

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148 See generally Whyte and Lin, above n 46, 24-5.
149 Bangladesh Bureau of Statistics (BBS), Statistical Pocketbook of Bangladesh 2010 (Government of Bangladesh, February 2011) XIX (‘Statistical Yearbook of Bangladesh 2010’).
150 Van Schendel, above n 51, 49.
decentralised by creating some local government areas. For this purpose, each District is
further divided into a number of Upazilas or Thanas (Sub-Districts). Currently there is a
total of 508 Upazilas (which have elected representatives) and Thanas (administrative units
headed a by government official). Each Upazila or Thana is furthermore divided into several
Union Parishads and Pourashavas (municipalities). There is a total of 6766 Union Parishads
and 223 municipalities in Bangladesh.

As a former British colony, the legal system of Bangladesh is heavily influenced by the
principles of Common Law. Thus most of the laws and legal principles are dominated by
Common Law. Alam states, ‘British influence proved to be the strongest and most far-
reaching’.

Bangladesh has an independent judiciary. Under Article 94(1) of the Constitution, the
highest court of the country is known as the Supreme Court of Bangladesh, which is
comprised of the Appellate Division (AD) and the High Court Division (HCD). The Supreme
Court is headed by the Chief Justice of Bangladesh, and other judges of the appellate
divisions. The AD decides appeals that are filed against HCD judgements, decrees or orders.
The HCD has specific original jurisdictions, such as, writ petition, and it decides the appeals
from the district courts in general. The district courts are divided into civil and criminal
courts. Districts courts are headed by a District and Sessions Judge (the same person) under
whom all civil court judges and judicial magistrates work.

154 BBS, Statistical Yearbook of Bangladesh 2010, above n 149, ch III.
155 Ibid 89. See also ‘Chapter III: Area, Population, Household and Housing Characteristics’
Encyclopedia - VII (California: ABC-CILO, 2002) 116. See also Solaiman, Investor Protection, above n 151,
56.
157 Julfikar Ali Manik, ‘Judiciary Freed from the Executive Fetters Today: CA to Declare Formal Separation for
Ensuring Justice for All’, The Daily Star (online), 1 November 2007
158 See Sarkar Ali Akkas, Judicial Independence and Accountability: A Comparative Study of Contemporary
Bangladesh Experience (PhD Thesis, University of Wollongong, 2002) 91–3. See also BBS, Statistical
Yearbook of Bangladesh 2010, above n 149, 17.
2.3. Historical Background of Food Safety and Its Regulatory Approaches in Bangladesh

Human civilisation evidences the practice of food adulteration and lack of food safety from the beginning of history. The civilisations of Ancient Rome and Greece suffered the presence of food adulteration. Food adulteration is recorded in the medieval period and then later into modern times as well, and food safety breaches in broad terms—the selling of ‘corrupt victuals’—could also be prosecutable in Britain in the Middle Ages.

In regard to early times, significant literatures are not found in relation to the concept of food safety. Before the 19th century scientists did not know about bacteria and it was difficult to discern if somebody had become ill due to unsafe food. It is perceived that in ancient times food regulations were basically used to combat economic frauds (for example, true weight is often covered in ancient codes), and there is often no reference to food safety issues. Roberts states, ‘a history of food safety really does not exist, but numerous discoveries, inventions, and regulations have led to the present knowledge and state of affairs in food safety’. The

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159 Hart, above n 128, 7.
160 For details re food adulteration, see ibid 8–11. For reference to medieval cases, see Swift v Wells, 201 Va., 110 SE 2d 203 (1959). ‘“So as far back as 1266AD, it is ordained that no one shall sell corrupt victuals.”’ 51 Hen III, stat 6. Early English decisions repeatedly held that an action on the case lies against the seller of corrupt food whether the same was warranted to be good or not. Keilway’s 92, 72 Eng Reprint 254; Roswel v. Vaughan, (1607) Cro Jac. 196, 79 English Reprint 171: at 206.
161 Cynthia A Roberts, Food Safety Information Handbook (Greenwood Press, 2001) 25. However, both the Old Testament literature and the Qur’an ban pork—a food safety reason has been suggested to be the probable presence in ancient times of the trichinella parasite (causes trichinosis in humans). Both also ban eating carrion or carrion eating creatures and insist on removing blood from carcases, which also reduces chances of contagion. See Ian Shaw, Is it Safe to Eat?: Enjoy Eating and Minimize Food Risks (Springer, 2004) 9. Herbs and spices—used frequently in cooking in warmer climates—also contain anti-bacteria etc: at 10.
162 Roberts, above n 161, 26. Although in various cultures particular herbal concoctions were believed to induce an abortion and either approved or forbidden; and the inherent poisonous qualities of many other foods or additives to them were well-known and in some instances even used for a mode of murder or execution (for example, hemlock and arsenic in Europe and elsewhere, and the poisoning of wells in India). See eg John M Riddle, Contraception and Abortion: From the Ancient World to the Renaissance (Harvard University Press, 1992); John Parascandola, The King of Poisons: A History of Arsenic (Potomac Books, 2012)6, 146; Hiralal Chatterjee, International Law and Inter-state Relations in Ancient India (Mukhopadhyay, 1958) 114;
Chinese people thought that if any food was boiled, it was safe to eat. Aristotle and other philosophers and scientists in his (Aristotle’s) time believed in a ‘spontaneous generation theory’, which suggested that insects and animals arose from the soil or plants. But spontaneous generation theory was merely taken from general observation without the aid of any microscope, not on the basis of any scientific experiment or the use of instruments to aid human sight. It is widely recognised that Aristotle had a significant influence on the history of human civilisation and so on the successor scientists for a thousand years. Unfortunately Aristotle’s misconception of biology was believed by later scientists who failed to challenge it for many centuries. More than a thousand years later and with subsequent advances in science, bacteria and viruses were discovered through the efforts of people like Antonie van Leeuwenhoek (who invented a microscope and observed formerly invisible moving rods in pond water and in his own teeth scrapings in the late 17\textsuperscript{th} century) and the renowned Louis Pasteur and others working in the 19\textsuperscript{th} century and still others in the 20\textsuperscript{th} century. People came to know more about the lack of safety of foodstuffs day by day. It is worth mentioning, however, that despite the gradual development of food science over time, that in addition to accidental adulteration by the those lacking knowledge or through inadvertence, deliberate food adulteration continued to capitalise on the ignorance of people of science and their lack of knowledge of food products and the requirements for food product safety.

Food safety and the adulteration of food in Bangladesh is the central concern of this current study. Thus it is worthwhile to give a historical account of food adulteration in Bangladesh.

163 David M Balme, ‘Development of Biology in Aristotle and Theophrastus: Theory of Spontaneous Generation’ (1962) 7(1–2) Phronesis: A Journal for Ancient Philosophy 91, 91. It is not an unreasonable assumption on the basis of observation as boiling many foods at high temperature for a prolonged period kills many bacteria etc (but there cannot be much of a delay between boiling and eating).

164 Ibid. For relevant observations on the development of knowledge of microscopic organisms and the persons and processes involved in the development of food safety (eg, van Leeuwenhoek and Pasteur, use of SO\textsubscript{2}, sterilisation etc), see also Chinapalli Vidyā and D B Rao, A Text Book of Nutrition (Discovery Publishing, 1999) 246–7, 248–9 Table 25.1.
The British (in the form of the East India Company) came to the Indian subcontinent for business and later a colony was officially established. Consequently it is argued that it was they who first brought food adulteration to the subcontinent like many other malpractices. For example, they let fall into disuse traditional canal systems and interrupted others that then resulted in several famines during which exports were maintained, prices rose and a perfect climate for food adulteration prevailed as demand for many foodstuffs often far exceeded supply. At the very least, it can be argued that the British vastly increased the prevalence of food adulteration practices.

In 1820, food adulteration is said to have first ‘officially’ come to public notice in Britain (in a wine factory). Throughout the 19th century investigation into and research on food adulteration had been expanding and accounts of incidents published in the newspapers. This investigation, research and reports attracted the public attention and raised severe concern. In 1860, the first food adulteration Bill — ‘A Bill for Preventing the Adulteration of Articles of Food and Drink’ — was passed by the British Parliament. In the same year the Penal Code 1860 (PC 1860) was passed by the same Parliament and applied to the entirety of British India (and was later inherited by independent India, Pakistan and Bangladesh). Sections 272, 273 were included to prevent food adulteration.

After British colonial rule ended, the major food safety law was passed by the Parliament of Federal Pakistan in 1959: the Pure Food Ordinance 1959 (PFO 1959), which was

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165 G K Beeston, ‘A Brief History of the Inauguration of Food and Drug Legislation in Great Britain’ (1953) 8 Food Drug Cosmetic Law Journal 495, 495. This is despite earlier laws on standards to be observed in regard to bans on use of lung-diseased animals in pies or inflating carcasses etc: M S March, ‘The Trade Regulations of Edinburgh during the 15th and 16th Centuries’ (114) 30 Scottish Geographical Magazine 483 (as cited in Margaret Skea, Food Standards Agency 16th Century Style ... or ... What’s in This Meat Pie?, on English Historical Fiction Writers blog, 4 March 2013 <http://englishhistoryauthors.blogspot.com.au/2013/03/food-standards-agency-16th-century-style.html>.


167 For details see chapter 4 of this thesis. See also Vidya and Rao, above n164, 240.
simultaneously enforced with the *PC 1860*. In 1974, the *Special Powers Act 1974 (SPA 1974)* was the first enactment by the Parliament of Bangladesh that contains provisions regarding food safety affairs. Section 25C was included in the *SPA 1974* to address food adulteration and provided extreme punishments, such as the death penalty. However, in practice none of these food safety laws that were in force at that time were actually working. Rather the situation was getting worse day by day. In 1985, the Government of Bangladesh (GoB) enacted the *Bangladesh Standard Testing Institute Ordinance 1985 (BSTIO 1985)* under which the Government established the Bangladesh Standard Testing Institute (BSTI) in Dhaka, the capital of Bangladesh. The BSTI later prepared the Bangladesh standards for various consumer products. Together with many other standards for products, food standards were also created. Provisions were made that every food product must have to maintain the Bangladeshi standards. But none of the regulations worked properly as is evident from the rampant food adulteration outlined in section 2.4 (below) of this chapter. Since early this century, consumers ever more demanded a new and effective law against food adulteration.\(^{168}\) Day by day it became an item on the agenda of the rank and file. To fulfil this demand, in 2009, the GoB enacted the *Vokta Odhikar Songrokkhon Ain 2009 [Consumer Rights Protection Act 2009] (Bangladesh) (CRPA 2009)* [author’s trans]. Unfortunately, this law also has failed to combat the food safety issues in Bangladesh.\(^{169}\)

Finally it can be said that, Bangladesh has a long history of food safety regulations which hardly can be argued to have been effective from their very beginning. And this ineffectiveness of the regulatory regime may have aided and abetted or resulted in uncontrolled food adulteration and other food safety problems in Bangladesh. The following section will address these major problems of food safety in Bangladesh.

\(^{168}\) For more details, see section 1.8 of chapter 1 of this thesis.

\(^{169}\) For details, see section 4.3 of chapter 4, section 5.3.9 of chapter 5 and section 6.2 of chapter 6, section 7.4.5 of chapter 7 and sections 8.6 and 8.8 of chapter 8 of this thesis.
2.4. Major Problems Concerning Food Safety in Bangladesh

Bangladesh has long faced an acute problem of widespread food adulteration owing to the lack of an effective food safety regulatory regime (FSRR). Most foodstuffs — be they manufactured or processed — are adulterated to varying degrees. This problem persists at every level in relation to food, from preparation to consumption. While some food manufacturers are involved in adulteration, other processors are involved in the unhygienic practices in food processing or handling. Foods are adulterated by using various harmful chemicals and toxic artificial colours on the one hand; and rotting perishables that are turning poisonous or turned into poisonous end-products are also stored, sold and served to consumers in an unhygienic atmosphere on the other.

Manufacturers are adulterating foods when ‘bulking’ up a product by using either dangerous material (such as by using a poisonous but visually equivalent bean product) or inert but nutritive value reducing material, for example by mixing husk with different cooking stuffs. Even infant’s powder milks have been adulterated with poisonous melamine. Numerous incidents of such adulteration have been reported in the public media, revealing seriously harmful approaches to production,

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170 For a further references and more examples of food adulteration in Bangladesh, see section 1.5 of chapter 1 of this thesis.


storage and sale of foodstuffs. Supermarkets blatantly sell fruits, fish and vegetables that have been treated with formalin and various other harmful substances. While used in prescribed concentrations in the USA, ‘formalin [a concentration of urea] is not approved for use in aquaculture in Australia, Europe and Japan because of its association with oncogenesis (tumour development) but in Bangladesh is widely, irresponsibly (and illegally) used on and in fish to keep them fresh while being transported or in processing. Further, long after Dichloro Diphenyl Trichloroethane (DDT) had been banned for agricultural use in Bangladesh as elsewhere, the use of DDT powder remains extensive in various food

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178 M A Z Chowdhury et al, ‘DDT Residue and Its Metabolites in Dried Fishes of Dhaka City Markets’ (2010) 29(2) Soil & Environment 117, 117. This is 10 years after Australia banned the product (1987) and 25 years after the US banned it (1972): Now banned, DDT had never been registered for use in Bangladesh: see, Environment and Social Development Organization-ESDO, ‘POPs Hotspots in Bangladesh’ (International POPs Elimination Project: Fostering Active and Efficient Civil Society Participation in Preparation for Implementation of the Stockholm Convention, 2005) 5. Its illegal use, however, remains a problem in...
products.\textsuperscript{179} Contrary to domestic legislation as well as the \textit{2001 Stockholm Convention on Persistent Organochlorine Pesticides} to which Bangladesh is a signatory, sutki\textsuperscript{180} have continued to be processed using DDT.\textsuperscript{181}

In addition, there are some famous brands of food manufacturers and processors involved in such activities even though they usually charge consumers a premium for their products on the basis of a claim to be providing safe food. But in a recent examination, the Dhaka City Corporation laboratory has found that some of these prominent names in manufacturing and processing — like Agora, Acme Group, Premium Sweets, Golden Foods, Alauddin Sweets, Fakhruddin Biriani — have been massively producing and selling adulterated food products.\textsuperscript{182} Actually, the entire food industry seems to have been blatantly ignoring the existing food regulations in Bangladesh for ages with impunity. Although some breaches resulted from ignorance, most of them are deliberate.\textsuperscript{183}

The problems created by food adulteration have long been recognised. A survey conducted by the Institute of Nutrition and Food Science, Dhaka University, in the early 1980s had shown that inadequate diets and the intake of adulterated foods are responsible for the malnutrition of 60 per cent of the people of Bangladesh.\textsuperscript{184} In addition, the Institute of Public Health (IPH) in Dhaka and the World Health Organisation (WHO) in their joint study of 1994 on food adulteration tested the products of 52 street vendors and found that all of the

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\textsuperscript{179} Bhuiyan et al, above n 122, 114.
\textsuperscript{180} See section 1.5 chapter 1 of this thesis.
\textsuperscript{181} For details of DDT use in dried fish in Bangladesh, see Chowdhury et al, above n 178, 117–21. DDT is generally regarded as a likely carcinogen, a likely teratogenic substance, an endocrine disruptor and a chemical with adverse effects on reproduction.
\textsuperscript{182} See Shawkat Ali Khan, ‘Adulterated Foods on Sale in City amid Lax Monitoring’, \textit{New Age} (Dhaka), 27 May 2009, Metro. In Bangladesh the companies mentioned are very famous food manufacturers and retailers.
\textsuperscript{184} The Survey was cited in Quazi Mohammad Ali, ‘Some Aspects of Consumer Protection in Bangladesh’ (1984) \textit{2 Dhaka University Studies} 101, 111.
vendors’ food samples were contaminated with different types of disease breeding microorganisms.\textsuperscript{185} Another study of 2003 conducted by the same organisations as above in the capital city revealed that amongst 400 sweetmeats, 250 biscuits, 50 breads and 200 ice creams samples, 96 per cent of sweetmeats, 24 per cent of biscuits, 54 per cent of breads, and 59 per cent of ice creams were adulterated.\textsuperscript{186} This 2003 study found that over the preceding decade, some 50 per cent of the food samples tested in IPH laboratory were adulterated.\textsuperscript{187}

Therefore, based on discussion of the above section it can be argued that food safety is an enduring problem in Bangladesh. The situation is extremely alarming and it is argued that it affects public health and safety in Bangladesh.

2.5. Impacts of Unsafe Food on Public Health in Bangladesh

Impure and adulterated foods can have numerous direct and indirect lethal effects, such as on public health, environment, education, income producing capacity and on the overall economy of the country. Given the scope and length of this study, it is difficult to encompass all these issues in details in this thesis. The major effects of unsafe foods on public health will be discussed generally in this section.

Unsafe foods are available everywhere in Bangladesh. As a result nobody is safe from the dangerous impacts of consuming adulterated and contaminated foodstuffs. Children especially are more vulnerable than adults and unsafe food is a major cause of child mortality, as revealed in a 2008 United Nations International Children Fund (UNICEF) report on child

\textsuperscript{185} Neela Badrie, Sonia Y De Leon and Md Ruhul Amin Talukder, ‘Food Adulteration Management Systems: Initiatives of Trinidad and Tobago, West Indies, Philippines and Bangladesh’ (Paper presented at Caribbean Agro-Economics Society 26\textsuperscript{th} West Indies Agricultural Economic Conference, Puerto Rico, July 2006) 85 [4].


\textsuperscript{187} See, eg, ibid 46; Badrie, De Leon and Talukder, above n 185, 85; Amin et al, above n 175.
survival.\textsuperscript{188} It is universally accepted that an important factor in malnutrition is unsafe food, which causes various types of serious illnesses including diarrhoea and it has other more permanent consequences for the human body.\textsuperscript{189} Hence, Bangladesh which has an abundance of adulterated foods cannot deny the contribution of unsafe foods to malnutrition. In addition, Powell asserts that proper handling of foodstuffs can indirectly remedy the nutrition problem, as contaminated foods can have serious impact on public health.\textsuperscript{190} He gives an indication of the breadth of the problem when he states that ‘pesticides can also contaminate foods and provoke serious reactions when ingested. Chronic malnutrition can occur when bacteria, parasites, and even viruses are found in food sources on a regular basis’.\textsuperscript{191} Furthermore, poor maternal health due to such factors, in pregnancy and subsequent to the birth of a child, also has an impact on the health of the foetus and the nourishment of (and possible transference of various infections to) a neonate. A recent study recognised by the GoB portrayed a depressing picture of child mortality.\textsuperscript{192} Pointing the forefinger at malnutrition as a significant cause of child mortality, the National Institute of Population Research and Training reported:

\textit{One in nineteen children born in Bangladesh dies before reaching the fifth birthday. The infant mortality rate is 43 deaths per 1,000 live births and the child mortality rate is 11 per 1,000 children. During infancy, the risk of dying in the first month of life (32 deaths per 1,000 live births) is three times greater than in the subsequent 11 months (10 deaths per 1,000 live births). It is also notable that deaths in the neonatal period account for 60 percent of all under-five deaths.}\textsuperscript{193}

\textsuperscript{191} Ibid.
\textsuperscript{193} Ibid 24.
Particularly, in Bangladesh, it is argued that many people die every year for reasons related to food adulteration, which it is argued is a kind of ‘silent genocide’.\textsuperscript{194} The serious threat posed by unsafe food can be easily comprehended from the recent official statistics of the GoB. The statistics shown in a Table posted on the website of the Ministry of Health and Family Welfare (MOHFW) reveal the number of food samples tested by the IPH from 2001 to 2009 and displays the distribution of the genuine and adulterated samples out of the total samples tested each year.\textsuperscript{195} The Table is reproduced below.

\begin{table}
\centering
\begin{tabular}{|c|c|c|}
\hline
Year & Genuine & Adulterated \\
\hline
2001 & 1000 & 500 \\
2002 & 2000 & 1000 \\
2003 & 3000 & 1500 \\
2004 & 4000 & 2000 \\
2005 & 5000 & 2500 \\
2006 & 6000 & 3000 \\
2007 & 7000 & 3500 \\
2008 & 8000 & 4000 \\
2009 & 9000 & 4500 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{194} For details of the severity of the problem of unsafe food in Bangladesh, see FE Report, ‘Speakers Liken Food Adulteration to Genocide’, \textit{The Financial Express} (online), 5 August 2010 <http://www.thefinancialexpress-bd.com/more.php?page=detail_news&news_id=108092&date=2010-08-05>.

\textsuperscript{195} Government of the People’s Republic of Bangladesh, Directorate General of Health Services (DGHS), \textit{Public Health Interventions by Selected Institutions} (24 November 2010) <http://nasmis.dghs.gov.bd/dghs_new/dmdocuments/All/Public%20Health%20Interventions.pdf>. Note: It is worth mentioning that no data subsequent to 2009 are available.
The Table reveals that the situation regarding food adulteration has not improved over the past 10 years. The situation is so unacceptable that the GoB appointed a taskforce (the National Taskforce on Food Safety (NTFS)) to find out the causes and consequences of adulterated food. Recently the NTFS conducted a survey and the results reveal that adulterated and contaminated foodstuffs each year cause various foodborne illnesses, including diarrhoea, malnutrition and other diseases, leading to the death of many people in Bangladesh. The NTFS recognises that diarrhoeal diseases cause various symptoms and different levels of disability in 5.7 million people in the country each year. Referring to the 1998 Annual Report of the International Centre for Diarrhoeal Disease Research, Bangladesh (ICDDRB), the NTFS states that a total of 1657381 cases of acute diarrhoea and resulted in the death of 2064 in 1998 alone. The Taskforce report added that the treatment for hygiene related diseases in Bangladesh cost USD 80 million each year. The extent of illness and deaths from diarrhoea has become alarming over the last couple of years in Bangladesh. The

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Samples</th>
<th>Genuine</th>
<th>Adulterated</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>No</td>
<td>%</td>
</tr>
<tr>
<td>2001</td>
<td>3280</td>
<td>1692</td>
<td>51.6%</td>
</tr>
<tr>
<td>2002</td>
<td>4300</td>
<td>2110</td>
<td>49.0%</td>
</tr>
<tr>
<td>2003</td>
<td>5120</td>
<td>2515</td>
<td>49.1%</td>
</tr>
<tr>
<td>2004</td>
<td>4413</td>
<td>2214</td>
<td>52.0%</td>
</tr>
<tr>
<td>2005</td>
<td>6337</td>
<td>3200</td>
<td>50.5%</td>
</tr>
<tr>
<td>2006</td>
<td>2779</td>
<td>1405</td>
<td>50.6%</td>
</tr>
<tr>
<td>2007</td>
<td>5992</td>
<td>3488</td>
<td>58.2%</td>
</tr>
<tr>
<td>2008</td>
<td>8734</td>
<td>5066</td>
<td>58.0%</td>
</tr>
<tr>
<td>2009</td>
<td>6338</td>
<td>3356</td>
<td>52.9%</td>
</tr>
</tbody>
</table>

Table 2.1: Food Samples Tested from 2001 to 2009 by IPH

197 Ibid.
198 Ibid.
Chapter 2: General Introduction

report of the Directorate General of Health Services (DGHS) under the Ministry of Health and Family Welfare of the GoB portrays the magnitude of the diarrhoeal diseases and confirms that this health problem is caused by mainly unsafe foodstuffs. The following table provides a statistics of the cases (instances) of diarrhoea and resultant deaths in Bangladesh from 2003 to 2009.200

<table>
<thead>
<tr>
<th>Year</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases</td>
<td>2196919</td>
<td>2132434</td>
<td>2040927</td>
<td>1961850</td>
<td>2335326</td>
<td>2294979</td>
<td>5036849</td>
</tr>
<tr>
<td>Deaths</td>
<td>1032</td>
<td>1067</td>
<td>694</td>
<td>239</td>
<td>537</td>
<td>393</td>
<td>712</td>
</tr>
</tbody>
</table>

Table 2.2: Cases of Diarrhoea and Resultant Deaths in Bangladesh, Reported by Year

Although the number of deaths seems to be significantly lower than that of the actual cases or instances of diarrhoeas diseases reported, thanks to the improvement of medical treatment under the auspices of various national and international initiatives, nonetheless the total number of deaths is still shocking. The soaring figure for 2009 for both number of infections and deaths is of additional concern, as it represents a significant increase, even when increasing population is taken into account.

In addition to this worst (fatal) consequence mentioned above, food-borne illnesses like diarrhoea may have serious social and economic effects, including losses in productivity, income, income-generating capacity and resultant poverty, suffering, dispossession and further family-wide malnutrition. In support of this claim, an investigation by a group of researchers found that people who consume unsafe foods and/or suffer from foodborne

diseases are less productive, and that the abundance of adulterated foods contributes to lower incomes, less access to safe foods and increased food insecurity.\(^{201}\) Intergenerational impacts can also be present as poor health in infancy can affect intellectual development while later interrupted education can also affect children’s subsequent opportunities and life outcomes. Finally, given the numerous deaths and enormous sufferings of people caused by unsafe foods in Bangladesh, the GoB should not be allowed to avoid its responsibility to protect its consumers’ rights, such as protection from such serious harm caused by the impure foods products available to them. The contribution of legal and regulatory failures in combating these human sufferings should be given due emphasis from a human rights perspective where consumers are deprived of enjoying consumption of safe foods. Hence the following section will address the food safety issue from a consumer rights viewpoint.

2.6. Unsafe Food and Violation of Relevant Rights

The right to consume safe food is an important right. Bangladesh, an LDC,\(^ {202}\) has long been facing problems regarding food safety. This section will discuss the significance of safe food as a right. The discussion will be conducted in two parts. The first part will discuss the violation of human rights related to the food safety situation in Bangladesh and the

\(^{201}\) Rahman, Hoque and Talukdar, above n 186, 45.
\(^{202}\) However, from a broader point of view, Bangladesh is categorised as the developing country. In fact, ‘[t]he category of the least developed countries (LDCs) was established in 1971 as a special group of developing countries characterized by a low income level …’ [emphasis added]: Committee for Development Policy and United Nations Department of Economic and Social Affairs, ‘Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures’ (United Nations, 2008) iii. See also United Nations, ‘Country Classification: Data Sources, Country Classifications and Aggregation Methodology’ (2012) — this UN report has enlisted Bangladesh in both in the group of developing countries (at 135 page) and in LDCs (at page 138). For more references where Bangladesh has been classified as the developing country, see International Monetary Fund (IMF), World Economic Outlook (IMF, 2011) 174 \(<http://www.imf.org/external/pubs/ft/weo/2011/01/pdf/text.pdf>\) (World Economic Outlook). See also Australian Government AusAID (AusAID), List of Developing Countries as Declared by the Minister for Foreign Affairs (AusAid, 30 January 2012) 2 \(<http://www.ausaid.gov.au/ngos/Documents/list-developing-countries.pdf>\) (List of Developing Countries).
subsequent part will focus on the fundamental rights under the Constitution that are violated by the ongoing food safety concerns.

2.6.1. Unsafe Food and Violation of the Human Rights

Bangladesh has been suffering from countless violations of human rights from many perspectives for decades. Due to the sheer scale and number of the problems — such as poverty, lack of education, corruption, over-population and the impacts of natural calamities (such as monsoons) — the overall human rights situation is not that good in Bangladesh. In fact, from a human rights point of view, Bangladesh has many issues to deal with, including unacceptable levels of child mortality, terrorism, extra judicial killing and so forth. Bangladeshi media and human rights watchdogs are continually focusing on these issues and bringing them to the notice of the international community. But the food safety problem has not been the subject of similar attention and is generally ignored as a human rights issue by national and international media as well as by human rights watchdogs at home and abroad. It is worth mentioning that depriving consumers of safe food is a tremendous violation of several human rights in numerous ways. The current section will examine this issue to identify the human rights that are being violated by the prevalence of safe foodstuffs in Bangladesh. As the present study is not a human rights study, this thesis will not be focusing on the details of human rights. The following section has been inserted in this research with a view to drawing the attention of the readers to the fact that issues related to unsafe food safety are a violation of human rights and the fundamental rights accorded citizens under the national constitution as well as a cause of much other harm in Bangladesh.

The phrase ‘human rights’ consists of two significant words — ‘human’ and ‘rights’. The word ‘human’ refers to any individual human being as distinct from other species and is a
natural person, undifferentiated by gender, age and so on.\textsuperscript{203} The word ‘right’ signifies different legal entitlements and relationships, such as privilege, safety, immunity and even power.\textsuperscript{204}

‘Human rights’ are generally defined as the rights that are natural, universal, inalienable and inherent to all human beings regardless of their nationality, race, sex, colour, culture, religion, ethnicity and social status.\textsuperscript{205} A person cannot fully explore his or her human nature without enjoying these rights. These rights are thus imperative to the flourishing and building up of human attributes and qualities.\textsuperscript{206} They are called the ‘birth right of all human beings’ as people are entitled to enjoy them simply by virtue of their humanity, therefore those rights need not be granted or bestowed by an authority for them to be enjoyed.\textsuperscript{207} As mandated by the United Nations, everyone is entitled to enjoy their human rights without any discrimination.\textsuperscript{208} The basic characteristics of human rights as set forth by the United Nations are that they are ‘all interrelated, interdependent and indivisible’.\textsuperscript{209}


\textsuperscript{204} Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1914) 23 Yale Law Journal 16, 30. Hohfeld elsewhere also mentioned that ‘the word “right” is used generically and indiscriminately to denote any sort of legal advantage, whether claim, privilege, power, or immunity’: Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 Yale Law Journal 710, 717.


\textsuperscript{209} Ibid.
Since different human rights are interconnected, the enjoyment of one right may entail the accessibility to other corresponding entitlements.\textsuperscript{210} Especially ‘right to life’ is the most important right among all human rights and it is seriously affected by the deprivation of right to food. This is so because an omission or deprivation of right to food can cause the termination of a life. Further, in a worst case scenario, if an individual is deprived of access to safe food, he or she may be badly affected by various food-borne diseases which may eventually result in the deprivation of the person’s right to life. Actually, the concept of state obligation has changed overtime, and it is no longer the case that the deprivation of life by allowing supply of poisonous foods to the people has to be tolerated except in unavoidable circumstances.\textsuperscript{211}

The violation of the right to safe food may harm the enjoyment of other human rights.\textsuperscript{212} As a matter of a fact, the failure to provide safe (unadulterated, uncontaminated) food to consumers directly or indirectly violates different human rights, such as the right to life, the right to food, the right to health, the right to a certain living standard, and so on. Girela spells out that food safety is a concern for consumers, the food industry and public administration, and that this fundamental human right is clearly derived from other fundamental rights, such as the right to life, human dignity, the right to protection of health and the right of consumers to protection.\textsuperscript{213} Narula considers this right from a different perspective and explains that, if there is a failure of the authority to disclose information about food nutrition, production, and safety, it may be a direct violation of the right to information articulated in art 19 of the

\textsuperscript{210} Ibid.
\textsuperscript{211} For details see, F Menghistu, ‘The Satisfaction of Survival Requirements’ in B G Ramcharan (ed), \textit{The Right to Life in International Law} (Martinus Nijhoff Publishers, 1985) 63, 63–64.
\textsuperscript{213} Miguel Angel Recuerda Girela, ‘Food Safety: Science, Politics and the Law’ (2006) 1 \textit{European Food and Feed Law Review} 33, 36. See also Philip Alston, ‘International Law and the Human Right to Food’ in K Tomasevski and P Alston (eds), \textit{The Right to Food} (Martinus Nijhoff Publishers, 1984) 9, 10. Alston remarked ‘… enjoyment of the right to food is intimately linked to the enjoyment of a whole range of other human rights including the rights to health, education, and to work, …’.
International Covenant on Civil and Political Rights 1966 (ICCPR). As explained by the Office of the High Commissioner for Human Rights (OHCHR) of the United Nations, the violation of the right to food may also involve (affect and/or be affected by) a violation of the right to water, the right to adequate housing, the right to education, the right to work and to social security, freedom of association, the right to take part in public affairs, freedom from the worst forms of child labour, freedom from torture, cruel, inhuman or degrading treatment, and so forth.

It is worth mentioning that, in regard to the violation of human rights, Bangladesh is a state party to the major international human rights instruments, such as the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), the Convention on the Rights of the Child 1989 (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) and so on. In regard to the right to food in Bangladesh, Ziegler states that the commitment of Bangladesh to human rights should be considered in any analysis of the right to food:

The Government is obligated to respect, protect and fulfil all human rights, including the right to food. Specific violations of these obligations should be documented and treated as human rights violations, although few organizations in Bangladesh are yet working to monitor and document violations of the right to food.

It is, thus, argued that Bangladesh has been violating these international human rights by failing to provide (or where provided, failing to enforce) laws to ensure safe food for the

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215 For details see generally, OHCHR, ‘Right to Adequate Food: Fact Sheet No 34’, above n 212, 5–6. This document explains the links between the right to food and other human rights.
217 Ibid 17 [42].
people for a long time. Everyone has the right to consume safe food. If a government fails to ensure this right, it signifies the violation of human rights in that particular country.

2.6.2. Unsafe Food and Violation of the Fundamental Rights of Bangladeshi Citizens

Generally, fundamental rights are those that are protected and guaranteed by the national constitution. These rights are often termed as ‘fundamental constitutional rights’. They are fundamental as they are enshrined in the Constitution, which is regarded as the supreme law of the land. Supporting this proposition, Goodpaster asserts that fundamental rights ‘are fundamental essentially because they have important structural implications for the regulation of governmental power which other rights do not have; and that these rights may not be burdened except to protect against real and serious threats to the polity itself’.

Highlighting the importance of fundamental constitutional rights, the Supreme Court of Bangladesh held in The State v Deputy Commissioner Satkhira and Others that, it is the constitutional responsibility of the court to ensure that the fundamental rights of the citizens are well protected. Correspondingly, the Supreme Court in Ain O Salish Kendra (ASK) & Others v Government of Bangladesh & Others stated that the state has a constitutional obligation to make effective provisions for securing the right to life, living and livelihood (of citizens) within its economic capacity.

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221 (1994)14 BLD (HCD) 266.
222 (1999)19 BLD (HCD) 488.
Although these fundamental constitutional rights have a higher status in the hierarchy of different legal rights recognised in a country, both human rights and fundamental rights should be mutually inclusive. Perhaps the most salient feature of fundamental rights is that they are inviolable even by a piece of ordinary legislation due to the supremacy of the constitutional law. Asserting the superiority of such fundamental rights, the US Supreme Court in *Boyd and Others v United States* held more than a century ago that ‘[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon’.  

The following discussion will unveil the violation of certain fundamental rights by the manufacture and sale of unsafe food products in Bangladesh.

Failure to provide safe foods to consumers violates several fundamental rights found in the Constitution, which is the supreme law of the land. For example, the right to life is a fundamental right of the people as guaranteed by the Constitution. Article 32 provides that ‘no person shall be deprived of life or personal liberty save in accordance with law’. In addition, art 31 of the Constitution states that every person in Bangladesh has an inalienable right to enjoy the protection of the law as well as to be treated in accordance with law. In particular, any action detrimental to the life, liberty, body, reputation or property of any person shall not be taken, except in accordance with law. The High Court Division of the Supreme Court of Bangladesh held in *Gias Uddin v Dhaka Municipal Corporation and*  

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227 Ibid art 31.
Others that the ‘protection of life’ under art 31 of the Constitution means that one’s life cannot be endangered by any action which is illegal.\textsuperscript{228} It can be relevantly mentioned here that food adulteration is clearly prohibited by several of laws in Bangladesh.\textsuperscript{229} Further, the same Supreme Court as above in \textit{Professor Nurul Islam v Government of Bangladesh} stated that the ‘right to life’ under art 31 of the Constitution means the right to have a sound mind and health.\textsuperscript{230} ‘Sound health’ essentially requires safe food. Thus, arguably, unsafe food is violating the right to life and right to health of the people of Bangladesh under arts 31 and 32 of the Constitution.

Article 18(1) of the Constitution is related to the above two articles. Unlike the above mentioned two articles, art 18(1) does not hold a fundamental right; rather it contains a state duty as a fundamental state policy. Article 18(1) of the Constitution reads:

\begin{quote}
The State shall regard the raising of the level of nutrition and the improvement of public health as moving its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic and other intoxicating drinks and drugs which are injurious to health.
\end{quote}

Article 18(1) has been applied and interpreted in a recent verdict of the Supreme Court in regard to the issue of food safety in Bangladesh. The petitioner in \textit{Farooque v Government of Bangladesh}\textsuperscript{231} (a 1996 case involving the importation of allegedly radioactively contaminated milk powder) claimed an infringement of the right to life guaranteed under art 32 and protected under art 31 of the Constitution. In support of his claim under arts 31 and 32, the petitioner cited art 18(1) on the ground of public health. Recognising the relevance of art

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{228} (1997) 17 BLD (HCD) 577.
\item\textsuperscript{229} Several of the enactments clearly prohibit food adulteration in Bangladesh: for example, \textit{Penal Code 1860 (Bangladesh)} ss 272 and 273 (‘PC 1860’); \textit{Special Powers Act 1974 (Bangladesh)} s 25C (‘SPA 1974’); \textit{Pure Food Ordinance 1959 (Bangladesh)} ss 6, 6A, 7 (‘PFO 1959’); \textit{Consumer Rights Protection Act 2009 (Bangladesh)} s 41 (‘CRPA 2009’).
\item\textsuperscript{230} (2000) 20 BLD (HCD) 341.
\item\textsuperscript{231} \textit{Farooque v Government of Bangladesh} (1996) 48 DLR 438 (‘Farooque’).
\end{enumerate}
\end{footnotesize}
18(1) and the infringement of constitutional rights by adulterated foods in Bangladesh, Kazi Ebadul Hoque J held in this public interest litigation that:

[T]hough article 18 cannot be enforced by the Court, it can be ... [consulted for] interpreting the meaning of the right to life under Articles 31 and 32. A man has a natural right to the enjoyment of healthy life and longevity up to normal expectation of life in an ordinary human being. Enjoyment of a healthy life and normal expectation of longevity is threatened by disease, natural calamities and human actions. When a person is grievously hurt or injured by another, his life and longevity are threatened. Similarly, when a man consumes food, drink, etc, injurious to health, he suffers ailments and his life and normal expectation of longevity are threatened. The natural right of man to live free from all the man-made hazards of life has been guaranteed under the aforesaid Articles 31 and 32 subject to the law of the land [emphasis added].

Finally the Constitution and the highest court of Bangladesh clearly establish that safe food is a fundamental right and the supply of contaminated foodstuffs for human consumption in Bangladesh contravenes a fundamental human right guaranteed by the Constitution.

2.7. Circumstances Leading to Unsafe Food in Bangladesh

Plenty of factors are considered to be responsible for the current situation regarding the lack of food safety in Bangladesh. The adulteration of foodstuffs has been occurring in Bangladesh from the very beginning of its independence (and probably earlier in the region) as it mentioned earlier. The issue of safe food, however, cannot be attributed to any single reason. There are a number of factors involved, including problems to do with regulation, pricing, choice, a lack of consumer education and culturally related issues. This section of this chapter will explain these different mentioned circumstances leading the manufacturing of unsafe foods in Bangladesh.

Regulatory Failures

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232 Ibid.
Among the different reasons for the manufacture of unsafe foods, one of the main ones able to be identified is the lack of proper regulation together with a lack of appropriate implementation procedures. Rahman, a pioneer writer on the consumer rights issue in Bangladesh, states that Bangladesh has had a long history of colonial governance, and, when faced with serious political instability where human rights violations were uncontrolled, consumer protection rights have been a low priority. He showed that the main problem for consumer protection in Bangladesh was the absence of proper legislation. The introduction of up-to-date food safety regulations with appropriate implementation can eradicate or at least minimise the food adulteration problems in any country, and could do so in Bangladesh.

There are multiple laws that deal with food safety issues and they are enforced by dozens of authorities but with what seems to be the least possible coordination, which has contributed to the failure of the FSRR of Bangladesh. Consumers are also not offered adequate opportunities for claiming damages and they are left with a restricted right to sue the culprits. Rahman, in his 1994 observations, noted that filing complaints under the consumer rights law of that time was cumbersome — ordinary consumers did not have the right to initiate legal action against the wrongdoer. In a recent study, Andaleeb and Ali repeat the same observation and reiterate that only the designated officials can initiate legal proceedings against a wrongdoer. Further, the criminal liabilities regime is not strong enough in its criminalisation of dangerous food safety conducts. Finally, the overall enforcement of the laws is unorganised in the absence of any enforcement guidelines. All these regulatory failures have been analysed in chapter 4, 5, 6, 7 and 8 of this thesis.

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234 Ibid 359–60.
Finally, in addition to the above mentioned regulatory shortcomings, there are several other regulatory loopholes that will be analysed in depth in various sections from chapter 4 to chapter 8 of this thesis.

**Product Price**

The downward pressure on the price of food products is one of the significant reasons for the production and consumption of the unsafe food in Bangladesh. Food is a good like any other consumer product, and while price is to a certain extent determined by relative scarcity or plenty (the more there is, the lower the price; the less there is of a product, the greater the price), demand for a food product can also depend on its price. The number of consumers prepared (or able) to buy a product is affected by the price point of the product. Beyond a certain price, consumers cannot afford particular food products in any country and ultimately —if the food is a staple in the nation’s diet (such as rice, for example) — it may cause demonstrations and riots demanding the introduction (or maintenance or increase) of a subsidy or rationing in some way so as to guarantee access to the food.236

With population growth (and accompanying demand for increased supply), increased urbanisation and increasing reliance on food transported from a distance, there has developed a need for the increased use of chemicals in primary production and the use of higher levels of processing (again usually involving chemical use, such as of fungicides, preservatives and so on) which can also result in higher priced products. So, there is that additional cost which consumers have to pay for the benefits they are getting. For example, if a particular food is to be highly refined or if it is to have an increased shelf-life, it will need additional processing or

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236 As has happened in recent years in many countries around the world, including Indonesia, Bangladesh, Thailand etc. See for details, Mindi Schneider, *We are Hungry! A Summary Report of Food Riots, Government Responses, and States of Democracy in 2008* (2010), Stuffed and Starved. <http://stuffedandstarved.org/drupal/files/We%20are%20Hungy%20-%20Summary%20Report%20of%20Food%20Riots%20Government%20Responses%20and%20States%20of%20Democracy%20in%202008.pdf>. And as in previous centuries: see March, above n 165.
treatment and so a manufacturer must raise the price to cover the increased costs. There is an inevitable tension between consumer ability and desire to pay resulting increased prices and the price of the goods produced. In relation to food safety, Henson and Traill argue that usually consumers are willing to pay less for each additional unit of safety.\(^\text{237}\)

But there is another, more prevalent factor that has resulted in a downward spiral of food safety, and it is not one that relies purely on product affordability to the consumer — it may be more related to a manufacturer’s desire for profit. Sometimes consumers in their desire either for ‘improved’ foods or for ‘lower priced products’ encounter problems in terms of food safety. Hossain, Heinonen and Islam surveyed 110 consumers, 25 sellers, 7 doctors and 7 pharmacists in the city of Dhaka to examine the reasons for consumers feeling ‘compelled to consume chemically treated foods’.\(^\text{238}\) Theoretically at least, this should have resulted in greater food safety where appropriate chemical use is adopted and result in a slightly higher priced product perhaps, or it could result in slightly lower prices in the longer term where greater chemical use reduces waste. However, this was not observed. The authors found that producers *always* sought to achieve greater profit by using lower price inputs and this led to producers in developing countries using cheaper, often hazardous and industrial chemicals in food, rather than those approved for such use.\(^\text{239}\) They found that 37 per cent of the consumers surveyed buy adulterated foods because such foods are cheaper and more commonly available than those that are unadulterated; while 15.5 per cent of consumers buy chemically treated foods because they ‘look nice’ and therefore are more attractive to them.\(^\text{240}\) So, it is obvious that adulterated foods are likely to be priced at the lower end of the


\(^{239}\) Ibid.

\(^{240}\) Ibid 591.
market, increasing their accessibility to poorer consumers. But this cannot be allowed to be an excuse for their manufacture and then allowing those people who cannot pay much for safe food to consume unsafe food; consumers must be prevented from consuming adulterated food. Access to safe food should be granted equally to everyone irrespective of the economic capacity of the consumers: that is, whether the food is expensive or cheap, it should be safe. Offering someone adulterated food, whether adulterated by chemicals, or by un-nutritious or less nutritious ‘fillers’, or contaminated by bacteria or moulds, is directly offering to make the consumers ill, and indirectly to shorten or even end their lives.

**Choice of Food Product**

Choice of food products is also a concern regarding food safety issues in the marketplace. If there are insufficient numbers of food manufacturers for a particular food item or inadequate supplies of an ingredient for that product at particular times and consequently the supply of that manufactured food product is low, consumers are bound to buy a food that may be adulterated as it gives the appearance of there being more of that particular foodstuff (and often of the foodstuff being of higher quality than might otherwise be the case). For example, formalin treated fish is reportedly sold at quite a high price, and formalin is also reportedly used in milk and on vegetables and fruit.\(^\text{241}\) Consumers in most of the developing countries, however, place greater emphasis on the satisfaction of their immediate physiological needs. Hence, consumers in such market conditions accept whatever is offered to them; they have little voice in the marketplace, little say over what is produced and how it is produced.\(^\text{242}\)

**Lack of Consumer Information and Education**

\(^\text{241}\) Kazi S M Khasrul Alam Quddusi, ‘Challenges of Governance in Bangladesh’ (2008) 38(2) *Social Change* 274, 281. The author notes ‘we are buying death or deadly diseases, and that too, at a very high price. Recently, 6.5 tonnes of formalin-treated fishes have been recovered in only one raid in Dhaka city.’

The provision of information to consumers on food products as to whether they are adulterated or not is an important concern in relation to the food safety issue in Bangladesh. If someone does not know much about any particular food product, that means he or she can assume it prima facie to be safe and buy it for consumption. Recently a group of researchers investigated whether urban dwellers are aware of food safety from media coverage in Bangladesh. The authors found that urban consumers like to buy processed food and they trust food labels. However, rural consumers, living where there is no electricity or media coverage, are ‘in the dark’ regarding food safety issues. Such circumstances place them in a vulnerable position and lead them to consume adulterated foods. In Bangladesh, consumer education is at a low level. Some newspapers publish news about food adulteration but a large number of people are unaware of the media reports and some fail to care about it despite their knowledge of the problem from these reports.

Misconceptions about particular foodstuffs or the people’s attitudes to them are also a reason for the consumption of unsafe foods by consumers. The people of Bangladesh are not well educated and are unable to distinguish between ‘unsafe’ or ‘safe’ foods, particularly if the product is not visibly affected or lacks a tell-tale odour. Some may also think that a food in nice packet or brightly coloured food is good for their health or unadulterated. Additionally, different consumers have different risk profiles which may rationally lead to a particular group of consumers to consume any particular unsafe food (for example, ‘some food is better than no food at all’). Sometimes, consumers are not always able to judge the longer-term risk factors, such as the impact of a nutritional imbalance in the diet, and the level of risk

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245 For details, Henson and Traill, above n 237, 156.
associated with food additives or pesticide residues in foodstuffs. For example, coloured misti\textsuperscript{246} (sweetmeats) are famous in Bangladesh as they look attractive and tasty. But few consumers know about the long term effects of the consumption of synthetic textile colours which may have been used in their preparation rather than the appropriate levels of approved and/or natural food colours. Consumers cannot even judge the immediate effects of any particular food. In fact, many of the direct effects may not be immediately apparent (for example, if a consumer consumes food treated with formalin, the effect may not be seen immediately, but later he or she may later develop cancer), and those that are observable may be confined to the longer term (for example, wasting away while apparently eating a good quantity of food but food lacking in quality due to adulteration). In these situations consumers rely upon external risk indicators (such as brand reputation and labelling) to indicate the level of food safety. Mitchell has analysed consumer perceived risk regarding a number of food products and the risk indicators employed in consumer choice processes. Important indicators identified were brand, product information, price, the nature of food packaging, and the nature of the food store and its ability to handle produce.\textsuperscript{247}

Hence, based on the above discussion, it can be said that a lack of consumer education and information for the consumers of Bangladesh may have a negative impact and contribute to the ongoing poor food safety situation in Bangladesh.\textsuperscript{248}

**Cultural Influences**

\textsuperscript{246} See the details of misti and its adulteration in section 1.5 of chapter 1 of the thesis.
\textsuperscript{248} The importance of consumer education in and awareness of food safety in Bangladesh has also been stressed at a recent food safety seminar in Bangladesh; see ‘FAO Report - Seminar on Food Safety Challenges in Bangladesh’, above n 144, 4.
Culture affects the consumption of adulterated foods in Bangladesh. For example, ripening fruits with calcium carbide, a cheap but harmful chemical associated with cancer, has become a part of the culture of Bangladesh where early tasting of fruit is valued. Rapid cultural changes— involving bottled water of questionable value in terms of purity and cost, ‘burgers’, and difficulty with the preparation of unfamiliar foodstuffs — also can contribute to food safety problems.

Apart from the circumstances and reasons mentioned above, there are other reasons for the continued production of unsafe foods in Bangladesh. These reasons include ‘unholy’ and illegal alliances of manufacturers and others, and the corrupt practices of both manufacturers and public officers (who are supposed to uphold food safety related legislation and protect the public).

The above discussion portrays a number of significant causes of the current food safety problems in Bangladesh. Among all the reasons mentioned above, product price is an issue which is related to the income of the people and what they can afford. In fact, the safety of a food product cannot be judged by its price because a higher price always does not mean that the product is safe. Sometimes, manufacturers demand a higher price for their product on the basis of their brand name, not for the quality of the actual product. Appleby et al commented, ‘the retail purchase price — the price that the consumer actually pays — does not necessarily reflect the levels of cost involved in production.’ A desire for greater profit can also be a motivating force. As section 2.4 of this chapter demonstrates, even famous brand food manufacturers who demand a higher price for their products from consumers in Bangladesh can and do produce adulterated food products.

Chapter 2: General Introduction

Consumer education and information should be an objective of food regulations. Regulations can be made that provide for the promotion of consumer education and information through different newspapers, electronic media and websites. Further, consumer education can help to eradicate the harmful food cultures or habits from Bangladesh. In fact, problems arising from cultural preferences or habits are an issue that can only be resolved gradually. They can be altered by changing the social structure and by providing proper scientific education that supports such change to the people.

Greater choice of food product can be also created by providing a good business environment for the food industries through effective regulations.

Therefore, the regulatory problem is a basic concern in regard to food safety issues in Bangladesh. The current research argues that if the regulations are updated and are properly implemented, all the other obstacles to ensuring safe food for consumers would be significantly diminished if not demolished.

2.8. Research Aims and Objectives

This study aims to improve the FSRR in Bangladesh by making it effective with a view to ensuring safe food for all consumers. The specific objectives of this research are as follows:

i. To critically examine the current legal, regulatory and enforcement framework of the food safety regulations of Bangladesh in light of the responsive regulation theory (RRT) and their equivalent frameworks of New South Wales (NSW), Australia.

ii. To identify the flaws and drawbacks of the food safety regulations of Bangladesh.

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iii. To investigate whether the current civil regime can ensure proper damages for the affected consumers and whether the existing criminal liability system is effective enough to make the unsafe food manufacturers criminally liable in Bangladesh.

iv. To offer suggestions for updating or reforming the existing legal, regulatory, liability and enforcement mechanisms of the food safety regulations of Bangladesh in light of their equivalents in NSW, where appropriate and necessary.

2.9. Research Questions

The central questions of this study are mentioned below.

- What are the major shortcomings of FSRR in Bangladesh?
- How can the existing FSRR for food safety be improved in Bangladesh?
- Does the present food safety regulation in Bangladesh comply with RRT?

The above research questions have been chosen based on the fact that the current FSRR in Bangladesh is flawed and ineffective as is evident from an examination of the existing literature and the realities encountered in every-day life in Bangladesh. The following sub-questions will be discussed in the present study in the search for answers to the main questions.

i. What are the current legal and regulatory frameworks for food safety in Bangladesh?

ii. Can the existing food safety liability regime ensure damages for the affected consumers?

iii. Can the present liability regime successfully criminalise dangerous food safety conducts in order to impose effective criminal liability upon the food manufacturers?
iv. How effective are the enforcement regimes governing food safety laws to ensure safe foods in Bangladesh?

v. How can RRT be applied in the enforcement regime of the food safety laws of Bangladesh?

vi. How are the food safety issues effectively regulated to ensure safe food in NSW?

vii. Can Bangladesh borrow from the FSRR of NSW to improve the equivalents in Bangladesh?

2.10. Rationale for the Study

After four decades of independence Bangladesh has been struggling to establish a proper food safety regulatory framework. In practice, the regulatory framework for food safety in the food industry has never been effective from any perspective. In a futile effort to make the regulations useful, some new laws have been enacted and some old laws have been updated. For example, the GoB has enacted the Bangladesh Standard Testing Institute Ordinance 1985 (BSTIO1985), and the Vokta Odhikar Songrokkhon Ain 2009 [Consumer Rights Protection Act 2009] (Bangladesh) (CRPA 2009) [author’s trans]. The GoB also updated the Pure Food Ordinance 1959 in 2005 and BSTIO 1985 in 2003. However, none of the government initiatives appear to have been successful as will be discussed in chapters 4, 5, 6, 7 and 8 of this thesis.

To the best of the present researcher’s knowledge, there have been no comprehensive academic studies or research on the FSRR in Bangladesh. Some minor works have been done in the area of consumer protection but few of them are concerned with food safety

251 The Vokta Odhikar Songrokkhon Ain 2009 is enacted and named in the Bengali language. The subsequent chapters of the thesis will refer to this Act in translation as ‘Consumer Rights Protection Act 2009’ as translated by the author of the study.
regulations. Moreover, previously no study has been undertaken that applies an appropriate or efficient regulatory theory to bring about an effective outcome for the food safety regulations in Bangladesh. Hence, there is scope to conduct legal research on the FSRR of Bangladesh.

The present research intends to make a significant contribution by offering a number of recommendations on strengthening the FSRR of Bangladesh in light of the RRT, which is currently applied in NSW. The RRT suggests a persuasion-based regulatory mechanism which has been commended and recommended in different studies. However, no comprehensive research has been carried out concerning the applicability of this theory for food safety regulation in any least developed country, especially in Bangladesh. Therefore, the present study aims to fulfil this gap and contribute to improving the food safety regulation in Bangladesh in light of the relevant provisions and practices in NSW.

The current study is expected to make recommendations that, if put into practice, would be able to eradicate a number of longstanding loopholes in the legal and regulatory aspects related to the manufacturing food industry in Bangladesh. Finally, it is hoped that the present research will enrich the knowledge of existing rules, regulations and mechanisms of food safety in Bangladesh and improve upon them so as to combat the lack of safety in regard to

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253 For example, in 2005, the renowned Hampton Review of the UK suggested persuasion instead of random inspection: see Philip Hampton, Reducing Administrative Burdens: Effective Inspection and Enforcement (HM Treasury, London, United Kingdom, 2005) 5. See also Peter Mascini and Eelco Van Wijk, ‘Responsive Regulation at the Dutch Food and Consumer Product Safety Authority: An Empirical Assessment of Assumptions Underlying the Theory’ (2009) 3 Regulation & Governance 27–47: in this study the RRT has been empirically tested in the Dutch food safety regulatory regime.
food products. It will also make a contribution towards the enrichment of contemporary literature on food safety regulations at regional and international levels.

2.11. Scope of the Study

The scope of the study is stated below.

a. Solid Foods for Human Consumption

A broad definition of ‘food’ includes a wide range of edible and drinkable substances for humans and animals, birds or fish and so on. But it would be unmanageable to encompass all foods in a single study. Hence, this study will look into solid foods for human consumption only. Amongst the liquid foods, this study will, however, extend the investigation to some vulnerable foodstuffs from safety perspective in Bangladesh such as, fruit juice, bottled water, ghee and the like.

b. Manufactured and Processed Foods

Food for human consumption may come from different sources (it may be homemade, domestically produced or imported), and in different states (such as, ‘natural’, that is food consumed in its raw state) or processed or manufactured to varying degrees.\textsuperscript{254} This research will basically investigate the manufactured foods\textsuperscript{255} and processed foods that are available for sale on the domestic market. However, among the processed foods, this thesis will mainly focus on minimally processed foods,\textsuperscript{256} especially packaged fish and sutki (dried fish) as food that is treated with formalin and DDT in Bangladesh.

\textsuperscript{254} For details see the classifications of food in section 1.3 of chapter 1 of this thesis.
\textsuperscript{255} See section 1.3 of chapter 1 of this thesis.
\textsuperscript{256} See section 1.3 of chapter 1 of this thesis.
It is worth mentioning that, in order to avoid repetition of the words, both the 'manufacturing' and 'processing' will not be used in every case. For the purposes of the thesis, the words such as 'manufacturing' will include 'processing'; ‘manufacturer’ or ‘producer’ will mean ‘processor’; ‘food manufacturer’ will mean ‘food processor’; and ‘food manufacturing/ producing’ will mean ‘food processing’ where applicable and necessary.

c. Laws Covered

The food safety legal framework of Bangladesh consists of numerous laws, and these laws are enforced by several regulatory authorities. But all statutes are not significantly functional; some are unnecessarily burdensome and outdated. These statutes are hardly worth an in-depth analysis. The current study has considered these pieces of legislation as ‘outdated, limited jurisdiction and unnecessary’ (OLJU) enactments in section 4.3.3 of chapter 4 of the thesis. Hence for the sake of a profound analysis of the important and currently effective food safety laws, the present study will not closely analyse the OLJU statutes. However, to demonstrate the overall food safety legal framework of Bangladesh these laws will be mentioned in chapter 4. Similarly, to portray the overall food safety regulatory framework of Bangladesh, the regulatory bodies relevant to the OLJU legislation will be discussed in chapter 5 of the thesis. Apart from this, these enactments will be mentioned where essential for the purpose of the thesis. Finally, this dissertation will mainly investigate the Penal Code 1860, the Special Powers Act 1974, the Pure Food Ordinance 1959, the Bangladesh Standard Testing Institute 1985 and the Consumer Rights Protection Act 2009. Except for these five enactments, all other pieces of legislation along with their regulatory bodies will not be analysed in this thesis except where required to support any relevant discussions in the study.

257 See the list of the laws in section 4.3 of chapter 4 of the thesis.
258 See the list of the regulatory authorities in section 5.3 of chapter 5 of the thesis.
d. Import, Export and Advertising Not Included

This thesis will only discuss the laws that deal with the domestic food manufacturing industry, those who commercially produce food in Bangladesh for human consumption. Therefore, no laws related to import or export will be discussed in this thesis. Also, this thesis will not elaborate on any laws regarding the advertisement of foods. The *Breast-Milk Substitutes (Regulation of Marketing) Ordinance, 1984 (BMSO 1984)*, a Bangladeshi statute which is intended to protect and encourage breastfeeding by prohibiting the advertisement, import, distribution and sale of breast-milk substitutes, such as powdered milk formulas, from the promulgation time of the Ordinance, will not be analysed in this thesis.

e. Recent Developments

While this thesis has finished the investigation and analysis of the food safety regulations of Bangladesh and identified their loopholes and drawbacks and reached to the recommendations for upgrading of the regulations, in late April 2013 the GoB drafted a new law for food safety called the *Nirapod Khaddo Ain* ['[Food Safety Law 2013](#) (FSL 2013) [author’s trans] which is supposed to be passed some time during this year. This proposed law has been summarily mentioned in section 9.5 of chapter 9 of the thesis and covers the basic principles of the *FSL 2013* as well as their similarities and dissimilarities with the recommendations of the current study.

f. Regulations of New South Wales, Australia

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259 *Breast-Milk Substitutes (Regulation of Marketing) Ordinance, 1984* ss 3, 4, 4A (*BMSO 1984*).

260 Some of the recommendations have been published in the author’s recent (February 2013) publication: see Abu Noman Mohammad Atahar Ali, ‘Food Safety and Public Health Issues in Bangladesh: A Regulatory Concern’ (2013) 8(1) *European Food and Feed Law Review* 31,31–40. The draft *Food Safety Law 2013* (Bangladesh) has encompassed several recommendations of this published work of the author of the thesis.

261 The draft law can be seen at Ministry of Food and Disaster Management (MOFDM), <http://www.fd.gov.bd/images/smilies/food%20safety%20law%202013.pdf> (last accessed 26 April 2013) (MOFDM, *Food Safety Law 2013* (draft)).
Every State and Territory has different food safety regulation in Australia. This study will examine the food safety regulations of NSW and the relevant provisions of the regulations of the Commonwealth of Australia that are considered to be complementary to the NSW state regulations. The food safety related laws, guidelines and overall regulatory mechanism of NSW will be discussed, analysed and recommended for adoption in Bangladesh only where it is needed for the upgrading or improvement of the FSRR of Bangladesh. To keep the dissertation within a manageable size, this thesis will not discuss any special laws relating to dairy products, \(^{262}\) meat, \(^{263}\) seafood, \(^{264}\) plant product, eggs, and shellfish and so on under the Food Safety Scheme of NSW. \(^{265}\) Respective NSW laws will be referred if necessary with regard to *sukki* (dried fish) and *misti* (sweetmeat) as these products are popularly consumed, but frequently adulterated, in Bangladesh. In particular, the *Food Regulation 2010 (NSW)* (*FR 2010*) deals with some specific businesses like meat, eggs, dairy businesses and so on which are not included in the scope of the chapter; and therefore, the *FR 2010* will not be further detailed in this thesis. However, the *Civil Liability Act 2002 (NSW)* will be discussed in chapter 6 where appropriate in order to examine the civil liability of the food manufacturers in Bangladesh. Except this, any other law from NSW will be referred in this study where appropriate and necessary. For example, chapter 7 will refer the *Crimes (Sentencing Procedure) Act 1999 (NSW)* to outline the purposes of criminal liability.

### g. Safety from a Scientific Point of View


\(^{263}\) See, eg, *NSW Standard for the Construction and Hygienic Operation of Retail Meat Premises (2001); Food Production (Meat Food Safety Scheme) Regulation 2000 (NSW).*


\(^{265}\) For details of the Food Safety Scheme, see section 4.2.7 of chapter 4 of this thesis.
Chapter 2: General Introduction

The meaning of the term ‘safety’ can vary based on personal perspectives, religion, culture, geographical location and so on. The present study will use the word ‘safety’ from a scientific point of view only. Adulteration by the admixture by human beings of various harmful, and/or inferior substances and additives to foodstuffs — as well as people’s unhygienic practices in regard to foodstuffs that cause various chronic and non-chronic, infectious and non- infectious diseases — will be discussed in this research with the emphasis due.

2.12. Research Methodology

The present research will be divided into three steps. These are: (a) the collection and review of the research materials which include statutes, case laws, books, journals articles, relevant websites and other secondary publications; (b) the identification and critical analysis of the merits and demerits of the legal, regulatory, liability and enforcement frameworks for food safety in Bangladesh; and (c) the framing of specific recommendations for further improvement of FSRR of Bangladesh in light of RRT as well as of the equivalent food safety regulatory mechanisms in NSW. Importantly, issues concerning enforcement of the framework of the food safety laws in Bangladesh will be critically analysed from the perspective of the application of RRT. In achieving the objectives of this research, it is essential to conduct an in-depth study of the laws and regulations governing food safety in Bangladesh.

In order to reach these goals, the current study will borrow from the food safety regulatory mechanisms of NSW where appropriate and necessary. This is because the current research has chosen NSW as the model jurisdiction with a view to improving the FSRR in Bangladesh. The reasons for the choosing of NSW as model jurisdiction are stated below.
Firstly, food safety is a fundamental issue which warrants equal treatment regardless of territorial boundaries or the level of economic development. Secondly, both jurisdictions belong to the common law family. Thirdly, RRT, the driving regulatory philosophy chosen for this research has been applied in the FSRR of NSW. Fourthly, Australian (especially NSW) food safety regulation is highly regarded at home and abroad, and conversely, the effectiveness of food safety regulations in Bangladesh has been overtly frustrating as outlined in this chapter. Based on the above reasons, borrowing the relevant principles, policies and laws regarding the food safety regulatory framework of NSW can be greatly advantageous to an attempt to develop their counterparts in Bangladesh where appropriate and necessary.

It is noteworthy that the current study does not involve a broad comparison between these two regulatory regimes, that is, those of Bangladesh and NSW. When a concern in regard to the FSRR of Bangladesh is identified, reference will be made to the equivalent NSW provisions and explained with a view to it demonstrating an updated legal provision or an effective practice of the regulations. The NSW regulations and practices will not be discussed if they seem inappropriate and unnecessary. This approach of analysis will be conducted with a view to identifying and recommending the most applicable solution for the FSRR of Bangladesh in light of their NSW equivalents.

RRT, as it is understood from the discussion in chapters 3 and 8 of the thesis, has been adopted in the food safety regulatory regime of NSW. Therefore, when any particular legal

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266 See chapters 3 and 8 of this thesis.
provision or regulatory mechanism will be recommended for Bangladesh following the identical example of NSW, it will be done in order to adopt RRT efficiently in the FSRR of Bangladesh.

Apart from using the food safety regulatory framework of NSW, this thesis will also use the relevant and apposite case references from the US and UK courts when analysing civil liabilities (in chapter 6) and criminal liabilities (in chapter 7) of the food manufacturers. These judicial references will be used with the intention of investigating and ensuring greater opportunities for damages being sought and obtained by consumers as well as for examining the effectiveness of the criminal liabilities of the food manufacturers.

The following methods will be used in this research.

1. Both primary and secondary resources will be used in analysing and examining existing laws, rules, policies, guidelines, principles and their enforcement regimes. Research materials will be collected mainly from libraries in NSW, online databases of the University of Wollongong and the internet. Some items will be borrowed through interlibrary loans when not otherwise available.

2. To collect the Bangladeshi laws, regulations, relevant books, journals, and government statistics, a field trip has been conducted in the initial stage of this study. During the field trip, the researcher has also taken the opportunity to informally consult with numerous food safety scholars, academics, enforcement authorities, magistrates, judges, delegates from the United Nations, consumers, manufacturers, processors and many others in order to receive the feedback regarding the proposed study.
3. The qualitative methodology of research will be followed for the interpretation of various primary and secondary archival materials in order to conceptualise the entire food safety issues of Bangladesh and NSW. The qualitative methodology of research entails:

an interpretive, naturalistic approach to its subject matter. This means that qualitative researchers study things in their natural settings, attempting to make sense of or interpret phenomena in terms of the meanings people bring to them. Qualitative research involves … case study, personal experience, introspective, life story, interview, observational, historical, interactional, and visual texts that describe routine and problematic moments and meaning in individual lives.268

The rationale of using the qualitative research method includes the argument that it is designed to make generalisation of the concepts considering the social phenomenon as well as it is useful for creating hypothesis based on the circumstances in order to build a usual explanation.269 Further, the current study involves two regulatory jurisdictions, namely, Bangladesh and NSW, where two different cultures exist. Qualitative research is suitable for the cross cultural studies,270 as this method allows the researcher to identify and define the complications of social and cultural diversities when looking into the issues by exploring fundamental insights and expectations.271 The similarities of the both (Bangladesh and NSW) regulatory regimes can be observed neutrally under the qualitative research method in order to investigate the adoptability of the regulatory mechanisms of NSW in Bangladesh.272 Therefore, considering the realities, the author of this thesis found it effective to apply the qualitative research method in carrying out the

272 See generally Denzin and Lincoln, above n 268, 3–4.
Chapter 2: General Introduction

study of food safety regulations of Bangladesh and NSW in order to determine an effective FSRR for Bangladesh.

4. Research materials concentrating solely on food safety in Bangladesh are rarely available. Reference can be found in a wide variety of literature on law, business, marketing, science and consumer protection related research literature available in journals, books, conference proceedings, newspaper reports, working papers, internet materials, videotape events, photographs and so on. These diverse research objects will be construed by using the ‘content analysis method’ that can suit the qualitative research in order to systematically discuss various research materials. By using the ‘content analysis method’, the present researcher will conduct a systematic study and analysis of a body of texts, images and other forms of scholarships from his perspective rather the original author/s or user’s perspective. Additionally, in reliance on the content analysis method, research materials will not be examined literally, rather texts and expressions will be treated as created to be read, interpreted and acted on for their meanings.

Treatment of Data

This thesis will investigate the major weaknesses of the FSRR of Bangladesh. The data will be used for analysis in order to raise and explore the existing issues in the food safety regulatory system of Bangladesh. In fact, the main objectives of using data will be to materialise the food safety related concerns of Bangladesh and offer possible solutions in light of their NSW equivalents where necessary and appropriate. Thus, the relevant NSW

273 'Content analysis is a widely used qualitative research technique': Hsiu-Fang Hsieh and Sarah E Shannon, ‘Three Approaches to Qualitative Content Analysis’ (2005) 15(9) Qualitative Health Research 1277, 1277.

274 Virginia Wilson, ‘Research Methods: Content Analysis’ (2011) 6(4) Evidence Based Library and Information Practice 177, 177.


276 Ibid xiii.
data will be cited while analysing a particular issue for conceptualising the problems related to the FSRR of Bangladesh.

2.13. Chapter Overview of This Thesis

The overview of the subsequent chapters of the thesis is as follows.

Chapter 3 provides a discussion on the application of RRT in the FSRR of Bangladesh considering its distinct socio-economic and politico-cultural realities. The original theory of RRT has been modified when applying it to the food safety regulatory mechanism of Bangladesh. Chapter 4 outlines the legal framework of food safety in Bangladesh. Chapter 5 discusses the main regulatory bodies involved with food safety regulation in Bangladesh along with their structures, functions and effectiveness in ensuring safe food. Chapter 6 reviews liability of food manufacturers for damages, and chapter 7 examines criminal liability of food manufacturers in Bangladesh. Chapter 8 investigates the administrative and judicial enforcement framework of the food safety regulations in Bangladesh; the main focus of this chapter is to find out how the enforcement regime of the food safety regulations in Bangladesh can adopt RRT and solve other important issues. The relevant laws and regulatory mechanisms are discussed throughout the dissertation where appropriate and necessary. Chapter 9 summarises the preceding chapters and contains recommendations together with final conclusions.

2.14. Summary and Conclusion

Food safety has long been a crucial problem in Bangladesh. The Government has introduced several regulatory initiatives to combat and address this issue, but these steps hardly ever are successful in eliminating or even minimising the lack of food safety as food adulteration and unhygienic production of foods continues to be rampant in Bangladesh to date. The overall
scenario portrayed above revealed that the food safety issue not only is costing the human lives and incurring economic losses for Bangladesh, but also it is seriously contributing to the gross violation of the human rights as well as fundamental constitutional rights of citizens. The final sections of this chapter reveal that although numerous reasons are considered to be responsible for the current food safety situation in Bangladesh, regulatory failure to combat the lack of food safety is the key reason for the current parlous situation. Thus, the current research has rightly selected to conduct this food safety study from the regulatory point of view. The major research questions of the study concern ensuring food safety through legal and regulatory reforms by guaranteeing adequate damages for consumers, imposing effective criminal liability upon the manufacturers and ensuring an efficient enforcement regime. However, to keep the dissertation to a practicable size, this chapter has outlined the scope of the study. The methodology section demonstrates that RRT will be the major regulatory philosophy adopted for the FSRR of Bangladesh. The methodology section also discloses that RRT has been adopted in the food safety regulatory framework of NSW which is a stimulating reason to choose NSW as a model food safety regulatory framework for Bangladesh along with some other inspiring rationales. Hence, the subsequent chapters of this thesis mentioned in the ‘chapter overview’ will mainly discuss the FSRR of Bangladesh in light of their counterparts of NSW where appropriate and necessary.
Chapter 3: Application of the Responsible Regulation Theory in the Food Safety Regulatory Regime in Bangladesh

3.1. Introduction

Regulatory philosophy is an important consideration in the creation, building and running of an entire regulatory system and its smooth implementation. The old regulatory practices, however, show that continuing deterrence has been the basic theoretical philosophy for enacting the laws. The regulators have been encouraged to provide severe sanctions to correct corporate misbehaviours. Later, the reformative theory of jurisprudence suggested treating human beings as correctable subjects from a behavioural point of view. From that perspective, the influential work of Ayres and Braithwaite’s *Responsive Regulation*, has greatly changed the concept of modern regulation. In this enduring and significant work they suggest why and how to combine deterrence and cooperative regulatory enforcement strategies. Ayres and Braithwaite introduce the responsible regulation theory (RRT) and recommend the regulatory enforcement pyramid of sanctions (REPS) to control the behaviour of the regulatees. The theory posits as a regulatory approach a gradual escalation — from persuasion and motivation at the base of the pyramid, upwards through to civil penalty.

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279 Nielsen and Parker, above n 277, 377.

280 The word ‘regulatee’ will mean the food manufacturers or processors for the purpose of this thesis unless or otherwise mentioned.

281 A civil penalty is also known as a ‘fine’ (but not in Bangladesh, as in Bangladesh criminal penalties also involve fines as detailed in section 8.2.3 of chapter 8 of this thesis). Such fines are imposed by the courts following the civil court procedures to settle the liability of the wrongdoers and to assess the penalty. A civil penalty is considered a hybrid of both civil and criminal laws because the penalty itself purposes to punish the wrongdoers. However, a civil penalty does not include any imprisonment. See Richard Head, ‘Company Secretary - The Rise and Rise of Civil Penalties in Australia’ (2008) 9 *KeepingGood Companies* 518, 518 <https://www.csaust.com/login.aspx?ReturnUrl=/media/406035/rise_civil_penalties_australia_october2008.pdf>
then criminal penalty, and licence suspension as more severe punishments, and finally to
licence revocation at the apex of the pyramid, as the corporate equivalent to ‘capital
punishment’.282 RRT is expected to ensure compliance at the base of the pyramid in most
cases, and only in few cases escalation to the higher level of pyramid is necessary where
‘prosecution is ultimately appropriate’.283

According to the RRT philosophy, every human being is born with a sense of
responsibility.284 However, growing up in the society diminishes this sense day by day unless
it is continually ‘polished’ or shaped by reminders. Thus, if regulations (similarly to
‘reminders’) are in place to persuade and motivate citizens to perform something correctly or
avoid some action, they will respond positively.

For the last two decades, RRT and its application has been discussed and empirically
investigated in a notable number of studies.285 RRT has already been adopted by several
countries, including Australia, Denmark and the Netherlands, and in different regulatory
regimes, such as those applying to income tax, occupational health and safety, labour
management, environmental inspection areas and so on.286 Responsive regulation has been
adopted in the food safety regulatory regime (FSRR) of Australia287 (particularly in NSW)
and has been empirically tested in the Dutch FSRR.288

> Therefore, for the purpose of the current study any penalty which embraces the imprisonment will not be
considered a civil penalty.

282 Ayres and Braithwaite, Responsive Regulation: Transcending the Deregulation Debate, above n 278, 35, 36.
The pyramid structure of Ayres and Braithwaite also can be found at Bronwen Morgan and Karen Yeung, An
Introduction to Law and Regulation: Text and Materials, The Law in Context Series (Cambridge University
283 David Brown et al, Criminal Laws: Materials and Commentary on Criminal Law and Process of New South
285 For details, see Charlotte Wood et al, ‘Application of Responsive Regulatory Theory in Australia and
286 Ibid; Mascini and Van Wijk, above n 253, 27–8.
287 See Productivity Commission Report on Food Safety, above n 267, xx. Note: The detail will be discussed in
chapter 8 of the thesis.
288 See Mascini and Van Wijk, above n 253, 27–47.
Chapter 3: Application of Responsive Regulation in Bangladesh

The idea of applying RRT to the FSRR of Bangladesh gives rise to two important considerations. Firstly, the complete model of responsive regulation — one that considers its positive and negative aspects as well as the challenges in the 21st century — has not been applied to the FSRR of any LDC. Secondly, RRT is basically constructed for developed countries. Therefore, where it is applied in a country like Bangladesh, it may require some modifications. These two issues will be the main focus of this chapter. Finally, a number of recommendations together with the completely adjusted model of RRT for application in the FSRR of Bangladesh will be proposed in the last sections of this chapter.

The current chapter will consider the idea of regulation, responsive regulation and its challenges in applying it to the food safety sector of a LDC, in this instance Bangladesh. After discussing the positive and negative aspects of the application of responsive regulation to the aforesaid regimes, and after considering the circumstances of the jurisdiction, the required modifications will be proposed for the regime.

To achieve these goals, the structure of the chapter will be as follows. Section 3.1 provides an introduction. Section 3.2 and section 3.3 will discuss the concept of regulation and responsive regulation respectively. The applicability of responsive regulation in the FSRR and in an LDC will be discussed respectively in section 3.4 and section 3.5. Section 3.6 will analyse aspects of the application of responsive regulation in the FSRR of Bangladesh. Since responsive regulation warrants modification before applying it to the FSRR of Bangladesh, section 3.7 will discuss changes, such as where a grading system in the food industry will be created and analysed for possible application. Section 3.8 will give a brief description of the practice of responsive regulation in the FSRR of NSW. Finally section 3.9 will summarise the entire chapter with conclusions.

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289 For details, see note 202.
3.2. Concept of Regulation

We are living in an era of regulation. The house where we live has to be built in accordance with a construction code, materials standards, fire code and so on; our transport (including buses, cars and aeroplanes) are made, sold, driven and maintained by stringent government regulation; and we even take our children to play in play-grounds where there are government regulated safety standards to be adhered to by those who design and construct the play-ground.  

Regulation has been defined in different ways but in various examples of legal scholarship generally refers to mechanisms used for governing, directing or changing human behaviour in particular areas of endeavour. Not only are statutes and regulations included in the concept of ‘regulation’, it also embraces standards, policy statements, rulings, codes of conduct and the like. In its narrowest and simplest meaning, regulation refers to ‘the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules’. In the broader sense, regulation covers all tools for social control, which also includes non-state mechanisms. From an economic point of view, it sometimes means an effort by the state actors to direct the economy. Baldwin, Scott and Hood extend the concept of regulation to that which has any

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293 Ibid 4.
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effects on persons’ behaviour. Additionally, a variety of activities including legal or quasi-
legal norms may also be encompassed by the definition of regulation.

A regulation has various characteristics which are discussed below.

(a) Regulation is generally associated with the governing of the behaviour of citizens or
enterprises and which includes some principle, rule, or condition. In the market,
regulation works to ensure a fair and effective marketplace for consumers as well as for
industries. It comprises an assortment of government actions, which includes the
development of policies, relevant scientific and policy research, the framing and
enactment of legislation and enforcement strategies adopted in that regard. A Canadian
research report defined regulation as that which includes both formal and less formal
instruments; they can be statutes, subordinate legislation and ministerial orders, standards,
strategies or guidelines, codes, education and even information campaigns.

(b) Regulation supports the social and economic goals of a state so that every citizen is
protected to a greater or lesser degree. It also encourages a dynamic economy which
creates opportunities for citizens. In the 21st century, good regulation should be able to
foster closer relationships between different parties within the whole system, such as
governments and their various departments, industry, consumers and other stakeholders.
This, in turn should be able to improve information, transparency and trust.

(c) Every regulation should have an effective enforcement strategy, as poor enforcement can
weaken the most sophisticated regulatory devices. However, the effectiveness of a

295 Baldwin, Scott and Hood, above n 292, 4.
296 Jordana and Levi-Faur, above n 292, 4.
297 External Advisory Committee on Smart Regulation (EACSR), Smart Regulation: A Regulatory Strategy for
Canada (Government of Canada, 2004) 9 (Smart Regulation).
298 Ibid.
299 Robert Baldwin and Martin Cave, Understanding Regulation: Theory, Strategy, and Practice (Oxford
University Press, 1999) 96.
proper regulatory system depends on a number of different factors. Among them, coordination is very important. Regulatory systems will run smoothly when the various regulatory authorities are efficiently coordinated. Regulators must make an effort to avoid overlap, duplication and inconsistency in every aspect of the regulatory process in order to ensure proper and effective enforcement.300

(d) A regulation must reflect the latest and the best knowledge.301 However, knowledge, expertise and standards should be justified by evidence when making a regulatory decision.302

(e) Every regulation is expected to be primarily based on standards and performance. If necessary, it must be reviewed and modified where required, eliminating unwarranted or unjustified or simply out-of-date irrelevant provisions to ensure maximum responsiveness of the regulated parties. It should adopt new incentives and consider the ‘policy objective, consumer needs, citizens’ expectations, scientific and technological advances and the changing business environment’.303

(f) Finally, a good regulatory system must consider the issues related to cost effectiveness,304 and be supposed to not allow direct state interference in every aspect.305

The following discussion will concentrate on revealing that responsive regulation basically demonstrates most of the characteristics of good regulation as discussed here.

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300 EACSR, *Smart Regulation*, above n 297, 134.
301 Note that section 3.6 of this chapter will discuss the importance and significance of network governance and the use of the expertise and updated food standards of developed countries.
303 Ibid 135.
304 However, cost effective issues must not be compromised with the public health issues. An unhealthy foodstuff can be lower in price but in the long run it will cause various health problems which could cost much and even the life which is never expected.
305 Hampton, above n 253, 7.
3.3. The Concept of Responsive Regulation

The traditional ‘tit-for-tat’ system of regulation is an old notion. The ‘tit for tat’ approach, generally means that increasingly serious violations of laws are dealt with by increasingly severe sanctions, and finally with the ultimate sanctions, such as imprisonment or cancellation of a licence to continue the business.\(^{306}\) However, the effectiveness of the ‘tit-for-tat’ approach has long been a matter of great debate. Ayres and Braithwaite admit that the ‘begin with guns’ approach is often effective when the regulatory agencies try to ensure compliance,\(^{307}\) as it is sometimes anticipated that tough sanctions will force corporations to comply with the law.\(^{308}\) Further, sometimes encouragement or cooperation is believed to make a regulatory system effective. If the system lacks effective sanctions, however, this could reflect the assumption of a great degree of willingness to comply on the part of the regulated. Compliance itself is, in fact, an effective element of an effective regulatory system. In introducing responsive regulation, Ayres and Braithwaite advanced different arguments for bringing both deterrence and compliance under same umbrella and it has been admired by authors across a wide range of legal scholarship. Ayres and Braithwaite’s concept of responsive regulation has a number of characteristics. These are described below.

**Motivation and Deterrence:** Responsive regulation suggests that ‘in order to be effective, efficient, and legitimate, regulatory policy should take neither a solely deterrent nor an entirely cooperative approach’.\(^{309}\) Ayres and Braithwaite espoused a pyramidal approach which starts with persuasive measures and then escalates to deterrence when necessary. As mentioned earlier, human beings are born with a sense of responsibility and they naturally

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\(^{307}\) Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, above n 278, 19.

\(^{308}\) Ibid 20.

\(^{309}\) Nielsen and Parker, above n 277, 376.
like to be trusted;\textsuperscript{310} hence, continuing punishments can kill the good will and responsiveness of a person. On the other hand, if a law is based only on assumed compliance in response to persuasion and if it is thought that persons will be motivated to be responsible in every case, this is also equally wrong. This is because, as history demonstrates, human beings are not responsible in every case and like to exploit opportunities that arise. Thus, the originators of RRT argue that a total persuasion based strategy will be exploited when the economic rationality motivates the actors and, on the other hand, a punishment based strategy will mostly undermine goodwill and any sense of responsibility.\textsuperscript{311} Thus they recommend a combined approach involving a pyramid of sanctions but include a commitment to persuasion.

**Persuasive Approach:** Braithwaite suggested that, particularly in the corporate regulatory regime, consistent punishment for regulatory noncompliance can have relatively poor outcomes while persuasion can have positive consequences, especially ‘when there is reason to suspect that cooperation with attempting to secure compliance will be forthcoming’.\textsuperscript{312} In fact, responsive regulation is essentially designed in such a way that it stimulates the regulatory capacities of the institutions,\textsuperscript{313} and persuasion plays a significant role in this whole process. It is worth mentioning that the notions of motivation and persuasion in the corporate sector were seen in various examples of early legal scholarship. Simpson favoured administrative sanctions and suggested that inspectors should be given power to issue an improvement notice so that a regulated party (regulated) had time to correct his mistakes while a prohibition notice could be served where the situation was worse.\textsuperscript{314} Simpson further argued that a solely persuasive approach could overindulge the regulatees that were violating

\textsuperscript{310} Braithwaite, *Restorative Justice and Responsive Regulation*, above n 284, 36.
\textsuperscript{311} Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, above n 278, 19, 24.
\textsuperscript{312} Braithwaite, *Restorative Justice and Responsive Regulation*, above n 284, 30.
regulations, while a completely deterrent approach could discourage them in regards to regulatory compliance as well as lead to a deterioration in the relationship between the regulators and the regulatees.\textsuperscript{315}

**Cheap:** In responsive regulation, Ayres and Braithwaite argue that punishment is expensive and persuasion is cheap.\textsuperscript{316} Not only this, but the continuing use of punitive sanctions creates a regulatory ‘cat-and-mouse game’ whereby regulatees exploit loopholes which then prompts regulators to create new rules to cover those laws.\textsuperscript{317} It is sometimes claimed that the driving reason for the remarkable influence of the responsive regulation in corporate sector may be the ‘clear empirical evidence that sometimes punishment works and sometimes it backfires, and likewise with persuasion’.\textsuperscript{318}

**Regulatory Enforcement Pyramid of Sanctions (REPS):** Responsive regulation recognises that it is hard for regulatory agencies to identify and implement a sanction for every infringement of the law. Rather, promoting an approach where the regulatees adopt voluntary compliance is convenient and inexpensive. Thus, responsive regulation targets the achievement of the maximum levels of regulatory compliance by persuasion.\textsuperscript{319} Starting with persuasion in the lower stage of the pyramid actively encourages duty holders to regulate themselves by motivating them positively;\textsuperscript{320} it also helps to avoid unnecessary hostility between the regulators and the regulatees.\textsuperscript{321} The most unique feature of the responsive regulation is the introduction of REPS as portrayed in this chapter (see Figure 3.1). In fact,

\begin{itemize}
\item \textsuperscript{315} Ibid 196–7; Mascini and Van Wijk, above n 253, 28–9.
\item \textsuperscript{316} Ayres and Braithwaite, Responsive Regulation: Transcending the Deregulation Debate, above n 278, 19.
\item \textsuperscript{317} Ibid 20.
\item \textsuperscript{318} Braithwaite, Restorative Justice and Responsive Regulation, above n 284, 31.
\item \textsuperscript{320} Neil Gunningham and Richard Johnstone, Regulating Workplace Safety: System and Sanctions (Oxford University Press, 1999) 117.
\item \textsuperscript{321} Gilligan, Bird and Ramsay, above n 319, 428.
\end{itemize}
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REPS is ‘an attempt to solve the puzzle of when to punish and when to persuade’. REPS is an enforcement based and action oriented plan. It can be observed that the lower parts of the pyramid have been given comparatively (and gradually) more space than the other parts. The reason for this is that most regulatory action will take place ‘at the base of the pyramid’, where persuasion will be used to try and attempt to convince regulatees to act in accordance with the regulations, a process which has been described as the ‘most restorative dialogue-based approach’. It is notable that persuasion may include motivation, education, advice, training, and so on; it also may embrace surveillance programs or media releases for encouraging a greater consciousness of legal and regulatory obligations. If persuasion does not work, the regulators may consider an escalation within the REPS structure and proceed to a warning letter. In the event of the warning letter failing to secure compliance, the regulators may impose a civil monetary penalty in an attempt to prompt compliance; the next step will be the criminal penalty if the civil penalty fails. If all the prior steps do fail, regulators will move to plant shutdown or temporary suspension of the licence in the case of a corporation. Finally, if the temporary suspension of licence does not work, regulators will have no option but to escalate to the final and uppermost step of the pyramid and revoke the licence.

322 Braithwaite, Restorative Justice and Responsive Regulation, above n 284, 30.
323 Morgan and Yeung, above n 282, 196; Scott, above n 313, 157.
324 Braithwaite, Restorative Justice and Responsive Regulation, above n 284, 30.
325 Scott, above n 313, 157.
326 Referring the Australian Securities and Investments Commission (ASIC) website in Gilligan, Bird and Ramsay, above n 319, 428.
327 Ayres and Braithwaite, Responsive Regulation: Transcending the Deregulation Debate, above n 278, 35. See also Morgan and Yeung, above n 282, 196; Scott, above n 313, 157; John Braithwaite, ‘Policies for an Era of Regulatory Flux’ in Brian Head and Elaine McCoy (eds), Deregulation or Better Regulation? Issues for the Public Sector (Macmillan, 1991) 21, 24 (quoted in Fiona Haines, Corporate Regulation: Beyond Punish or Persuade (Clarendon Press, 1997) 218–19). See also Freiberg, above n 306, 97–8; ALRC, Principled Regulation, above n 306, 76.
**Information Based Approach:** Under the REPS most regulatory action occurs at the base of the pyramid where the aim is to achieve compliance by the use of persuasion.\(^{329}\) If persuasion fails and a regulatee persistently refuses to cooperate, only then is an inspector advised to escalate to more severe sanctions. In every case inspectors have to start with persuasion, which is mainly considered to be comprised of information based strategies. The reason behind the application of persuasion is that most human beings like to cooperate and conform to authority,\(^{330}\) and they generally respond to persuasion and motivation.\(^{331}\)

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\(^{328}\) Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, above n 278, 35.


Compliance: Responsive regulation is backed by a philosophy that individual or corporate bodies are most likely to abide by the regulations when they are informed that, in order to REPS to work effectively, the enforcement is supported by more severe sanctions which can be implemented when regulatees fail to comply. Hence, compliance can be said to be a dynamic game of enforcement, where the regulators try to get promises from regulatees by negotiation or persuasion, while there is a credible threat of penalties if the regulatees prefer to neglect compliance.332

Social Control: Responsive regulation is the least costly and more respectful way of effecting social control.333 It ‘makes the use of coercion more legitimate, because non-coercive strategies have been given a chance to work’.334 In fact, day by day it makes a society more responsible. Braithwaite states that when responsive regulation is working in a regulatory regime, an inspector may visit a regulatee and find that regulatee violating the laws, but the inspector may suggest that there will be no penalty this time but in future a penalty will be considered. In this case, the regulatee should certainly understand the situation and then respond positively. If he or she does not respond positively, there is the system of deterrence, and lastly the incapacitative option. Braithwaite calls this entire system ‘an integration of restorative, deterrent and incapacitative justice’.335 In addition to creating a greater responsiveness among all parties, responsive regulation also creates a chance of

332 Braithwaite, Restorative Justice and Responsive Regulation, above n 284, 34; Ayres and Braithwaite, Responsive Regulation: Transcending the Deregulation Debate, above n 278, 19. See also Brent Fisse and John Braithwaite, Corporations, Crime and Accountability (Cambridge University Press, 1993) 143 [3]; Haines, above n 327, 219.
333 Braithwaite, Restorative Justice and Responsive Regulation, above n 284, 32.
335 Braithwaite, Restorative Justice and Responsive Regulation, above n 284, 32–3.
dialogue where the regulatees have the chance to argue about what they consider to be unjust or unworkable laws.\textsuperscript{336}

In support of the RRT, Freiberg describes responsive regulation as embodying six basic concepts. Firstly, it focuses on contingency, which indicates that regulators need to sketch some tools and strategies so that they can match the situations produced by the activities of the regulatees. Secondly, responsive regulation warrants an enforcement hierarchy where the sanctions will be escalated to the more punitive level if the prior one proved ineffective. Thirdly, it is flexible, which means that it considers the circumstances and the good will or bad will of the regulatees. Fourthly, responsive regulation features tripartism,\textsuperscript{337} which promotes the involvement of third parties (in addition to the state regulator and the manufacturer regulatee). Fifthly, it brings the thoughtful application of sanctions. Lastly, it empowers the parties.\textsuperscript{338}

**Criticism of Responsive Regulation:** Besides all the positive characteristics there are some criticisms of responsive regulation. Some of these are examined below.

Freiberg considers that REPS works only when complete enforcement is not required and this makes it incomplete as a system for primary enforcement. But it is argued that Freiberg failed to notice that standards, codes, ethics, guidelines and agreements which work at the base of the pyramid as ‘persuading’ approaches, certainly influence the regulatees to comply with the regulations and signify their connection to enforcement.\textsuperscript{339} Braithwaite has admitted\textsuperscript{340} that responsive regulation is not designed to maximise consistency in law enforcement.\textsuperscript{341} In fact, the concept of responsive regulation developed from dissatisfaction with the business

\textsuperscript{336} Ibid 34.
\textsuperscript{337} Tripartism will be discussed in section 3.6.1 of this chapter.
\textsuperscript{338} Freiberg, above n 306, 97.
\textsuperscript{339} Ibid 98–9.
\textsuperscript{340} Braithwaite, *Restorative Justice and Responsive Regulation*, above n 284, 29.
\textsuperscript{341} Freiberg, above n 306, 98–9.
regulation debate. It is said that firms sometimes only understand ‘the bottom line’, which warrants the application of consistent sanctions for breaches of regulations. On the other hand it is also claimed that business people are responsible citizens and persuasion can help them to comply with laws. Therefore, finally the important critical question is: when to apply persuasion and when to apply punishment.  

This question is at the heart of the discretion of the inspectors. It also requires clear guidelines indicating the situations or circumstances that comprise offences for which the regulators can penalise the regulatees.

Mascini and Van Wijk have doubts about the enforcement consistency of inspectors under the responsive regulation model. When should an inspector apply punishment — is it on the first visit or on a subsequent visit? What happens if the inspector is changed or transferred to different place? And what will the new inspector do because the next visit will be the first visit of the new inspector! Further, the employees, owners or directors of the firm can change. All of these people concerned may not have the knowledge of the prior inspections and their outcomes, which prompts the same theme regarding the application of responsive regulation: when to punish and when to persuade.

In the absence of clear guidelines in regard to the question of when to punish and when to persuade, the concern raised by Mascini and Van Wijk can be addressed simply. When the first inspector comes to inspect a particular company, he or she should keep detailed data of his inspection on record regarding what happened on that occasion and how the particular regulatee behaved. The 21st century is blessed with electronic and computerised technology. Things are generally recorded and subsequently stored using computerised and/or electronic devices, like smart-phones, tablets, cameras, computers, and so on. It is preferable for the

342 Braithwaite, Restorative Justice and Responsive Regulation, above n 284, 29. Note: Braithwaite has explained the various circumstances regarding punishment and persuasion in his noteworthy book: John Braithwaite, To Punish or Persuade: Enforcement of Coal Mine Safety (State University of New York Press, 1985).

343 Fisse and Braithwaite, above n 332, 140, 145.

344 Mascini and Van Wijk, above n 253, 30.
same inspector visit the same regulatee the second time; however, if he or she does not come, the current inspector should have the previous record and consider it closely before taking any decision either to further persuade or to punish (impose sanctions). The current inspector needs to consider the prior attitude of the regulatee, whether the particular regulatee regarded the persuasion positively or negatively, that is whether they accepted the need to comply or rejected it and whether the response was put into action. If the regulatee seemed to have behaved positively the first time but was now behaving badly, then they should be given further persuasion and exempted from punishment with a warning letter substituted. A regulatee, who did not behave positively on the first visit and showed no signs of complying with the regulations, should be given a warning letter with a possibility of escalating to a civil penalty on the next visit. In the event of the owners of a particular firm having changed, the current owners or directors or employees should be aware of the prior recorded data kept in the firm’s — and the regulator’s — files. That such information be made available to potential new owners should be a part of the norm of firms and common sense that they see such material before coming into control of a firm that has been owned by others. It can otherwise be argued that, ‘we are new to this company and we don’t know what happened before!’ . This kind of excuse rarely should be a cause for noncompliance, however. 345 In fact, computerised and annotated data can help the current inspector to decide whether he or she needs to apply sanctions now or choose to adopt a course of persuasion once again. However, there are inevitably cases where particular mitigating circumstances should be taken into consideration, such as where a father has died unexpectedly and an inexperienced son takes over the company directorship or where a major cyclone has destroyed every record of the firm and so on.

345 For a detailed discussion regarding the problems of application of responsive regulation along with solutions, see generally Mascini and Van Wijk, above n 253, 30–1.
Finally, it is argued that no single theory of regulation can be equally applicable for all countries. Theories need to be developed and modified to accommodate different times and regimes. When applying any particular theory, it needs to be adjusted to the prevailing circumstances of the specific regulatory regime. As Ayres and Braithwaite admitted, ‘responsiveness implies, after all, that there are no universal solutions’. Braithwaite suggested that REPS (as shown above) is the basic model, though it may not represent the content of a particular pyramid, it is one which permits the modification of the responsive regulation model where it needs any changes to allow it to be accommodated in the FSRR of Bangladesh and Australia. Thus, the following parts of this chapter will be an effort to accommodate the RRT in the FSRR of Bangladesh and modify it if necessary.

3.4. Application of Responsive Regulation in a Food Safety Regulatory Regime

Responsive regulation and its REPS have been successfully used in various regulatory regimes in different countries. In Australia, the Corporations Act 2001 (Cth) has been designed on the basis of responsive regulation. The Australian Occupational Health and Safety (OHS) and coal mining sector regulations have also been greatly influenced by REPS. The Australian Tax Office (ATO) also utilises the pyramidal compliance

346 Ayres and Braithwaite, Responsive Regulation: Transcending the Deregulation Debate, above n 278; Mascini and Van Wijk, above n 253, 28.
348 See a modified model of an enforcement pyramid under responsive regulation theory in Freiberg, above n 306, 98.
349 Note ‘Cth’ is the accepted abbreviation for ‘Commonwealth of Australia’, indicating that the Act is federal (that is, national) legislation.
350 Gilligan, Bird and Ramsay, above n 319, 428.
enforcement model,\textsuperscript{352} which is based on the RRT. In addition to this, responsive regulation has been employed by several jurisdictions including the United Kingdom, New Zealand, Timor Leste, Indonesia, and Pennsylvania within the United States of America.\textsuperscript{353} Most importantly, in New South Wales the NSW Food Authority (NSWFA) is currently using the REPS with a great success.\textsuperscript{354} However, the application of responsive regulation in the food safety sector deserves a broader discussion from wider perspectives. The following section will be a discussion of the application of responsive regulation in the FSRR, addressing its challenges and also proposing solutions.

Akin to the other cases, implementation of the REPS in the FSRR warrants addressing the central question as to ‘when to punish and when to persuade’. However, this question has been rationally addressed in section 3.3 of this chapter. Specifically, Braithwaite, Murphy and Reinhart suggested that the regulators need to cope and adjust their behaviour considering the various tendencies and capacities of regulatees regarding compliance.\textsuperscript{355} Hence, in adopting REPS in its FSRR the enforcement authority needs to adjust the regulation considering the particular country in which it operates as well as addressing its current FSRR. In fact, before applying a regulatory policy, adoptability is the most important and primary factor to consider.\textsuperscript{356}

Responsive regulation has been empirically tested by the Dutch Food and Consumer Product Safety Authority.\textsuperscript{357} Research found that while applying responsive regulation, inspectors’

\textsuperscript{353} Braithwaite, ‘Responsive Regulation and Taxation’, above n 352, 4.
\textsuperscript{354} See Productivity Commission Report on Food Safety, above n 267, xx.
\textsuperscript{357} Mascini and Van Wijk, above n 253, 31.
views varied on different issues; in particular, they had different opinions on regulatee behaviour, the focal point of inspection, enforcement style, and consideration of the profile of the regulatees. Actually, these are the issues regarding regulatory implementation which should be addressed.

Firstly, it is quite normal to have different views from inspectors, as human conscience and considerations generally differ from one individual to another. This issue can be possibly addressed by making clear guidelines for inspection as has been already emphasised above. Guidelines can direct the main issues regarding inspection in an orderly manner ensuring that the worst problems are the first addressed; for example, whether any prohibited chemical is used or not, whether an industry’s cleanliness satisfies the standard or not, whether the workers have any infectious diseases or not, and so forth. Inspectors are to discover whether or not the manufacturer (the regulatee) behaved well and tried to comply with food standards or, for example, tried to maintain cleanliness, bought new machinery for production or employed trained and experienced workers.

Secondly, the consideration of the profile of the regulatee is an important issue. The word profile is used here so as to indicate that every feature and circumstance of the particular food manufacturer is to be considered. An inspector should consider the particular food product that the particular manufacturer is making, or even the size and locality of the manufacturer. Food safety is a sensitive issue because food directly enters the human body and can have temporary or permanent affects on the body or mind either immediately or later due to accumulated impacts for example. A seriously unsafe food produced by a small local manufacturer (these being responsible for the bulk of processed food product sales in Bangladesh) can cause the sudden death of a consumer; while larger and even renowned manufacturers have also been shown to be guilty of a lack of observance of what is required

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to guarantee food safety for consumers. So, there is no possibility of overlooking any food business without increasing risks.

Empirical research on the application of responsive regulation by the Dutch Food and Consumer Product Safety Authority found that sometimes the inspectors wanted to penalise the violators but could not whilst sometimes they felt that the violators should be exempted, yet they could not but penalise them due to the rules or guidelines for inspection. This experience indicates that despite having clear guidelines and rules for inspection, food inspectors need to be given some discretionary powers. It has been reiterated that consideration of circumstances is significantly important for escalation or de-escalation of the REPS. Correctly utilising discretion is a matter of experience which can hardly be expected from someone who lacks it. This necessitates the proper training of the inspectors as well. However, in Bangladesh allowing greater discretion for inspectors should be discouraged as corruption has already been a severe problem for last couple of decades. The two (rules and discretion) need to be balanced in effect.

Every regulator follows its own policy and principles. The enforcers are all human beings who are driven by their human instincts. It is argued that inspectors may not always be able to apply a suitable enforcement approach due to conflict with other goals. For example, there may be chances of building a relationship between the regulators and the regulatees (between the inspectors and manufacturer) which may have either a positive or negative impact on the expected outcome. Whilst in some instances a closer relationship may make a regulatee more motivated to comply, this is not always the outcome. If the relationship becomes closer, an inspector may indeed be reluctant to escalate in the REPS to deterrence even where events indicate that this should occur. On the other hand, if the relationship fails and falls to the level

359 Ibid 37.
361 Mascini and Van Wijk, above n 253, 38.
of conflict, then the inspector may more likely to adopt deterrence rather than persuasion, despite the indication that a lesser response may be required. This problem can be easily avoided by changing the inspectors on a regular basis. If the detailed data of the prior inspection is available (as has been mentioned), it is hardly essential to send the same inspector to the same regulatee in every case. Moreover, this changing of inspector might have another positive impact in an LDC. If the manufacturer does not know who the next inspector is, or if the particular inspector does not know where he or she is going to inspect next, then there are fewer opportunities for corruption or bribery of the inspector by those producing or selling unsafe foods.  

Finally, it can be argued that the application of responsive regulation in the FSRR is arguably a correct choice. The so-called ‘control and command’ system which suggests stronger (often criminal sanctions) for a deterrence-based justice system has been said to have failed in the business sector; the reason for this failure is not the lack of goodwill on the part of the corporations or smaller businesses rather it is the case that their management may simply not have the capability to comply; and it is argued that much of this problem can be solved by increasing the manufacturer’s ability to comply by the regulator’s use of persuasion, and the introduction of appropriate education or by training at the base of the enforcement pyramid under responsive regulation.

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362 The issue of corruption in relations between the regulators and the regulatees will be discussed in section 3.6.1 of this chapter.


3.5. Application of Responsive Regulation in a Least Developed Country

The question as to whether responsive regulation is applicable in an LDC like Bangladesh needs to be addressed. Braithwaite mentions that responsive regulation is basically designed for developed economies and it faces some limitations in relation to its application in a developing country.

Firstly, the regulatory capacities (for example, the regulatory bodies, their infrastructures, functions, powers and so on) in developing countries are not as good as those in the developed nations.365 Secondly, responsiveness can work properly where there is a society with a strong state, markets, civil society and so on. In practice, the institutional strength of these organisations facilitates the governance capabilities of the other institutions.366 The weaker organisational capacities of developing countries due to a lack of regulatory staff — as well as insufficient education of those that do exist — can hamper the effective operation of responsive regulation.367 Thirdly, the weaker markets of such countries inhibit the progress and growth of state capacity, and a weaker state contributes to slowing down every institutional infrastructure.368 Fourthly, developing nations have a general problem of corruption among regulatory bureaucrats; and non-governmental organisations (NGOs) are hardly strong enough to work as watchdogs to combat this problem. The overall state regulatory capability of the developing countries is weak and it often has to deal with a less settled and less powerful business sector.369 Thus some countries do not possess an adequate

365 Ibid 884, 887.
367 Braithwaite, ‘Responsive Regulation and Developing Economies’, above n 330, 889.
368 See generally ibid 886.
369 Ibid 885, 889. Nevertheless as the country develops further, they may also deal with incursions by huge multinationals into their developing markets as manufacturers in Bangladesh. The country’s regulator may then also be at a profound disadvantage due to lack of experience with such companies and find that they ‘flex their muscles’ in the market and attempt to operate far more freely than may be the case in the country of origin or may demand such cost pricings as makes ‘cutting corners’ by adulteration and so on probable rather than possible.
and sufficiently strong state regulatory capacity required to obtain the best outcomes that would otherwise predicted from RRT.\textsuperscript{370}

Apart from the above, Braithwaite suggests some positive aspects of responsive regulation for developing nations. The enforcement pyramid indicates that an inspector will not apply a sanction on his or her first visit, but rather he or she will try to persuade the regulatee by providing advice and motivation and by letting them know that he or she (the inspector) will soon return and, if the same poor conditions are found in regard to the corporation or manufacturer, he or she will have no other alternative but to penalise that manufacturer as per the rules. If the regulatee agrees with this, it seems that any future punishment (if the manufacturer continues to ignore the regulatory requirements) would also be fair as the REPS works to ensure compliance.\textsuperscript{371} This proposition of the REPS indirectly indicates that the corporations need to learn to be more responsible so that they do not need to be warned further or penalised upon further inspection. In practice, this compliance method is a useful option for developing countries. Most such countries do not have a mechanism to implement all state legislation; not only this, their governments hardly possess the capacity to enforce each and every law, rule and so on. Hence, Braithwaite recommends that, due to their weak enforcement capabilities, developing countries need to use the REPS for compliance so that they can reduce the burden on the regulators.\textsuperscript{372} Therefore, it is strongly believed that responsive regulation has potential for developing countries.\textsuperscript{373}

Although Braithwaite has not separately mentioned the applicability of responsive regulation in LDCs, this thesis argues that the aforementioned observations in relation to developing countries are equally relevant to LDCs. Hence, in view of the above discussion it can be

\textsuperscript{370} See generally Scott, above n 313, 158.
\textsuperscript{371} Braithwaite, ‘Responsive Regulation and Developing Economies’, above n 330, 888.
\textsuperscript{372} Ibid.
\textsuperscript{373} Ibid 884.
plausibly said that, for an effective implementation of responsive regulation in an LDC, modification of this theory is needed taking in account the circumstances of a particular country and its regulatory regime where the RRT is to be applied. The following sections suggest more modifications of responsive regulation in order to apply it effectively in Bangladesh.

3.6. Application of Responsive Regulation in the Food Safety Regulatory Regime of Bangladesh

In the event that the REPS is applied in the FSRR of Bangladesh, the regulatory authority and/or government needs to look into the barriers which have been discussed in section 3.5 of this chapter and determine ways to overcome them for the proper and efficient implementation of responsive regulation. This section deals with the issues related to the ways to effectively implement responsive regulation in the FSRR regime of Bangladesh.

Braithwaite suggests that the problems that have been discussed in section 3.5 can be solved with the introduction of network governance, modifying the basic RRT. Braithwaite accepted the idea of Drahos and admitted that responsive regulation can be better enforced by escalation in terms of the pyramid by involving networking with domestic and foreign actors.\(^{374}\) The idea of network governance and its positive aspects are discussed in the following points.

(a) Braithwaite has been persuaded by the concept that people now live in the era of networked governance and thus it is better for developing nations to move directly to the regulatory society era of networked governance from their current state regulatory system. He believes that it will help such nations to let the ‘responsive regulation work by escalating less in terms of state intervention and more in terms of escalating state

\(^{374}\) See generally Drahos, above n 334, 40.
networking with non-state regulators’. After mentioning this, Braithwaite introduced a regulatory figure of pyramid that was specifically designed for developing countries (see Braithwaite’s ‘Figure 2. A responsive regulatory pyramid for a developing economy to escalate the networking of regulatory governance’), where he demonstrated that various state and non-state actors can be included as network partners to increase the expected effectiveness of responsive regulation. He has proposed the involvement of NGOs, industry associates, professionals, international organisations as non-state actors.

(b) Network governance has been positively advocated by Freiberg. He states that regulation that involves non-state actors can be more effective than only state-centred regulation; this is because the former involves more concerned parties which help to elicit more of the desired outcomes. It is argued that in an era of network governance, weaker actors can engage with stronger ones in their projects to overcome their inadequacies. Basically this is the main reason for the introduction of network governance for developing countries, although the same reason can be true even in the case of developed countries. As an instance of network governance Braithwaite cited the example of a health regulator of a developing country enrolling the aid of the US Food and Drug Administration and sharing that body’s expertise while developing food or drug safety or standards, and so on. This example indicates that Braithwaite suggests that utilising foreign state or non-state actors will help to increase the performance of a regulatory regime as well as

376 In fact, Braithwaite mentioned that he gained the idea of this kind of figure of Pyramid from Drahos’s literature. See Drahos, above n 334, 34–5.
378 Ibid.
380 For more precise examples, see Braithwaite, ‘Responsive Regulation and Developing Economies’, above n 330, 896.
ensuring and upgrading safety or standards. In addition he suggests involving developing
country domestic NGOs to help overcome the incapacities of state regulators.\textsuperscript{381}

(c) Braithwaite expresses his concern that responsive regulation can sometimes be hard to
implement in a developing country as it puts more discretion in the hands of regulatory
bureaucrats, a move which may lead to rampant corruption.\textsuperscript{382} Therefore, he thinks that
introducing networking regulatory partnerships will structurally reduce corruption in
those counties.\textsuperscript{383}

(d) Jacobs asserts that the regulatory bodies work with various decentralised and horizontal
networks to promote common interests.\textsuperscript{384} For instance, a significant aspect of the
adoption of network governance in the country’s FSRR can be that due to the
participation and recognition of various domestic and foreign food safety state and non-
state actors, Bangladesh can manufacture internationally standardised foodstuffs which
may lead it to compete with its counterparts around the world. Bangladesh has enough
raw materials for food production and incredibly cheap labour which can be used in the
food industry.

(e) The introduction of network governance (especially networking with developed
countries) in the FSRR can be a good idea because most of the developed countries are
similar with regards to food standards. Actually, food standards should generally be the
same all over the world although the problems that must be addressed to achieve those
standards may vary from country to country. The Organisation of Economic Co-operation

\textsuperscript{381} For more precise examples, see ibid.
\textsuperscript{382} Ibid.
\textsuperscript{383} Ibid. Note: The issue of corruption is a serious concern, particularly in Bangladesh. This issue has been
further addressed with another theory of Braithwaite in the section 3.6.1.
\textsuperscript{384} See Scott H Jacobs, ‘Regulatory Co-operation for an Interdependent World: Issues for Government’ in
and Development (OECD) notes that ‘in areas such as food, telecommunications and intellectual property, standard setting by international organisations is well accepted’. 385

(f) Food safety issues are by nature a trans-border concern. This is so primarily because there is significant international travel and people from different nations now visit various countries. There is also a great deal of international trade in foodstuffs which necessarily involves issues regarding the standards of imports and exports. Food safety is a health and safety concern for the entire human civilisation. Its absence or shortfalls causes diseases, both physical and mental. Martin and Painter recommend that regulatory co-operation should be prioritised in pre-approval regulatory programs or in programs addressing trans-boundary concerns or in programs where there is a concern regarding health and safety issues. 386 In these areas governments can actually benefit from sharing information. 387 It should be noted that the issue of food safety encompasses all of these — it is indeed a pre-approval, trans-boundary and health and safety issue.

(g) Regulatory network governance has been suggested by much international literature. The 2004 Canadian Regulatory Review emphasises that the Canadian federal government needs to seek cooperation and work with its US and Mexican counterparts so that they can build mutual trust and confidence in each other’s regulatory processes, 388 in different areas (including food) in order to achieve a high level of consumer protection. 389 The Review states that ‘Canada should also move toward accepting the approvals and reviews of products by its US and EU trading partners in sectors where there are well-established,

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388 EACSR, Smart Regulation, above n 297, 137.
389 Ibid 17.
internationally recognized conformity assessment procedures already in place. The Review significantly advocates the introduction of network governance in Canadian regulatory regimes. It should be mentioned that the proposed network governance does not intend to compromise the sovereignty of any of the participants nor does imply any kind of foreign intervention in the national government’s operations or decision making, rather it will rather help to redefine the relationships and roles with the aforesaid state and non-state actors in the regulatory process. In fact, living in the 21st century there is hardly any reason not to be connected with the international network as many voluntary standards bodies, international organisations and NGOs are generally ready to contribute as non-state actors. For example, the food certification program under the American Heart Association is totally voluntary. Thus, Bangladesh can easily take this opportunity to upgrade or verify its specific food standards by adding the American Heart Association to the regulatory network.

(h) Some international regulatory networks are already in operation. Under the auspices of FAO-WHO Codex Alimentarius Commission, delegates from Codex member countries and observers (governmental and non-governmental organisations) regularly meet to make recommendations regarding food standards. In 2012, 623 delegates from 147 Codex member countries (including the EU as the sole ‘member organisation’) and 38 observers (governmental and non-governmental organisations) gathered in Rome in that body’s

continuing efforts to make recommendations on food standards. \(^{394}\) Under the North American Free Trade Agreement (NAFTA), any member country has the right to set scientifically based higher standards for agri-food products beyond the existing international health and safety standards; beyond that, any other member country can be challenged regarding their standard before a neutral commission and the other country can accept this food standard if it succeeds in the Commission.\(^{395}\)

(i) The current FSRR of Bangladesh is already involved in a type of network governance to some extent. For example, the Bangladesh Standard Testing Institute (BSTI) has been linking with the International Standardisation Organisation (ISO), Codex and many others for upgrading the food standards in Bangladesh.\(^{396}\) However, if the manufacturers are required to acquire these standards or certification directly from the international authorities, this could represent a reduction in the burden on a state regulatory agency like BSTI; moreover it will lessen the scope of corruption because it will not be so easy to bribe the representatives of the international agencies. Once they acquire the recognition for maintaining the standards of network partners, the regulatees will bring it to the regulator (that is, BSTI) for verification of such recognitions and the regulator could then let them enter the market to start business.

Finally, the above discussion indicates that the introduction of network governance is really needed for LDCs for them to internationalise their food standards. In relation to their FSRR,
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no country is perfect in its record of ensuring the production and maintenance of consistently safe food for consumers. Network governance can, however, be a guiding idea for LDCs including Bangladesh. It is thus argued that the application of responsive regulation in the FSRR in Bangladesh should be modified to allow network governance. Therefore, a modified framework of responsive regulation for FSRR in Bangladesh will be proposed in section 3.7 of this chapter. However, before that discussion regarding the modification of the responsive regulation, the issue of network governance needs to be justified by some other regulatory concerns since it engages third parties in the activities of a sovereign state. Hence the following section will discuss this issue.

3.6.1. Responsible Regulation and Tripartism

One of the major risks in the application of responsive regulation in the FSRR of Bangladesh is the longstanding rampant corruption in Bangladesh, which must be dealt with. Arguably, regulators along with regulatees both have a tendency to be engaged in corrupt practices while dealing with food safety regulations, which may contaminate the whole system under responsive regulation as mentioned above. Ayres and Braithwaite also acknowledged this problem and addressed it with a solution where they suggested the application of ‘tripartism’ to decrease and discourage the practice of corruption among the regulators.397

Ayres and Braithwaite in their research mention that a regulatory encounter has the potential to promote the development of cooperation as well as to indirectly persuade the regulatee to comply but the regulators also risk regulatory capture and corruption. To fight such capture and the practices of corruption, they suggests an alternative to the normal ways of dealing with such risks of corruption, such as the limitation of discretion, rotation of personnel and so

397 Ayres and Braithwaite, Responsive Regulation: Transcending the Deregulation Debate, above n 278, 55.
forth. They call this proposed system ‘tripartism’, in which the various Public Interest Groups (PIGs), such as different NGOs, will act as a third player in the regulatory process. The concept of tripartism indicates that the PIGs will be able to directly punish the regulatees for corruption as well to punish the regulators who fail to penalise the non-compliance. The authors explained ‘tripartism’ and stated that under this system PIGs can participate in the regulatory process in three ways. Firstly, under tripartism all the available information to the regulators can be accessed by the PIGs. Secondly, PIGs will be able to negotiate with the firm involved and the applicable government agency in regard to any kind of dealings under tripartism. Thirdly, it can work as a regulator and can sue or prosecute the regulatees directly.

However, the concept of the use of tripartism for combating corruption encounters some problems in regard to directly applying it in the FSRR of Bangladesh. These are as mentioned below:

(a) The judiciary of Bangladesh has been separated from the executive since 1 November 2007. Except for the limited mobile court activities of executive magistrates, most of the judicial powers are now applied by the judicial officers in Bangladesh. So, if a PIG is allowed to punish either the regulators or the regulatees, it will be inconsistent with and contrary to the current judicial system of Bangladesh. Therefore, this situation suggests tripartism cannot be applied in Bangladesh in its current form (that is, without any alteration).

398 See ibid 54, 55, 56; Braithwaite, ‘Policies for an Era of Regulatory Flux’, above n 327, 27.
400 Ayres and Braithwaite, Responsive Regulation: Transcending the Deregulation Debate, above n 278, 55. See also Haines, above n 327, 225; WHO, ‘Effective Drug Regulation’, above n 329, 28.
401 Ayres and Braithwaite, Responsive Regulation: Transcending the Deregulation Debate, above n 278, 56; Ayres and Braithwaite, ‘Tripartism: Regulatory Capture and Empowerment’, above n 399, 439.
402 Ayres and Braithwaite, Responsive Regulation: Transcending the Deregulation Debate, above n 278, 57–8; Braithwaite, ‘Policies for an Era of Regulatory Flux’, above n 327, 30.
403 Manik, above n 157.
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(b) This thesis is an effort to build a new (application of RRT is new in Bangladesh), updated and effective regulatory regime in the food safety sector of Bangladesh where several tools, including legislation, liability frameworks, and enforcement mechanisms need to be reformed, and consequently, the idea of tripartism as given by Ayers and Braithwaite can hardly be operating in that country. The authors have also admitted as much when they said that ‘tripartism is considered as a strategy for implementing laws and regulations that have already been settled’. 404

(c) The empowerment of the domestic NGOs (as PIGs) can pose greater risks, even be counterproductive in Bangladesh. The NGOs also have the opportunity to be corrupt. The report of Transparency International Bangladesh on NGOs shows that many of the NGOs of Bangladesh are engaged in corruption. 405 The report stated that the study had ‘ignited a huge debate within the society, as it revealed [the] different nature of irregularities and corrupt practices in the NGO sector’. 406 As a result, a particular PIG selected to be employed to eradicate the corruption can itself be corrupted and further pollute the regulatory regime. Therefore this study recommends that it is better to have one enforcement body as the main regulator, one that can have the power to penalise under REPS.

However, it is also here argued that the concept of tripartism can be indirectly applied in the FSRR of Bangladesh. Domestic network partners can be allowed to check the transparency and accountability of the main regulatory enforcement body. The domestic PIGs who will work as network partners can be allowed to have inspectorial powers as a network partner as

404 Ayres and Braithwaite, Responsive Regulation: Transcending the Deregulation Debate, above n 278, 58.
is suggested in section 3.6 of this chapter. If upon inspection they find either the regulator or the regulatee is engaged in corruption, they can sue the particular regulator or regulatee in Public Interest Litigation (PIL) on behalf of the public for whom they demonstrate *locus standi.* In fact, this is already happening in Bangladesh. Some NGOs (such as the Consumer Association of Bangladesh (CAB) and the Bangladesh Environmental Lawyers Association are already working as PIGs and they are filing a remarkable number of PILs.

So, these NGOs can certainly do this as they are already informally engaged as a network partner. This is especially true of the CAB, which is even now participating in the many anti-adulteration drives and assisting the enforcement authority.

Therefore, it can be said that, by working as a network partner the PIGs can take part in combating corruption in Bangladesh, and their participation will eventually represent the overture of tripartism in responsive regulation in Bangladesh.

### 3.7. Modification of Responsive Regulation for Application in the Food Safety Regulatory Regime of Bangladesh

After discussing responsive regulation and its adaptability for application in the FSRR of Bangladesh, it is supposed that further modification of this theory is imperative for its proper implementation and effective performance. The ongoing section will be a discussion regarding the modification of responsive regulation as it applies in the FSRR of Bangladesh.

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407 The indirect involvement of the foreign network partners has been discussed in section 3.7 of this chapter.
Responsive regulation aims to increase responsibility among the corporations or businesses. Therefore, if a corporation shows responsibility, it should be rewarded; whereas if any corporation shows irresponsibility, it should be reprimanded and downgraded if necessary. Unfortunately, the current FSRR of Bangladesh does not follow this principle. For example, consider the following two situations. Food manufacturer ‘A’ is continually behaving responsibly and has long complied with all regulations in regard to a particular product; while on the other hand food manufacturer ‘B’ has demonstrated continued non-compliance with the regulations and produced unsafe food in regard to that particular product. Here, unless the licence of manufacturer ‘B’ is suspended or revoked, it can compete in the same market with ‘A’ and may be profitable, perhaps even more so than manufacturer ‘A’ who may have outlaid greater funds to ensure regulatory compliance. This situation simply may discourage the good actors like ‘A’ from continuing to be compliant and it may encourage the bad actors like ‘B’ to continue to breach regulations, and perhaps even more frequently and seriously for greater profit.

Braithwaite addresses the above issue in a recent volume. He proposes the introduction of a ‘reward’ for showing responsibility, arguing that human beings always are responsible, and they are encouraged to be more responsible if they are rewarded. Furthermore, corporations do business in the market and there they must always be economically competitive to survive. In a free market economy, food manufacturers also have to compete every day with their counterparts in regard to food safety and standards. So, once they are

rewarded for their compliance, they can use this reward for their advertising which will help their business flourish.

Following the suggestion of Braithwaite, in order to apply the RRT in the FSRR of Bangladesh, it is argued that a grading system should be introduced in the food manufacturing sector. This can be a well-considered initiative rather than having all (responsible and irresponsible) food manufacturers in the same category. There is no logic in seeing and treating every manufacturer the same, rather their regular compliance or regular non-compliance with regulation should be taken into account. Actually, grading — especially upgrading — can be treated as one kind of reward as Braithwaite recommends. If any particular food manufacturer shows greater responsibility by continually complying with the regulatory provisions and manufactures safe and quality foodstuffs, it should be upgraded from a lower grade to a higher grade. Conversely, if any manufacturer shows irresponsibility and continually manufactures unsafe and low quality food, it can be downgraded from an upper to lower grade. This concept can be called ‘Responsibility Ensures Upgrading, Irresponsibility Risks Downgrading’.

3.7.2. Grading Classifications

Generally a grading can be defined as a category of a commodity classified on the basis of one or more of the characteristics, such as the properties or qualities of that product. It is argued that for the food manufacturing industry and to accommodate such a system within responsive regulation, there should be three grades for food manufacturers on their particular products, such as Grade A (best or safest), Grade B (moderate or safer) and Grade C (satisfactory or safe).

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It is worth mentioning that scaling of grades is not the way to distinguish ‘safe’ food from ‘unsafe food’, rather it is a way of recognising the responsible behaviour of manufacturers in the food industry. It is obvious that all the ‘Grade A’, ‘Grade B’ and ‘Grade C’ foods are safe for consumption. So the question may arise that if all the foods are safe, what is the incentive to achieve ‘Grade A’ status. It is because manufacturers always look forward to achieving greater profit. Further every human being will be fond of gaining honour and recognition of his or her effort to produce the safest food. The higher status manufacturers will enjoy the higher and broader avenues for business and greater profit will be gradually be achieved by them. For example, if a food manufacturer achieves ‘Grade A’ for their product and becomes famous domestically, more foreign importers will be interested in importing food from them. Consequently this will encourage manufacturers to be more responsible and achieve ‘Grade A’ status for their products.

Now the question arises as to how a manufacturer’s efforts in regard to their products will be graded for these categories. The discussion below will concentrate on this issue. The following method may be used in regard to such grading in Bangladesh.

(a) If any particular food manufacturer wants to start a food business as a ‘Grade A’ manufacturer of a particular product, before they receive approval from the main food safety regulatory body\textsuperscript{415} to enter the market, the company would have to have its food standards, manufacturing processes, environment, cleanliness and all other relevant matters considered in regard to food safety and recognised by one domestic food safety related NGO (for example, the CAB in the case of Bangladesh), and the food safety authorities of two developed countries\textsuperscript{416} (for example, the Food and Drug Administration

\textsuperscript{415} The current study has proposed an apex (main) food safety authority be named the ‘Bangladesh Food Safety Authority (BFSA)’; for details, see sections 5.4.1 and 5.5 of chapter 5 and section 9.4 of chapter 9 of the thesis.

\textsuperscript{416} The reason for engaging the developed country food safety authority as a network partner is that it will reduce the chances of corruption in managing recognition from a food safety authority.
(FDA) of USA, and the Food Safety Authority (FSA) of UK) who would be considered the network partners with the particular manufacturer.  

(b) In case any manufacturer wants to start a food business as a ‘Grade B’ manufacturer of a particular product, the company would need to be recognised by one domestic food safety related NGO (for example, the CAB), and one developed country food safety authority, for example, NSWFA), who would be considered the network partners with the particular manufacturer. 

(c) A food manufacturer that wants to start a food business as a ‘Grade C’ manufacturer of a particular product, the company could do so by being recognised by one domestic food safety related NGO (for example, the CAB), which would be considered the network partner with the particular manufacturer. Importantly, no food company would be allowed to start business in Bangladesh unless its safety and standards are recognised by BSTI, the main food standard authority in Bangladesh as discussed in section 5.3.7 of this thesis. 

Additionally, once any particular food product enters the market, all network partners need to reaffirm their certification by further field monitoring as to whether these particular food products are maintaining their true standard in the market or not. Monitoring activities with the network partners must certainly be coordinated and thus network partners must monitor the improvement or degradation of the food standard at both the production stage as well as in the market when it is sold to the consumers.  

Any manufacturer can directly start business as ‘Grade C’ or ‘Grade B’ or ‘Grade A’ by fulfilling the above mentioned criteria. However, a food manufacturer’s manufacturing authority (for example, licence of the business) could not be suspended unless (if initially at a

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417 The respective manufacturer will choose the ‘network partners’. However the ‘networks partners’ should be approved by the proposed BFSA.

higher grade) it falls from ‘Grade A’ to ‘Grade C’ and then fails to maintain even that standard. Creating appropriate criteria is important here as is the involvement of network partners. Network partners should be chosen carefully. In this situation, recognition from the food standard authority of a developed country as recognised by the United Nations Development Program (UNDP) is wiser as their standards are already accepted across the world. This would be preferable to the involvement of more domestic NGOs or other LDC/developing country food safety authorities. It should be noted in this regard that there is no established convention for the designation of ‘developed’ (and ‘LDC/developing’) countries or areas in the United Nations system. Japan in Asia, Canada and the United States in northern America, Australia and New Zealand in Oceania and Europe are commonly considered ‘developed’ regions or areas.419

Once the particular manufacturer achieves certification by their network partners and applies to the domestic food safety authority for entering the market, the relevant domestic authority will consider and verify the certifications (certificates of recognition) by the other bodies. Then the respective food safety authority may allow the particular food product of the manufacturer concerned to be sold in the market. There will be a seal affixed beside the indication of what grade has been achieved for the particular product and an indication for consumers of what the grading means. Every year the manufacturer would need to renew their certification of grading. For example, if NSWFA certifies a particular food product of Bangladesh in 2013 as maintaining all food standards of NSW, this certificate will be valid for one year. The manufacturer would have to renew it in 2014. In the interim, the inspector or any other consumer can challenge the grading and the manufacturer would have to demonstrate the quality of the product to the relevant authority. It is true that maintaining all these certifications each and every year may add to the cost of manufacture; however, if the

particular manufacturer is recognised by one or more developed world food safety authorities, it could export its food products to all over the world and earn greater profits than it could otherwise expect.

While a food business may wish to start operation as a ‘Grade C’ company, the proposed system would allow it to gradually be upgraded to a ‘Grade B’ or ‘Grade A’ manufacturer of a particular product. In practice, sometimes it may be difficult to manage the number of certifications required from the network partners. In this case, if a ‘Grade C’ company in Bangladesh maintains their standard successfully for one year, that is, it has passed the initial grading and first subsequent certification processes, the requirements for the manufacturer to be upgraded as a ‘Grade B’ company can be relaxed in recognition of this success. In such an instance, the requirement of getting recognition from one developed country food safety authority can be deleted as a reward for the consecutive success. Such a manufacturer can be upgraded to a ‘Grade B’ manufacturer by managing recognition from only one domestic food safety related NGO. In the case of a ‘Grade B’ company in Bangladesh the same can happen for upgrading to a ‘Grade A’ manufacturer and the requirements can be relaxed to the extent of managing to obtain recognition from only two network partners: one from a domestic food safety related NGO and another from a developed country food safety authority. The important fact is that to be recognised as a ‘Grade A’ food manufacturer in Bangladesh, recognition from at least one developed country food safety authority recognition is a must.

In addition, whenever any food manufacturer fails to maintain the standard as ‘Grade C’ in relation to its manufactured product, it will be downgraded a position and placed on a ‘name and shame’ list and will be under observation — unless its offences are such that its licence is permanently cancelled as sanctions have escalated to the apex level of REPS. During its time on the ‘name and shame’ register, the licence of any food manufacturer will be cancelled unless it upgrades its standard to at least the starting business grade, that is, as a ‘Grade C’
manufacturer. A manufacturer whose business has been entered in the ‘name and shame’ register should only be given the chance to restart business as ‘Grade C’ business, so that they are not pressurised to upgrade standards suddenly.

The proposed network governance and grading system to be applied in the FSRR of Bangladesh is represented in the following figure.

![Networked Food Standard Pyramid for Food Manufacturers in Bangladesh](image)

**Figure 3.2: Networked Food Standard Pyramid for Food Manufacturers in Bangladesh**
3.7.3. Significance of the Grading System

In addition to the recognition and reward approach as discussed in section 3.7.1, a grading system can have various positive impacts upon the food industry. The following discussion will demonstrate the positive aspects of the adoption of a grading system in the FSRR in Bangladesh.

Freebairn mentions that grading will increase producers’ returns, their competitiveness in the market as well as bringing greater buyer satisfaction and marketing efficiency. He considers grading systems as a market innovation and argues that they will help to trace the dynamics of the consumers, manufacturers and the market as well.\footnote{Freebairn, above n 414, 147, 148.}

In practice, all buyers do not have a similar buying capacity. Lower graded food\footnote{It is recommended that lower graded food does not mean to be unsafe or unhealthy in any aspects because the domestic recognition of food standards will be the minimum criteria for a particular food product to be sold in the market. For details, see section 3.7.3 of this chapter.} will generally be in a comparatively lower price range while higher graded foodstuffs will attract a higher price. The price range accommodates the buying capacity of all kinds of consumers. Within a graded food industry, a consumer can choose a particular food product which he or she prefers and he or she is willing to pay for.\footnote{Freebairn, above n 414, 148.}

By acquiring the higher grading a manufacturer can possibly make more profit in his business and consumers can be benefited as well. For example, two similar biscuits with the same ingredients and fulfilling the same requirements are designated as manufactured by ‘X’ and ‘Y’ and both do business in the market. X has gained recognition with two awards for its safety and standards from two developed country food safety authorities, for example, the FDA and FSA, and has acquired a ‘Grade A’. On the other hand, Y (with everything similar) has just gained recognition of the domestic food safety authority, for example, the NSWFA.
and has been graded as ‘Grade C’. Here X can easily price their product higher while Y cannot. However, in the case of ‘X’, the manufacturer has benefited, and in the case of ‘Y’ the consumers have benefitted since they are getting the same foodstuff as those purchasing the X product but are enjoying a lower price. Finally, Y will try to gain the recognition required to be a ‘Grade A’ manufacturer and the whole situation is one where ultimately the market is more competitive and consumers are benefitting both from the safety perspective and economic perspective. 424

The grading of food products can make the markets and entire food industry efficient. Quality and grade will be seen at the food-level which will eliminate the time and expense of arguments over the quality of the food. 425 Although theoretically multiple grading may be required for a manufacturer of several different products. In reality a high standard manufacturer would be most likely to adopt similar standards across its entire operation, whatever the product. Nevertheless, a fish processor may achieve one grade for one product and another for a different product (the latter prepared in less hygienic conditions, for example). To further clarify this issue, the following example is provided: A biscuit manufacturer (for instance, BD Food & Co) makes cream biscuits and salted biscuits. While the cream biscuit has satisfied all the criteria necessary for Grade ‘A’, the salted biscuit has simply achieved Grade ‘C’. This can be the case whether it is prepared in another manufacturing unit or in the same unit. The appropriate grade would be indicated on any labelling for the relevant product of that company.

424 See generally ibid 153. Note: It is argued that ultimately products will become of a higher standard and the competitive advantage of the initial compliers will be eroded by the increased competition — thus placing downward pressure on pricing. Nevertheless, product cost will still reflect higher inputs and manufacturing costs. So there often seems to be an underlying assumption that the poorest will still be able to buy the product as the economy will have further improved by that stage bringing the poor into a position of being able to afford the improved quality product.

425 Ibid 158.
The above arguments signify that none of the graded food product will be unsafe for consumption, which thus directs that grading will be on the basis of domestic and international recognition. Once the Bangladesh regulatory (and manufacturing community) opens the line of regular communication and maintains a network with their counterparts for recognition, then it will recognise that its current weakness or strength which ultimately will elicit the better production performance and the utmost food safety. Therefore, introducing a grading system eventually delivers greater safety as well as great market efficiency, as detailed above.

3.7.4. Limitations of Grading Systems

Despite all the positive aspects, there are some challenges that the manufacturers might face when a government introduces a grading system into the food industry. The following part will identify these challenges and suggest the possible solutions to overcome these difficulties.

The idea of grading of food products may be a difficult thing for consumers to understand in an LDC like Bangladesh.\textsuperscript{426} Seiver and Hatfield mention, ‘a grade means different things to different people. Depending on culture, training, agenda, and the perceived purpose of the grading system, different members of the public can interpret inspection grades in dramatically different ways’.\textsuperscript{427} For this reason, the authors propose promoting a greater awareness of a grading system among the public and professionals. It is argued that this can be achieved for the professionals and manufacturers by mandatory training. For the mass of the people, this can be done by publication in different printed and electronic media and by leafleting.

\textsuperscript{426} However, it is positively noted that several consumer associations (for instance, Consumer Association of Bangladesh (CAB)) are working to educate the consumers in Bangladesh.

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The criteria that are chosen for the purpose of grading can be varied and changed considering the circumstances.\textsuperscript{428} However, in the case of manufactured food, safety and standards aspects should be the main criteria for grading. Safety should be considered in all aspects in relation to cleanliness, factory environment, nutritional ingredients, and so on, and it should also be noted that standards change from time to time as a result of the scientific discoveries and inventions. It is worth mentioning that while safety can be defined in many different ways, most of the domestic and foreign state and non-state actors follow the \textit{Codex Alimentarius}\textsuperscript{429} standard which is the basis for food standards throughout the world; however, it can sometimes vary regarding the quantitative use of ingredients in country to country. So, particular food manufacturers which want to gain the higher grade need to create and maintain all the standards that they want or need to acquire by engagement with particular network partners. In terms of cleanliness, factory environment and other uses of ingredients, these differ a little. It is argued that, grading criteria in the case of manufactured food can be chosen considering the culture, ethnicity and overall impact on human health.

3.7.5. Enforcement of REPS in the Graded Food Industry\textsuperscript{430}

The application of REPS in a graded food industry cannot be identical for in all aspects. For example, in the first instance where a ‘Grade A’ manufacturer violates the regulation, it naturally loses the right to continue its business as a ‘Grade A’ company. Thus, once a warning letter has been sent and improvement notice served, the manufacturer should be kept under observation. In the event of a second instance of non-compliance, it should be downgraded to a ‘Grade B’ company as further warning. If the same company further violates the law, at this stage it can be given a civil penalty. At the third violation it loses the

\textsuperscript{428} Office of Technology Assessment, Congress of the United States, ‘Perspectives on Federal Retail Food Grading’ (NTIS order #PB-273163, Washington DC, June 1977) 5.

\textsuperscript{429} Codex members cover 99% of the world’s population. See Codex Alimentarius: International Food Standards, \textit{About Codex} (7 May 2013) <http://www.codexalimentarius.org/about-codex/en/>.

\textsuperscript{430} For details, see Ali, ‘Responsive Regulation and Application of Grading Systems’, above n 411, 38–41.
right to do business as a ‘Grade B’ company and so can be downgraded to a ‘Grade C’ food manufacturer. After this, if the same manufacturer persists in violating the regulations, there is no chance of further downgrades, so, at this stage it can be given the criminal penalty. If a manufacturer which is running a business as a ‘Grade C’ company and has been previously criminally penalised again violates the law, at this stage its licence should be suspended and its name added to the ‘name and shame’ register. If it cannot return to the food business within the timeframe provided, for example, within one year, its licence should be permanently revoked and it should not be given permission to return to any kind of food business run by the same owners or directors. The following figure shows the entire application of the enforcement pyramid of sanctions to a ‘Grade A’ food manufacturer.
Figure 3.3: The Application of REPS for a ‘Grade A’ Food Manufacturer

Regarding a ‘Grade B’ manufacturer, the first violation should be addressed with a warning letter or improvement notice and by observation as is usually the practice. In the event of a second violation, it should lose the right to run the business as a ‘Grade B’ manufacturer. So,
at this stage the inspector will not directly penalise but rather downgrade the manufacturer to a ‘Grade C’ company as a further warning. In the event of a third violation, as there is no scope for further downgrading, the regulator, in accordance with the regulatory pyramid illustrated below, escalates the sanction to a civil penalty. After that, if the manufacturer again violates the law, criminal penalties apply. Thereafter, its licence should be suspended and its name added to the ‘name and shame’ register. In the final stage, if the company cannot get back to business within the required period of time, as a ‘Grade A’, ‘Grade B’ or ‘Grade C’ food manufacturer, then the licence of this particular food manufacturer should be permanently revoked and they cannot have any further opportunity to start a food business again. The enforcement pyramid for a ‘Grade B’ manufacturer is shown in the following figure:
With regard to a ‘Grade C’ manufacturer, the regular REPS will be applied as there is no scope for downgrading. After the application of persuasion, the first violation will be addressed with a warning letter or improvement notice, and by observation and inspection. Then, further or continuing violations will cause sanctions to be escalated accordingly, to civil penalty, then criminal penalty, to licence suspension and entry in the ‘name and shame’ register, and finally to licence revocation and no further participation in the food industry. The enforcement pyramid for the ‘Grade C’ manufacturer is shown in the figure below.
It is worth mentioning that in every case of escalation by the enforcement authorities in accordance with the pyramid, the report of the network partners should be given serious consideration. It has been demonstrated in section 3.6.1 of this chapter that domestic network partners can participate in the enforcement indirectly by assisting the anti-adulteration drive or by suing in a PIL. Foreign network partners, however, have not been included in the enforcement pyramid directly under tripartism. International actors, such as the developed country food safety authorities (for example, NSWFA, FDA or FSA), have been included here for the standardisation of food product so that such foodstuffs can compete in the
international market with other counterparts; but these foreign actors cannot directly interfere in the judicial system of a sovereign country, like Bangladesh, or in a jurisdiction (like NSW) within a sovereign country. However, all network partners (both domestic and foreign) can be indirectly included in the REPS. It would be done in the following way.

Firstly, the network partners would have the power to give their recognition or withdraw such recognition in regard to a particular food manufacturer based on their standards after the network partners’ inspection of every possible areas; it is one kind of indirect enforcement — either positive in the case of a well-deserved up-grade or negative in the event of having to downgrade the food manufacturer’s grading or comment negatively on their performance. Domestic and foreign state and non-state actors could do this after inspections under the FSRR of Bangladesh.

Secondly, there has been another proposal for their involvement. Whenever an inspector inspects the particular food manufacturer and finds that it does not satisfy any particular ‘Grade A’, ‘Grade B’ or ‘Grade C’ classification as described above, the inspector will first collect the particular food sample or any other evidence, such as a video record on cleanliness, environment, temperature recordings and so on. After collecting the evidence, he or she will send a copy or portion of such evidence to the network partners (either to all or to selected partners) for their comments to be submitted within a short span of time (for example within two weeks) so that the inspector can rapidly and on the basis of the best advice make a considered decision, before downgrading the particular manufacturer. At this stage, the network partners have the opportunity to provide their opinion after testing the food sample in the laboratory or testing the evidence record, for example, videos as to whether or not the manufacturer is maintaining the standard as earlier certified by the network partners. Once the inspector receives the feedback from the network partner/s, he or she can decide on the basis of his findings and the feedback from the network partners. This is how the network
partners can join in the REPS under RRT. It is worth mentioning that this will indirectly enforce the tripartism and help reduce corruption of the regulators as well as the regulatees.

As described above in this chapter regarding the application of REPS, in every case the court has the power to intervene at every step, including the civil penalty, criminal penalty, licence suspension, or licence cancellation. An aggrieved regulatee may wish to challenge in an authorised court any sanction that has been issued by the inspectors or any enforcement authority under the REPS. In such cases the court will take the ultimate decision. In fact, under the REPS a penalty notice (either civil or criminal) will be effective only when the concerned manufacturer (on whom penalty notice has been served) does not want to have the dispute decided by a court, and thus accepts the prescribed punishment under the REPS.

Finally, it can be said that the above modification of responsive regulation to accommodate it with the FSRR of Bangladesh can be subject to further change or modification in regard to its number of network partners so as to make it more flexible. However, it is recommended that serious consideration of the above model be given by the respective authorities in Bangladesh.

3.8. Practice of Responsive Regulation in the Food Safety Regulatory Regime of NSW

The Productivity Commission Report on regulations applying to businesses under the Australian food safety regimes suggests that Australian states and territories already do follow the responsive regulation model. The Report suggests that an enforcement pyramid in the food safety sector is in place in NSW as shown in Figure 3.6 below.

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431 See FA 2003 s 120[2].
The NSWFA now spends much time on providing training, informal advice, education to food regulatees rather than on inspecting or penalising premises to improve food safety.

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433 Ibid xxi. See also Gilligan, Bird and Ramsay, above n 319, 428.
Chapter 3: Application of Responsive Regulation in Bangladesh

awareness and address specific compliance.\footnote{Ibid.} Chapter 8 of this thesis will demonstrate in detail how the RRT is working in the FSRR of NSW with the administrative and judicial enforcement of the food safety laws.

3.9. Summary and Conclusions

Food safety is a sensitive area which affects every consumer directly and indirectly. The regulatory philosophy, framework and, above all, its effectiveness in a particular country are major concerns for both the regulators and the regulatees. The application of RRT in the FSRR of Bangladesh as discussed above indicates that there is little scope of a return to the question of whether a fully persuasive or completely deterrent enforcement style is preferable. They both have their pros and cons but so it can be said that responsive regulation is a viable option as has been demonstrated in this chapter.\footnote{See generally Mascini and Van Wijk, above n 253, 42.} In fact, for the last two decades, the application of RRT have critically analysed and empirically investigated in a significant amount of legal research which has been presented in this chapter.\footnote{For example, see Hampton, above n 253, 5.}

Traditionally regulators have emphasised the application of continuing deterrence for the violation of the regulations rather than emphasising compliance; and it then becomes a general belief that increasing sanctions will motivate regulatees to comply with regulations.\footnote{See generally Hampton, above n 253, 6.} However, it is argued that the application of the REPS in the FSRR of Bangladesh can positively be useful and effective\footnote{Effectiveness is a measurement of whether or to what extent an enforcement agency can reach their goal or at least can improve the food safety in the entire food industry as has been shown in this chapter: see Charlotte Yapp and Robyn Fairman, ‘Assessing Compliance with Food Safety Legislation in Small Businesses’ (2005) 107(3) \textit{British Food Journal} 150, 152.} both for the regulators and for the regulatees. Bangladesh has long had and continues to have serious problems with corruption, which may influence the application of responsive regulation. But a regulatory regime must

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\footnote{Ibid.}

\footnote{See generally Mascini and Van Wijk, above n 253, 42.}

\footnote{For example, see Hampton, above n 253, 5.}

\footnote{See generally Hampton, above n 253, 6.}

\footnote{Effectiveness is a measurement of whether or to what extent an enforcement agency can reach their goal or at least can improve the food safety in the entire food industry as has been shown in this chapter: see Charlotte Yapp and Robyn Fairman, ‘Assessing Compliance with Food Safety Legislation in Small Businesses’ (2005) 107(3) \textit{British Food Journal} 150, 152.}
need to ensure transparency and accountability for its ultimate success in combating poor practices and corruption in every sphere.\textsuperscript{439} This issue has been addressed by the introduction of the network governance along with a grading system that incorporates the concept of \textit{Responsibility Ensures Upgrading, Irresponsibility Risks Downgrading}. It is supposed that the introduction of networked governance along with the grading system will help the manufacturers produce more standardised safe food products in a competitive free market economy.

Finally, it can be argued that the application of RRT is possible with some changes in the FSRR in Bangladesh. It is relevant to mention that the Productivity Commission of Australia has recognised that the NSWFA is far better than the other food safety regulators in Australia,\textsuperscript{440} and this credit perhaps goes largely to RRT as applied in the NSW food safety regulatory framework. The ongoing success of the NSWFA has made it one of the most renowned food regulators at home and abroad. This success provides impetus for the present thesis to take the NSWFA along with the enforcement mechanism of the food safety laws of NSW as a model for the food safety regime of Bangladesh.\textsuperscript{441} However, some modifications of responsive regulation have been suggested above so that the FSRR of Bangladesh can conveniently borrow from the food safety regulatory framework of NSW.


\textsuperscript{440} See generally \textit{Productivity Commission Report on Food Safety}, above n 267, xxii.

\textsuperscript{441} See the other reasons advocating the taking of NSW as a model in section 2.12 of chapter 2 of the thesis.
Chapter 4: Legal Framework of Food Safety in Bangladesh

4.1. Introduction

A modern and effective legal framework for food safety is significant to ensuring safe food for all and to guaranteeing a healthy nation. A legal framework should be purposeful, goal-directed, and should have problem-solving attempts by all the actors involved in.\textsuperscript{442} This need not require a large number of laws to govern food safety issues; rather, well-framed coordinated and clear legislation that is effective in meeting the contemporary needs of consumers and manufacturers of food products is required.

As discussed on the subject of Bangladesh and its legal system in section 2.2 of chapter 2 of this thesis, Bangladesh inherited many of the laws that are in place today from its former colonial master, Great Britain. The current chapter will explain the main statutory laws related to the food safety issues within the scope\textsuperscript{443} of this thesis. The food safety legal framework (FSLF) of New South Wales (NSW), Australia, will be discussed prior to explaining the equivalents in Bangladesh with a view to obtaining information regarding a particular role model of a modern and effective FSLF.\textsuperscript{444} Additionally, this chapter will evaluate the legal drawbacks of the current Bangladeshi food safety regulations and suggest amendments of that system in light of their NSW counterpart.

The FSLF of Bangladesh is composed of numerous laws. The chart depicted in section 4.3 of this chapter demonstrates that a dozen enactments by and large deal with the food safety issues in Bangladesh. However, the current chapter will not elaborate on all the laws mentioned in that chart due to consideration of the length of the thesis. Considering the


\textsuperscript{443} See the scope of the thesis in section 2.11 of chapter 2.

\textsuperscript{444} See the methodology of the thesis in section 2.12 of chapter 2 of this thesis.
situation of having several laws to deal with food safety situations in Bangladesh and the existence of such a severe lack of food safety, as detailed in section 2.4 and section 2.5 of chapter 2 in this thesis, readers can readily understand that the laws under the FSLF of Bangladesh may have loopholes. Therefore, a significant number of sections of this chapter will be an issue based discussion, except for those that portray the FSLF of NSW as a model in the first phase of the chapter. This chapter will solely address the major issues in regard to the legal framework of the food safety in Bangladesh.

The chapter begins with the introduction in section 4.1. In section 4.2 the FSLF of NSW will be shown to provide a model legal framework for food safety. This section will reveal that the FSLF of NSW is composed of few laws, mainly modern ones that are closely coordinated for the sake of increased effectiveness. In section 4.3 the issues of the FSLF of Bangladesh will be analysed in light of the FLSF of NSW. Section 4.3 will consist of a discussion on three basic issues of the FSLF of Bangladesh as recognised from the literature review of this thesis. These three issues are related to the ‘multiplicity and overlapping of food safety laws’, ‘lack of coordination of laws’, and ‘outdated, limited jurisdiction and unnecessary enactments’ — all of which will be accordingly analysed in section 4.3.1, section 4.3.2 and section 4.3.3 of the chapter. While discussing the issues concerned with the FSLF of Bangladesh in section 4.3, in each section a particular issue will be raised and discussed first, and then it will be examined in light of the relevant tools of the FSLF of NSW as revealed in section 4.2 of the chapter. At the end of every section, suggestions will be made where appropriate and necessary with a view to overcoming the shortcomings of the FSLF of Bangladesh. The chapter will be summarised and concluded with recommendations in section 4.4.
4.2. Current Legal Framework of Food Safety in NSW

This section will detail the basic structures of the FSLF of NSW. It is included at this stage of the chapter to show a model FSLF for Bangladesh so that the subsequent deliberations on the FSLF of Bangladesh can identify the shortcomings in it and can follow a guide to build an effective framework. The structure of the NSW FSLF is divided into few sub-sections. These sub-sections include the legal provisions in relation to food standards created for Australia and their enforcement. The Food Act 2003 (NSW) and the Australian Consumer Law (NSW) along with coordination among all food safety laws in NSW will be discussed following a discussion on the NSW Food Authority, the highest coordinating body for regulating all food safety related activities. Small parts of this section involve a discussion on the food safety schemes and import and export related laws in order to describe the entire food safety legal framework of NSW, although not all are included in the scope of the thesis.

It is worth noting that all the provisions of the laws, bodies under the framework will not be explained in detail in the current chapter. A few laws and regulatory bodies along with their enforcement structures will be analysed in subsequent chapters, such as, chapters 5, 6, 7 and 8 of this thesis.

4.2.1. The Australia New Zealand Food Standards Code (ANZFSC)

The national food standards of Australia are established and maintained by the Food Standards Australia and New Zealand (FSANZ), under the Australia New Zealand Food Authority Act 1991 (Cth). The FSANZ created a national code for food standards, the Australia New Zealand Food Standards Code (ANZFSC) (also referred to as the ‘Food Standards Code’), which prescribes compositional, chemical, and microbiological standards as well as the standard of labelling for food safety, and other standards for food that is offered

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445 See more details of FSANZ in section 5.2.2 of chapter 5 of this thesis.
for sale in Australia.446 The ANZFSC has four chapters. Chapter 1 includes the ‘General Food Standards’, Chapter 2 includes the ‘Food Product Standards’, Chapter 3 includes the ‘Food Safety Standards’ and lastly Chapter 4 includes the ‘Primary Production Standards’.447 Healy, Brooke-Taylor and Liehne comment that FSANZ is outcome based and importance is given to creating standards that can apply for all foods and ones that can be easy to comply with and enforce. Additionally, the ANZFSC is risk and evidence based and consistent with World Trade Organisation (WTO) obligations.448

NSW State authorities consider compliance with the ANZFSC by food manufacturers (and their continued maintenance of that compliance) most seriously; the purpose is to maintain standards so as to best guarantee people’s health and safety. Any person who wants to run a food business or wants to sell food must abide by the requirements of the ANZFSC. A person cannot sell any food that is packaged or labelled in a manner that contravenes a provision of the ANZFSC. However this stipulation does not apply for primary production unless a relevant food safety scheme (FSS)449 provides that compliance with a provision of the ANZFSC is required by that food business or food business sector (for example, for eggs, dairy, meat, seafood and so forth).450

4.2.2. Enforcement of the ANZFSC

The ANZFSC is made for the whole of Australia (and also for New Zealand) irrespective of any particular State or Territory jurisdiction. Hence, for implementation of the Food

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449 See the details of Food Safety Schemes in section 4.2.7 of this chapter.
Standards Code, the Government of NSW has enacted a number of laws. The two important and key pieces of legislation in this regard are the *Food Act 2003 (NSW)* (*FA 2003*) and the *Food Regulation 2010* (*FR 2010*), which has been promulgated under the *FA 2003*. The *FA 2003* brings into force the ANZFSC. Each type of enterprise (for example, seafood sector, and the dairy product sector) must comply with the relevant parts of that ANZFSC. The *FR 2010* brings into force a number of additional requirements for specific businesses, some of which are required to develop a food safety program (for example, egg related businesses). The NSW Food Authority (NSWFA) is empowered to prioritise various types of food businesses for the formulation and implementation of the FSS.

The *FA 2003* reflects the provisions of the national *Model Food Act (October 2000)* (Cth), made for the whole of Australia, and it covers most of the foods for human consumption. The *FR 2010* sets minimum food safety requirements for food industry sectors that have been determined to be at the greatest risk, namely the dairy, meat, plant product, egg, and seafood and shellfish businesses and for businesses preparing food for vulnerable persons in NSW.

Such sectors are subject to FSS.

### 4.2.3. Food Act 2003 (NSW)

The *FA 2003* is the key legislation in NSW for criminalising dangerous food safety conducts, for regulating the administrative authorities as well as for endorsing the provisions for

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451 *Food Regulation 2010 (NSW)* (‘*FR 2010*’) deals with some specific businesses like meat, eggs, dairy businesses etc and they are not included in the scope of the thesis. Therefore, the *FR 2010* will not be further detailed in this chapter.

452 *FR 2010* preamble.

453 For this the Food Authority uses *Food Safety Risk Profiling Framework* (2007) and a *Priority Classification System* (2010) avail NSW Food Authority (NSWFA), ‘Priority Classification System’ (NSW/FA/CP017/1004, 27 April 2010) (‘*Priority Classification System*’).


455 *FA 2003* s 93. See also NSWFA, *Priority Classification System*, above n 453, 2.


457 *FR 2010* explanatory note (a).
judicial enforcement of food safety issues. The following discussion will comprise a brief unfolding of the FA 2003.

The FA 2003 is a law that comprehensively covers food and food safety affairs. The objects of this Act are to guarantee the safety and suitability of food for human consumption and to prevent misleading conduct in regard to it, and to provide for the implementation of the ANZFSC in NSW.458

The FA 2003 is divided into several parts. Some of the contents of some parts are mentioned below. Part 1 discusses the preliminary matters of the law where definitions important for food safety related affairs are provided. For example, in Part 1 of the Act ‘food’ is defined to be any substance or thing of a kind used (or represented to be used) for human consumption whether it is live, raw, prepared or partly prepared. The definition of food also includes any ingredient or additive used (or represented as to be used) as an ingredient or additive in the above or if used to prepare the substances for human consumption if it comes into direct contact with that substance.459 Any food under the FA 2003 will be deemed ‘unsafe’ if it causes (or may be likely to cause) physical harm to one who consumes it, but it cannot be said to be unsafe for its inherent nutritional or chemical values.460 Part 2 of the FA 2003 includes the ‘offences relating to food’ which has been divided in two divisions inserting the ‘serious offences’461 in Division 1 and ‘other offences’462 in Division 2. Handling any food in an unsafe manner,463 sale of unsafe food,464 and any false description of food465 are serious offences under the FA 2003. Part 2 div 3 provides the defences for the offences mentioned in

458 FA 2003 s 3.
459 See generally ibid s 5.
460 Ibid s 8. Assuming that such a product has been ‘properly subjected’ to any relevant processes required for its intended use and consumed in accordance with its ‘reasonable intended use’: s 8.
461 For more details on the serious offences under the FA 2003, see section 7.3 of chapter 7 of the thesis.
462 For more details on the other offences under the FA 2003, see section 7.3 of chapter 7 of the thesis.
463 FA 2003 s 13 .
464 Ibid s 14.
465 Ibid s 15.
div 1 and div 2. Parts 3, 4, 5, 6, 7 and 8 of the FA 2003 deal with the ‘emergency powers’, ‘inspection and seizure powers’, ‘improvement notices and prohibition orders for premises or equipment’, ‘taking and analysis of samples’, ‘auditing’, and ‘regulation of food businesses’ respectively. Part 9 of the FA 2003 includes provisions in relation to administration where an apex coordinating body is formed; this part also mentions details of enforcement agencies and authorised officers. Parts 10 and 11 accordingly handle the ‘procedural and evidentiary provisions’ for the enforcement of the law and ‘miscellaneous’ provisions. In addition to the aforementioned 11 parts, there are also some sections that have been deleted or repealed (sch 1) or amended since the Act’s commencement and others that have been added to the law for various purposes.

Finally, the above is just a glimpse of the FA 2003. Many of the provisions of this law will be broadly explained in the subsequent chapters of the thesis for analysing the issues related to regulatory, liability and enforcement issues of the food safety laws in NSW.

4.2.4. Australian Consumer Law (NSW)

Besides the FA 2003 and its articulation with ANZFSC, the Commonwealth legislation named as the Competition and Consumer Act 2010 (Cth) (CCA 2010) handles the issues relevant to consumer rights protection. Schedule 2 of the CCA 2010 and regulations under s 139G of that Act comprise the text of the Australian Consumer Law (ACL), which provisions are applicable for the entire Commonwealth under an inter-governmental

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466 For details on the apex coordinating body see 4.2.6 of the chapter.
468 CCA 2010 sch 2 s 3.
469 Fair Trading Act 1987 (NSW) s 27 (‘FTA 1987’).
agreement and they apply to the violation of consumer laws by corporations.\(^\text{470}\) In NSW, part 3 of the *Fair Trading Act 1987* (NSW) (*FTA 1987*) has adopted the application and implementation of the provisions of the *ACL*.\(^\text{471}\) Section 28(1)(b) of the *FTA 1987* mentions that for the purpose of the application of the *ACL* in NSW, it will be referred as the ‘*Australian Consumer Law (NSW)*’ (*ACLNSW*).

The *ACLNSW* contains a variety of important provisions in addition to those providing general protection in regard to ‘misleading and deceptive conduct’ (under sch 2, ch 2, pt 2–1 (ss 18–19) of the *CCA 2010*) and specific protections in relation to ‘false and misleading representations’ (under sch 2, ch 3, pt 3–1, div 1 (ss 29–38) of the *CCA 2010*) regarding such conduct in regard to a range of goods. Section 18 of the *ACLNSW* prohibits any misleading or deceptive conduct (or conduct that is likely to be so) by persons in trade or commerce. Section 29 of the *ACLNSW* proscribes any such person to falsely represent any goods in terms of ‘a particular standard, quality, value, grade, composition, style, model, ... history or any particular previous use’ in connection with the supply or possible supply of goods or services and so on.

The provisions of the *ACLNSW* facilitate consumer protection because it imposes no barrier to the victim who wishes to obtain remedy personally. Additionally, this statutory provision has directly brought any wrongdoer under the civil liability. It is argued that, in NSW as long as the *ACLNSW* is available, consumers can obtain redress for the full extent of their loss or damage, and that the *FA 2003* has just added a stronger ‘nail in the coffin’ of the wrongdoers, enabling them to be brought to justice. Laying down detailed provisions in the law essentially


minimises the possibility of defendants being able to evade the scope of civil liability in a regulatory regime.

4.2.5. Coordination among the Major Food Safety Laws

On the subject of the false, misleading and deceptive descriptions of food as stated in the above, the ACLNSW is commonly concerned with the FA2003. Thus, it is worthwhile bringing up at this point that, regarding misleading and deceptive conduct in food businesses and false descriptions of food stuffs, there has been a degree of perplexity for a number of years about jurisdiction between two regulatory agencies while State and Territory departments and food agencies are charged with interpreting and enforcing the ANZFSC.472 The two relevant regulatory agencies are: the FSANZ (a bi-national governmental agency); and the Australian Competition and Consumer Commission (ACCC), a Commonwealth body responsible for ensuring compliance with the ACL.473 In this matter, at NSW State level the relevant Act is the FA 2003, which provides for the implementation of the ANZFSC in NSW,474 and the relevant State body is the NSWFA.475

The question of overlap or duplication between the FSANZ and the ACCC in regard to the prevention of deception and misleading conduct in food businesses was acknowledged by the policy makers, and the necessity for coordination addressed, in a joint ACCC and FSANZ Memorandum of Understanding (MOU) signed on 29 April 2004.476 The MOU mentions as follows.

474 FA 2003 s 3.
475 See the details of NSW Food Authority in section 5.2.3 of chapter 5 of this thesis.
The ACCC and FSANZ will maintain a close cooperative working approach to the arrangements established under this MOU. This will involve sharing information and maintaining an effective and open dialogue on matters that relate to provisions of the Code which are concerned with the prevention of misleading and deceptive conduct in respect of the promotion and sale of food in Australia.  

This coordination among two different laws, such as the CCA 2010 (the then Trade Practices Act 1874) and the FA 2003 and the two distinct bodies, namely the ACCC and the FSANZ, are noteworthy for Bangladesh in regard to its multiplicity and coordination of food safety laws. It is worth mentioning that recently the CCA 2010 has given the ACCC new enforcement powers to protect consumers (including the ability to seek or issue substantiation notices, infringement notices, banning orders, and higher penalties, and the ability to seek civil financial penalties). The ability to deal more speedily with issues (such as harmful misrepresentation) related to safety and food is among areas highlighted. Now food safety issues are more speedily dealt with as the ACCC is able to deal more effectively with matters that affect many consumers, particularly vulnerable consumers, as indeed the ACCC itself anticipates.

4.2.6. Provisions of the Highest Coordinating Body

The FA 2003 embodies the provision of an apex (coordinating) authority for the proper enforcement and implementation of these aforementioned laws and regulations. Part 9 of the FA 2003 provides that there will be a corporate body titled the New South Wales Food Authority (NSWFA) that is constituted by this Act. It has various functions in regard to

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478 See section 4.3.1 and section 4.3.2 of this chapter.
481 FA 2003 s 107(1).
ensuring maximum food safety throughout NSW. The report of the NSWFA claims that the body (NSWFA) ‘has a key role at every stage of the food cycle — from the day the food is harvested/slaughtered to the moment it arrives on the dinner table’. The NSWFA administers and enforces the ANZFSC as well as the *FA 2003* and a number of food safety schemes under the *FR 2010*.  

### 4.2.7. Food Safety Schemes

There are some food safety schemes (FSS) for specific foods and food businesses in NSW. Section 102 of the *FA 2003* provides that regulations can be made to prescribe a FSS under the Act for any particular type of food, food business or related activity in order to ensure food safety. Inclusion of a particular food, food business or associated activity is on the basis of such food, business or activity being identified as being in need of particular attention due to higher risk. Such regulations can make provisions for different purposes, including the handling of food, temperature issues related to food, licensing activities in relation to food businesses, and for the preparation, implementation, maintenance or monitoring of food safety programs for food businesses. That is why, to trigger s 102 of the *FA 2003*, the *FR 2010* has been promulgated. The *FR 2010* endorses provisions for prescribing in regard to the issues of FSS in relation to dairy, meat, egg, plant product, seafood, and shellfish businesses, as well as businesses involved in providing food for vulnerable persons. The *FR 2010* also covers matters related to licensing, and prescribes the fees and levies for licences required.

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482 Ibid s 108. Note: the details of the organisation and functions of the NSWFA will be discussed in section 5.2.3 of chapter 5 of this thesis.


484 Ibid.


486 For details, *FR 2010* s 102.

487 Ibid explanatory note (a).

488 Ibid ss 20–32.
and the charges for inspection and audit of such FSS,489 as well as other fees and charges payable for the purposes of the FA 2003. The FA 2003 is closely articulated with the ANZFSC (and other publications where indicated by the section of the FR 2010 relevant to a particular FSS) to create comprehensive standards and food safety requirements for food businesses.490 In relation to food standards, the FR 2010 details any modifications of the ANZFSC for application to FSS and for food handling in NSW.491 The FR 2010 further prescribes enforcement agencies for the FA 2003 (and their duties), and also the offences under the FA 2003 and regulations for which penalty notices may be issued492 and so on.

4.2.8. Export and Import Related Regulations

In addition to applying to domestic food manufacture, the ANZFSC also applies to exports and imports of foods. The Australian Quarantine and Inspection Service (AQIS) is charged with implementing the provisions of the ANZFSC related to food imports into and exports from all States and Territories of Australia. Under the Export Control Act 1982 (Cth), the AQIS is the competent authority to check the export certification.493 The importation of foods into NSW is also subject to the Imported Food Control Act 1992 (Cth), which provides for the inspection and control of imported food using a risk-based border inspection program called the AQIS Imported Food Inspection Scheme. All foods have to meet the quarantine requirements of the Quarantine Act 1908 (Cth) to enter Australia.494 It is important to note

489 Ibid s 37.
490 See, eg, FR 2010 s 50, where it is stated that control measures for Listeria contamination are to be carried out in accordance with the Australian Dairy Authorities’ Standards Committee publication, the Australian Manual for Control of Listeria in the Dairy Industry.
491 FR 2010 explanatory note (d).
492 Ibid explanatory notes (e) and (f).
that because of the importation and export of foods is not incorporated in the present study, these will not be further discussed in detail in this thesis.

Finally, on the basis of the preceding discussion, it can be argued that the FSLF of NSW does not consist of a copious number of laws attempting to deal with various foods; rather it is composed of few laws that are well-coordinated and updated in a timely manner. The FSANZ develops the ANZFSC which is implemented by the FA 2003. Apart from the FA 2003, the legal framework contains the enforcement of the ACLNSW to protect the consumers from deceptive and misleading conduct of manufacturers. The entire food safety laws are implemented under the guidance of the apex body, the NSWFA. It will not be an overstatement to assert that the overall FSLF of NSW is reasonably uncomplicated, and does not confer any burden on manufacturers that is naturally associated with a multiplicity of legislation, a lack of coordination, and the presence of ambiguity and complexities, as may be the case elsewhere. Also because of this simplicity, a consumer can easily be educated and become familiar this legal framework which is necessary for ensuring overall food safety.

### 4.3. Issues Concerned in the Food Safety Legal Framework of Bangladesh

Bangladesh has no integrated legal framework to address food safety matters. Food safety issues have been dealt with by a number of laws. Below find a chart of multiple laws that deal with the food safety issues in Bangladesh.  

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Chapter 4: Legal Framework of Food Safety in Bangladesh

Current Legal Framework of Food Safety in Bangladesh

1. Penal Code 1860
2. Control of Essential Commodities Act 1956
3. Food (Special Courts) Act 1956
4. Pure Food Ordinance 1959
5. Cantonments Pure Food Act 1966
6. Pesticide Ordinance 1971
7. Special Powers Act 1974
8. Fish and Fish Products (Inspection and Control) Ordinance 1983
10. Iodine Deficiency Disorders Prevention Act 1989
11. Consumers Rights Protection Act 2009
12. Mobile Court Act 2009

Figure 4.1: Food Safety Legal Framework of Bangladesh

The legislation mentioned in this table is applied without any or with the least possible coordination and it has sorely failed to combat the widespread adulteration of foods in Bangladesh. Several of the statutory laws related to food safety in Bangladesh are mostly inherited from its colonial rulers.\textsuperscript{496} Hence, in terms of the age of the pieces of legislation involved, some laws are more than a century old; they have changed little in that time and are seldom updated. The sub-sections below will discuss major alarming issues that have so long existed in the FSLF of Bangladesh.

\textsuperscript{496} See section 2.3 of chapter 2 of the thesis.
4.3.1. Multiplicity and Overlapping of Food Safety Laws in Bangladesh

Several laws in Bangladesh treat a number of food safety problems as offences. The current section will discuss a few significant food safety offences to indicate the existence of multiple laws to deal with one issue and their overlapping where they attempt to fulfil the purpose for which they were made. However, due to the immensity of the ongoing research as well as to avoid the reappearance of these issues, this section will not involve analysing the offences, rather the offences will be focused upon with a view to showing the impact of the multiplicity of applicable enactments. The following section will be evaluated subsequent to its closing stages, taking into account the counterparts NSW provisions mentioned at the end of the each sub-section.

At this point it is important to note that the contents of the below-mentioned provisions of the laws in Bangladesh along with their problems in relation to criminalising the dangerous food safety conducts to identify manufacturer’s criminal liability will be detailed in section 7.4 of the chapter 7 of this thesis.

(a) Food Adulteration

Of all food safety evils in Bangladesh that the food manufacturers are committing, food adulteration is the central issue. The following portion will talk about how a single offence such as food adulteration has been subject to more than a few laws, leading the FSLF of Bangladesh to suffer from a multiplicity of legal implications, in particular overlapping.

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498 For details, see section 7.4 of chapter 7 of the thesis. Only the CRPA 2009 considers it a civil wrong, details of which are available in section 6.2 of chapter 6 of the thesis.
I. The Penal Code 1860 (PC 1860), the oldest criminal legislation in Bangladesh, in its chapter XIV discusses the issues that affect public health and safety. In particular, ss 272 and 273 of the PC 1860 make food adulteration as an offence.

II. The Special Powers Act 1974 (SPA 1974) is made to provide ‘special measures for the prevention of certain prejudicial activities and for [the] more speedy trial and effective punishment of some grave offences’. Section 25C of this Act articulates the same offence of food adulteration having repeating the provisions of the PC 1860 but by changing the languages and punishments. The SPA 1974 provides severe penalties for food adulteration.

III. The Pure Food Ordinance 1959 (PFO 1959) is one of the leading laws in regard to the food safety issue in Bangladesh. This law aims to better control food manufacture and the sale of food for human consumption. Section 6(1)(a) prohibits the adulteration of food through manufacturing and s 16 prohibits the keeping of adulterants in places where food is manufactured.

IV. At the same time as the offence of food adulteration is tried under the three above mentioned laws, in 2009 GoB enacted the fourth law, the Consumer Rights Protection Act 2009 (CRPA 2009), to criminalise conduct relevant to consumer rights in Bangladesh. This law includes provisions under ss 2(20)(b) and 41 to outlaw food adulteration as an offence.

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499 The British Government enacted this law for the people of the entire Indian subcontinent when Bangladesh was a part of Bengal (in the early 1900s the second largest and most populous province of the then ‘British India’). Thus India, Pakistan and Bangladesh once shared the same law and their subsequent legislation has been influenced by it. See Imperial Gazetteer of India (1907) 4, 46.

500 The contents of these sections along with their problems to criminalise the dangerous food safety conducts have been discussed in section 7.4.1 of the chapter 7 of this thesis.

501 SPA 1974 preamble.

502 See section 7.7 of chapter 7.

503 PFO 1959 preamble.

504 For details, see section 7.4.5 of chapter 7 of the thesis.
V. The Bangladesh Standard Testing Institute Ordinance 1985 (BSTIO 1985) provides that a factory of the food manufacturer can be shut down if any [food] product produced by that particular manufacturer does not follow the ‘Bangladesh Standard’, which is made by the Bangladesh Standard Testing Institute (BSTI). When any food manufacturer includes inferior or adulterated ingredients while producing the food, it will not comply with the Bangladesh Standard. From this perspective, food adulteration is an offence which can be separately tried under the BSTIO 1985 simultaneously with the aforementioned four distinct statutes.

Hence, based on the above discussion, it can be seen that a single criminal offence like food adulteration is considered as an offence under five different statutes at the same time in Bangladesh.

By way of contrast, in NSW, a single law the FA 2003 regards food adulteration or any kind of lack of safety in relation to food where a food is rendered either unsafe or unsuitable for consumption as an offence.

To sum up, in putting side by side the Bangladesh and NSW provisions, it can be seen that in NSW only a few provisions under the FA 2003 manage to encompass the entire food adulteration issue, whereas at least five laws with similar provisions exist to criminalise the same conduct in Bangladesh.

(b) Using Unauthorised Chemicals

505 See Bangladesh Standard Testing Institute Ordinance 1985 (Bangladesh)s 33C(1) (‘BSTIO 1985’). See the details of the BSTI at section 5.3.7 of chapter 5 of this thesis.
506 See FAO Food Safety Project Team, ‘Improving Food Safety, Quality and Food Control in Bangladesh: Report on a Workshop on Food Inspection Arrangements in Bangladesh’ (Food and Agriculture Organization of the United Nations, September 2010) 12 (FAO, ‘Report on a Workshop on Food Inspection Arrangements in Bangladesh’).
507 FA 2003 s 8 defines the word ‘unsafe’. For more details, see section 7.3 of chapter 7 of the thesis.
508 Ibid s 9 defines the word ‘unsuitable’.
509 Ibid pt 2 div 1–2.
510 For details, see section 7.3 of chapter 7 of the thesis.
511 For details, see section 7.4 of chapter 7 of this chapter.
Unauthorised chemical use is a serious offence in relation to food safety matters in Bangladesh, specifically the use of formalin, a dangerous chemical for human health, in treated food, such as fish. Similar to the food adulteration offence, several enactments in Bangladesh include as an offence the use of unauthorised chemicals. Considering the extent and the severity of contamination of ‘fish’ processing by formalin, this section presents it as an example below.

Formalin treating of fish can be tried under at least three pieces of legislation.

I. The PFO 1959 incorporates the word ‘fish’ as food. ‘Fishery’ and fish processing is also included under the jurisdiction of this law. That means unauthorised fish processing is an offence under this law. The PFO 1959 prohibits the sale or use of any food which is poisonous or which contains dangerous chemicals (such as formalin) or toxic food colour.

II. The Fish and Fish Products (Inspection and Control) Ordinance 1983 (FFPO1983) enacts provisions regarding fish and fish processing. The FFPO 1983 purposes to ‘provide for inspection and quality control of fish and fish products’. All ‘cartilaginous and bony fishes, prawn, shrimp, amphibians, tortoise, turtles, crustacean animals, etc.’ are included under this law. The FFPO 1983 also includes ‘fish products’ such as fish sauce, fish paste, fish powder, fish oil, etc.

512 See section 2.4 of chapter 2 of this thesis.
513 Different foods are randomly treated with formalin in Bangladesh. For example, see UNB, Sylhet, ‘26 of a Family Fall Sick after Eating ‘Formaline Treated fish’, The Daily Star (Dhaka), 13 March 2013, Metropolitan; ‘Formaline Still Widely Available: Minister’, The Daily Star (Dhaka), 1 August 2013, Business; ‘Formaline Detection Point for Fish Buyers at Karwan Bazar’, The Daily Star (Dhaka), 13 March 2013, Business; ‘Fruits Highly Soaked in Formaline’, The Daily Star (online), 11 June 2013. For more details on the use of formalin in different foods in Bangladesh, see section 2.4 of chapter 2 of this thesis.
514 PFO 1959 s 3(5).
515 Ibid s 3(4C).
516 Ibid s 6A
517 See more about fish management in section 5.3.8 (Ministry of Fisheries and Livestock) of chapter 5 of this thesis. This Ordinance works in conjunction with two sets of rules, namely the Fish and Fish Products (Inspection and Quality Control) Rules 1997 and the Fish and Fish Products Inspection and Quality Rules 1989 and other provisions made in relation to these. These Rules are basically intended to develop quality improvements to promote exports. As import and export are not included in this study, these rules are not discussed in this thesis.
518 Fish and Fish Products (Inspection and Control) Ordinance 1983 (Bangladesh) preamble (‘FFPO 1983’).
coelenterates, molluscs, echinoderms and frogs at all stages of their life history’ have been included as ‘fish’ in the *FFPO 1983*.\(^{519}\) ‘Fish products’ includes any products or by-products of freshly\(^{520}\) caught fish (otherwise known as ‘*sutki*’).\(^{521}\)

Section 4 of the *FFPO 1983* empowers an inspector to conduct inspections in order to ensure compliance with the provisions of the Ordinance. And an, ‘“inspection” means physical examination of fish processing and packing plants with regard to hygiene and sanitation and physical, chemical and bacteriological examination of fish and fish products’.\(^{522}\) It is worth mentioning that the *FFPO 1983* asserts that ‘processing’ means ‘cleaning, filleting, icing, packing, canning, freezing, smoking, salting, cooking, pickling, drying or preparing fish in any other manner for marketing’,\(^{523}\) and ‘quality control’ means the ‘technique by which conformity of a product to [an] establish[ed] standard is assured’.\(^{524}\) However, the current study finds that the random inspections are not frequently conducted under the *FFPO* nor is the Ordinance routinely used in regards chemical treated fishes or fish products in Bangladesh.

III. Mixing of formalin in fish is an offence under s 42 of the *CRPA 2009* which makes mixing of any substance that is severely dangerous for human health a punishable offence.

Hence, the aforementioned discussion shows that more than one law deals with the single issue of the use of formalin in fish processing. It is a source of some distress to note that although among all the laws that relate to fish processing and related safety matters, none of them include any provision for coordination among them for the effective application of the

\(^{519}\) Ibid s 2(a).
\(^{520}\) And fresh fish means a fish ‘that has not been processed in any manner’: Ibid s 2(d).
\(^{521}\) Ibid s 2(c).
\(^{522}\) Ibid s 2(f).
\(^{523}\) Ibid s 2(g).
\(^{524}\) Ibid s 2(h).
legislation for the betterment of food safety in Bangladesh, and the detection and prosecution of offenders.525

Further, where the particular chemical is Dichloro Diphenyl Trichloroethane (DDT) (see section 2.4 of chapter 2) rather than the formalin (discussed above), then there is one more special law applicable. The one extra law is the Pesticides Ordinance 1971 (PO 1971). The PO 1971 aims to regulate the use of pesticides,526 and therefore pesticide use — at least in theory — has become subject to a number of restrictions under this law.527 This Ordinance defines ‘pesticide’ as including any substance used for ‘preventing, destroying, repelling, mitigating, or controlling directly or indirectly any insect, fungus, bacterial organism, nematodes, virus, weed, rodent, or other plant or animal pest’.528 Misuse of pesticides can also be tried as offence under s 272 of PC 1872, and s 25C of SPA 1974 (as mentioned in the above section) under a maximum of four laws.

By way of difference, in NSW, the word ‘unsuitable’ (defined in s 9 of the FA 2003) encompasses all kinds of use of chemicals that is foreign to food or which use is not permitted by the ANZFSC. Section 17 of the FA 2003529 proscribes any production and processing of unsuitable foods (handling and sale of unsuitable food). It is notable that ‘handling of food includes the making, manufacturing, producing, collecting, extracting, processing, storing, transporting, delivering, preparing, treating, preserving, packing, cooking, thawing, serving or displaying of food’ [emphasis added].530

(c) Food Hygiene

526 Pesticide Ordinance 1971 (Bangladesh) preamble (‘PO 1971’).
527 Ibid ss 4, 5, 11.
528 Ibid s 3(n).
529 For details, see section 7.3 of chapter 7 of the thesis.
530 FA 2003 s 4(1).
Bearing in mind the descriptions in section 2.4 of chapter 2 of this dissertation, it can be seen that, among all the food safety anxieties in Bangladesh, food hygiene is a grave concern. Unhygienic food is everywhere in Bangladesh, especially where foods are manufactured by local factories and so forth. The discussion below will articulate how this conduct (unhygienic food handling or processing) is considered in several pieces of legislation as a criminal offence.

A food may be manufactured in an unhygienic environment and unfit for human consumption or treated in such a matter as to be harmful to human health. Section 273 of the PC 1872 outlaws any food or drink the condition of which renders it unfit as a food or drink. Section 24 of the PFO 1959 deals with the provisions related to premises and any part or parts of premises used for the manufacture of food. The occupant of any premises used for the manufacture of any food has to ensure that there is no sanitary convenience, dustbin or ash pit immediately outside/beside the premises. The occupier has to ensure that the roof, ceiling, walls, windows, doors and floor of such premises or part of such premises are kept neat and clean with sufficient and suitable ventilation, and so on. These conditions aim to maintain the hygiene of food during processing and manufacturing.

Section 6 of the FFPO 1983 articulates that anyone suffering from leprosy, tuberculosis or such other contagious disease as is specified by the Government in the Official Gazette is not allowed to handle, carry or process any fish or fish products. A licence is required to operate any fish processing and fish packing plant or establishment according to s 7(1) of the FFPO 1983.

531 For example, see Parvez, above n 97; Uddin, above n 110.
532 For details, see section 7.4.1 of chapter 7 of the thesis.
533 For details, see PFO 1959 s 24.
The *CRPA 2009* includes the provisions related to the food hygiene issue under its jurisdiction but using circumlocutory language. Section 43 of this Act proscribes any kind of unlawful (prohibited by any law of the land, for example, the *PFO 1959*) [food] manufacturing or [food] processing that can be hazardous to human health. Indeed, the unhygienic dealings with food can cause the particular food to be unsafe for human consumption.

The above discussion portrays that at least four laws consider food hygiene related issues as an offence in Bangladesh.

On the contrary, every kind of food hygiene for manufacturing has been included under the definition of the ‘handling of food’ in NSW and outlawed by the provisions of the *FA 2003* as discussed above (see above discussion on ‘using unauthorised chemicals’).

(d) **Food Standards**

Rules have been made under the provisions of the *PFO 1959*,\(^{534}\) namely the *Bangladesh Pure Food Rules 1967* (*BPFR 1967*). In these Rules, there are generic standards for 107 food products for Bangladesh.\(^{535}\) For example, Standard No 78 of the *BPFR 1967* articulates the standards, ingredients and their measurements in regard to fruit juice. But there is another applicable food standard in Bangladesh as well that is set under the *BSTIO 1985*, one of the notably important laws in Bangladesh dealing with food safety standards. The Bangladesh Standard Testing Institute (BSTI)\(^{536}\) has 155 products for which mandatory certification marks should be shown. On the list, the first item recorded is fruit juice (Standard Number - BDS CAC 247: 2008).\(^{537}\) The national taskforce on food safety recognises this issue and mentions that many of the standards made under the *BPFSR 1967* overlap the provisions and

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534 *PFO 1959* s 5.
535 See the *BPFR 1967* sch, 13. Note: *BPFR 1967* is not available in the internet to date.
536 See the details of BSTI in section 5.3.7 of chapter 5 of the thesis.
standards of the BSTI. Despite this type of recognition by a national taskforce, still there is to date no action by the government to solve this overlapping of food standards.

On the other hand, as mentioned above in section 4.2.1 of this chapter, the ANZFSC is the only food standard code for the whole of Australia. There is no chance of overlapping or a multiplicity of standards.

The discussion in section 4.3.1 demonstrates that food safety issues are dealt with by numerous laws in Bangladesh, which creates several problems. But it is hard to ‘wrap up’ and suggest that a multiplicity of laws is always a negative device in the FSLF of a particular country in case there is a situation where strong coordination exists among the regulations thus offsetting and eliminating overlap or confusion. It is a disgrace that Bangladesh has sorely failed to construct any efficient coordination among the aforementioned pieces of legislation. Not only this, chapter 5 of this thesis will elucidate each of these laws as it is enforced by a separate regulatory authority, which creates further regulatory overlapping. This situation also creates confusion in the minds of regulatory authorities, traders, and investors. A multiplicity of laws in operation does not make any sense to the average consumers, or manufacturers that have difficulty discerning which law deals with their particular food product.

It is unreasonable to have a dozen laws for the issue of food safety in a small country like Bangladesh. This is because the more laws there are, the more difficult it is to maintain and

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538 FAO, ‘Report on a Workshop on Food Inspection Arrangements in Bangladesh’, above n 506, 3[5].
539 For details, see section 4.3.2 of this chapter.
540 See section 5.4.1 of chapter 5 of the thesis.
541 In this regard, merely to find the consistency of the problem pointed out above, a relevant example from the United Kingdom (UK) can be cited. Early this century the multiplicity of regulations in the UK food industry became a concern. The renowned Hampton Review addresses this issue and brings up a 2003 academic study where it has been suggested that ‘62 per cent of small food business proprietors do not understand which food safety regulations are relevant to them’. See Hampton, above n 253, 5.
update them to meet changes in standards\textsuperscript{542} (for example, those generated by continuing scientific research in regard to residue impacts) and to other matters related to food safety in the contemporary world (for example, technological change, increased chemical use, and gene technology). Thus, the following discussion will endeavour to find a potential solution to this issue in light of the equivalent NSW FSLF.

NSW possesses an integrated food safety system, as is seen from section 4.2 of this chapter. The \textit{FA 2003} covers the major issues of food safety. The \textit{FR 2010} has been enacted to bring about the particulars of that law with a few specific schemes for foods like meat products, eggs and so on that has been identified on a risk basis. Again, the \textit{ACLNSW} looks after consumer rights related issues in general, and food safety is simply a part of it. Therefore, considering such perspectives, the \textit{FA 2003} is the key law in the regulation of food safety\textsuperscript{543} for manufacturers and for ensuring food safety for all consumers throughout NSW.

Based on the preceding discussion, the following recommendations can be made.

i. There is a pressing need to have coordinated and amalgamated food safety law in Bangladesh to provide the necessary framework for a marked reduction in continuing problems in relation to food safety,\textsuperscript{544} and to promote the proper functioning of the whole food safety mechanism. Hence, taking a lesson from NSW, Bangladesh can amalgamate all the existing laws and create a new law borrowing the example of the \textit{FA 2003}. The Food and Agricultural Organization (FAO) of the United Nations has recognised the issue

\textsuperscript{542} See section 4.3.3 of this chapter.
\textsuperscript{543} For details, see chapter 5 and chapter 8 of the thesis.
Chapter 4: Legal Framework of Food Safety in Bangladesh

of multiplicity and overlapping of the enactments in LDCs, and is assisting them to overcome the problems by emphasising the introduction of an integrated food safety system. Bangladesh can take necessary help from the FAO given that perspective.

Following the example of NSW, Bangladesh can borrow the design of simply having one food standard code which will help to reduce ambiguity and overlapping. In which case the BSTI can take the lead and the standards under the BPFR 1967 may be repealed and replaced by new standards within a new single Act.

4.3.2. Lack of Coordination of Laws

Despite the presence of a large quantity of laws to deal with food safety matters in Bangladesh, the provisions related to effective coordination among these laws for smooth implementation do not exist in practice. For example, as mentioned above, the BSTI has made food standards under the authority of s 5(a) of the BSTIO 1985. When BSTI developed food standards, at that time the BPFR 1967 was in operation. But the BSTIO 1985 does not involve any provisions for the recognition the food standards under the BPFR 1967 with a view to creating coordination between two standards, although they serve similar purposes.

In a 1984 publication, Ali pointed out that the lack of coordination of laws and their administration is the main reason for the widespread violation of consumer protection laws in Bangladesh. Most of the laws become practically useless due to a lack of integration of

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545 Bangladesh is considered as an LDC: see above note 202.
function between the provisions of those laws as well as due to bureaucratic problems associated with that non-coordination. In 2005 the Government of Bangladesh (GoB) amended the PFO 1959 to introduce a provision regarding a coordinating body by inserting s 4A. This section provides for the constitution of a National Food Safety Advisory Council (NFSAC), which in general is regarded as a coordinating body. But the NFSAC has numerous drawbacks in regard to letting it work as an independent coordinating body in the FSLF of Bangladesh, which have been detailed in section 5.3.4 of chapter 5 of the thesis. So, it can be seen that unless the problem of the multiplicity of laws is eradicated by enacting a single law following the suggestion above, coordination among the laws will remain a pressing need in the FSLF of Bangladesh.

However, a potential solution in regard to this issue can be found in the counterpart NSW FSLF. Section 4.2.5 and section 4.2.6 of this chapter reveal how the food safety authorities have built up coordination among all the major food safety laws in NSW. In this regard, it is noteworthy that only the misleading and deceptive conduct in food business had up until a few years ago been a source of overlapping in the food industry of NSW. But it was solved by an MOU between the enforcement authorities of the two laws. In particular, section 4.2.6 of this chapter portrays how the FSLF of NSW embodies a coordinating authority (NSWFA) that acts to manage the integrated application and administration of all the relevant laws and helps to implement each law in its respective area, which maximises food safety in the whole State of NSW.

549 Food Safety Project Team (FSPT), Improving Food Safety, Quality and Food Control in Bangladesh: Food Inspection and Enforcement in Bangladesh: Current Arrangements and Challenges (Food and Agriculture Organization of the United Nations, October 2010) 1 (Food Inspection and Enforcement in Bangladesh).
551 See generally NSWFA, ‘Annual Report 2008–09’, above n 483. The details of the problem of coordination among the food safety regulatory bodies in Bangladesh and the equivalent provisions of NSW to cover the issues has been discussed in chapter 5 of this thesis.
Therefore, given the current food safety problems in Bangladesh, such a plethora of laws, particularly ill-coordinated and the overlapping laws (as mentioned above), may also multiply rather than dispel ignorance of the law. Hence it can be argued that manufacturers may sometimes adulterate food from sheer ignorance. In practice, coordination among laws and bodies is not easy to achieve in these circumstances and so, in every aspect an integrated regulatory approach is indeed a need.552

Lastly, given the current situation, it can be said that Bangladesh can follow the examples of NSW to coordinate among all the food safety laws for a better result. In that case Bangladesh can create MOUs between the enforcement authorities of the respective laws to ensure better coordination. Also, the laws will be needed to be updated in accordance with the MOU.

4.3.3. Outdated, Limited Jurisdiction and Unnecessary Enactments

The FSLF of Bangladesh encounters the problem of outdated legislation that is ‘on the books’ but not implemented in the legal framework. In addition, there is legislation that is not effective in maintaining food safety, yet still exists. The following section of this chapter will discuss outdated, rarely implemented and limited jurisdiction enactments that exist in the FSLF of Bangladesh. It is so necessary to address this, that the current section has been inserted in this chapter with a view to describing these obsolete laws that still remain in the FSLF of Bangladesh but are hardly ever used or are used in a limited jurisdiction but are a burden to the government. These statutes also produce ambiguity in the understanding among the enforcement authorities as well as the regulatees (such as, manufacturers, consumers and so forth) as to whether these laws are relevant (or operational) for them or not.

The Control of Essential Commodities Act 1956 (CECA 1956) was enacted with an intention of controlling the ‘production, treatment, keeping, storage, movement, transport, supply,
distribution, disposal, acquisition, use or consumption’,\textsuperscript{553} of foodstuffs.\textsuperscript{554} Section 3 of this Act provides that the Government has the power to control \textit{production} [emphasis added as it relates to the current research], supply, distribution, and so on, of essential commodities. Under s 2(a)(i) of this legislation, ‘foodstuffs’ has been included as an essential commodity. But in practice, this law is rarely used for food safety purposes but still is a valid law in Bangladesh.

The \textit{Food (Special Courts) Act 1956 (FSCA 1956)} provides for courts to be set up for the speedy trial of those accused of offences in relation to foodstuffs.\textsuperscript{555} The \textit{FSCA 1956} states that contravention of any notified order regarding foodstuffs will be deemed to be a violation of the \textit{FSCA 1956}, though a regulatee (for example, a food manufacturer) can violate any provision of the \textit{CECA 1956} and this offence will be tried by special magistrates appointed under the \textit{FSCA 1956}. No other court shall have any jurisdiction to take cognisance of any such offence.\textsuperscript{556} Here clearly the \textit{FSCA 1956} has ignored its preceding legislation, the \textit{CECA 1956}. However, the \textit{FSCA 1956} itself then becomes ineffective. Taking into consideration the practicalities of today, the \textit{FSCA 1956} is an outdated enactment. To comment on the whole, the \textit{FSCA 1956} seems insignificant in the current FSLF of Bangladesh. It is because this law is hardly ever applied to any kind of food adulteration or other manifestation of unsafe treatment of foodstuffs by manufacturers. In the ordinary course of events, ineffective laws should be repealed or where useful amalgamated with other laws. But, this outmoded legislation remains in the FSLF of Bangladesh although its usefulness has ceased. The \textit{FSCA 1956} has neither been repealed nor been amalgamated with other laws dealing with food safety.

\textsuperscript{553} \textit{Control of Essential Commodities Act 1956 (Bangladesh)} preamble.
\textsuperscript{554} Section 2(1)(a)(i) of the Act states that ‘foodstuffs’ have been defined as an ‘essential commodity’.
\textsuperscript{555} \textit{Food (Special Courts) Act 1956 (Bangladesh)} (‘\textit{FSCA 1956}’) preamble.
\textsuperscript{556} \textit{FSCA 1956} s 3.
Some laws existing in the current FSLF of Bangladesh are used for limited jurisdictions. These are either enacted for some particular group of people, or for particular food product, or for specific ingredients that are used in foods. These laws appear unusual considering the reality and circumstances and they simply add a bulk to the legal regime for the food safety in Bangladesh and add an extra burden for both regulator and regulatee. Among them the Cantonments Pure Food Act 1966 (CPFA 1966) is significant and therefore to be discussed.

The GoB has enacted the CPFA 1966 for preventing the adulteration of food in ‘cantonments’, which are essentially places declared by the government to be a military area. Under this law, the GoB outlaws the mixing, colouring, staining, powdering or coating of food in contravention of the rules, and prohibits the preparation, manufacture of adulterated foods, or misbranded or mislabelled foods (that is the contents are other than is identified on the label) or of a quality other than that purported, or other foods (as set out under the Act). The Act also sets out that no one is directly or indirectly (by any other person or persons) allowed to ‘prepare, manufacture…any food which is unsafe, unwholesome, injurious to health or unfit for human consumption’, or which is ‘not of the nature, substance or quality that it purports or is represented to be; or …is not of the nature, substance or quality demanded’.

It is essential to point out that anything used for food or drink for human consumption is defined as food in the CPFA 1966 except drugs or water. However, aerated water, and, of particular importance, any water used for the preparation of any food will be deemed as food.
under this law. Any substance used for food preparation, or any flavouring matter or condiment, or any colouring substance used to prepare food, are foods under this law. Chewing gum or similar products are also considered food under this law. This definition of food indicates that nearly all kinds of foods have been encompassed in this law, despite the fact that there are parallel laws such as, the PFO 1959 for the ordinary consumers in Bangladesh encompassing the same foods articulated in the CPFA 1966.

Although the current study depicts uncontrolled production of unsafe food as a common problem in all areas of Bangladesh, it is nevertheless discriminatory and waste of national resources to have a distinct law for a particular group of people (here those in cantonments) to guarantee them the ability to enjoy safe food.

The logic of having an identical law in places across Bangladesh to ensure safe food for all is hard to contradict. Just for reference in this particular instance, the author of this study has studied some developed countries, such as Australia, United Kingdom and United States of America to examine whether there are any particular food safety laws for their military or for cantonments. It is found that none of these above mentioned developed countries have special food laws for the cantonments. It is further discovered that when the CPFA 1966 was enacted in 1966, Bangladesh had been a part of Pakistan (and called ‘East Pakistan’ at that time). Bangladesh, after its independence inherited the CPFA 1966 from Pakistan. As no country in the world except in Pakistan finds it necessary to have special food safety laws for military personnel or their residential areas (the origin of the word cantonments), it does not seem to make any sense to have this law in existence in Bangladesh.

566 Ibid s 2(9) explanation 1.
567 Ibid s 2(9)(i)–(iii).
568 Ibid.
569 See section 2.4 of chapter 2 of this thesis.
The current thesis also considers the *PO 1971* and the *FFPO 1983* as unnecessary laws prevailing in the present FSLF of Bangladesh. Some reasons are given for this proposition. Firstly, the *PO 1971* and the *FFPO 1983* both provide provisions to prevent the use of pesticides use (for example, DDT) and the chemical (for example, formalin) in food items. But it has been demonstrated in section 4.3.1 of the chapter that multiple laws such as the *PC 1860, PFO 1959, SPA 1974* and the *CRPA 2009* are already operating for the same purpose; several provisions of these four laws have already criminalised misconduct related to agricultural chemicals (including pesticides) and other chemicals in the treatment of foods.\(^571\)

Secondly, neither the Ministry of Agriculture, which has regulatory responsibility for the enforcement of the *PO 1971*, nor the Ministry of Fisheries and Livestock which has regulatory responsibility for the *FFPO 1983*, play an effective role in the prevention of the use of pesticides and chemicals in regard to food.\(^572\) Thus, the existence of the *PO 1971* and the *FFPO 1983* simply adds more burdens to the legal framework.

Another instance of outdated enactments that at present exist in Bangladesh is the *Iodine Deficiency Disorders Prevention Act 1989 (IDDPA 1989)*. The GoB has enacted the *IDDPA 1989* to virtually eliminate iodine deficiency disorders through the universal availability and consumption of iodised salt in Bangladesh and a ban on the production, storage, distribution of non-iodised salt. No-one may exhibit for sale any kind of salt other than the iodised salt.\(^573\) In addition, the *IDDPA 1989* proscribes any kind of sale, storage, distribution or exhibition for sale of unpackaged (loose) salt. The packet will be labelled with the name and address of the producer of the salt, its weight and production date, packet number and a declaration

\(^{571}\) See section 7.4 of chapter 7 of the thesis.

\(^{572}\) See the role of the Ministry of Agriculture and Ministry of Fisheries and Livestock as the regulatory body in section 5.3.2 and in section 5.3.8 of chapter 5 of the thesis accordingly.

\(^{573}\) *Aiodin Ovabjonito Rog Protirod Ain 1989 [Iodine Deficiency Disorders Prevention Act 1989] (Bangladesh) s 4(2) [author’s trans] (“IDDPA 1989”). Note: ‘iodised salt’ is defined in s 2(a) of this Act.*
regarding the mixing of iodine in that particular salt.\footnote{Ibid s 6(1)(2) [author’s trans].} Later the *Iodine Deficiency Diseases Prevention Rules 1994* were also passed to ensure better public health by the standardising salt with the appropriate quantity of iodine. This thesis finds that in NSW, the ANZFSC sets out the ‘compositional and labelling requirements for salt and salt products’.\footnote{Australian Government, ComLaw, *Australia New Zealand Food Standards Code - Standard 2.10.2 - Salt and Salt Products*<http://www.comlaw.gov.au/Details/F2009C00920>}. A manufacturer is bound to follow the standard provided in the ANZFSC because the *FA 2003* brings into force the ANZFSC. Anyone who produces salt other than in accordance with the ANZFSC is liable to be punished under the *FA 2003*. Therefore, it is argued that the *IDDPA 1989* is unnecessary legislation (taking into account the example of NSW). This is because the standard for salt could be straightforwardly incorporated in the BSTI standards, which set the standards for many other food products in Bangladesh. Moreover, the production of salt other than in accordance with the BSTI standard could be included as an offence under any law (in this instance, it should be noted that the current thesis has suggested a single food safety law for the whole of Bangladesh), for example, the *PFO 1959*. But until a single law is enacted, it can be inserted as an offence under the *BSTIO 1985*.

**Outdated Provisions of Necessary Laws**

Apart from the above discussion, another substantial negative aspect of the FSLF in Bangladesh is that a number of laws that are currently operational also contain obsolete provisions in the following ways.

Some of the laws that have been discussed in section 4.3.1 of the chapter are more than a century old without any updating of the relevant provisions, for example the *PC 1860*. In practice, the entire legal framework for controlling food safety in Bangladesh is miserably outdated because most of these laws were formulated when the food industry was not so well
organised, without mechanisation or industrialisation or the availability of any of the chemicals in use today and in the absence of much knowledge that has become available in modern times.576 Times have changed, the food industry has changed but the laws which regulate the industry have not been changed.

The law that deals with the damages for the victim of the unsafe food (for example, *CRPA 2009*) has several difficulties in regard to the provision of damages to victims,577 and the laws that deal with the food safety related offences (for example, *PC 1860*) provided negligible penalties.578 It is also noted by several national and international studies that food standards made under the authority of the *BSTIO 1985* do not embody the updated and recent recommendations of the Codex Alimentarius Commission,579 the international food standards setting authority created under the authority of the United Nations Food and Agriculture Organisation (FAO) and the World Health Organisation (WHO). Henson and Jaffee in this regard pointed out that food safety control systems in developing countries tend to be deficient due to ‘weaknesses in their legislative frameworks’ and their failure to comply with ‘international standards and norms’580

Further, none of the above mentioned laws of Bangladesh embrace specific provisions for food labelling, which is one of the fundamental elements to ensuring food safety in any country. The BSTI has taken this matter into consideration just recently when it formulated a

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577 See section 6.2 of chapter 6 of the thesis.
578 For details on the adequacy of penalties of the laws, see section 7.7 of chapter 7 of the thesis.
general Product Labelling Policy 2006 but it apparently does require packaged food to ‘carry a label indicating country of origin, quantity, weight, component materials, and dates of manufacture and expiry in Bangla (the native language)’.\textsuperscript{581} The FAO project on food safety in Bangladesh mentioned in its report that ‘food safety and quality issues are not reflected in the policy.’\textsuperscript{582} The GoB is concerned about the shortcomings in the area of food labelling as well as the need to establish national standards and harmonise these with international standards.\textsuperscript{583}

The following discussion will attempt to find a potential solution to the issue regarding outdated, limited and unnecessary laws in Bangladesh in light of the equivalent NSW FSLF.

The FSLF in NSW is up to date. For instance, the \textit{FA 2003} is a law which is a modern enactment designed to meet contemporary food standards, and another is the \textit{ACLNSW}, which is the most recent Act, being implemented from 1 January of 2011. Simply put, few laws run the entire FSLF of NSW and not a single law exists without any use in the regime. All laws relating to food safety in NSW are modernised on a regular basis and standards are maintained in line with the global norms. The state-run website of the FSANZ mentions that, ‘in developing food standards, we adhere to a risk analysis approach recommended by the Codex Alimentarius Commission, the recognised international agency for global food standards’.\textsuperscript{584} In NSW, food labelling is mandatory. On the website of the NSWFA, it is noted that,

\textsuperscript{581} Huda, Muzaffar and Ahmed, ‘An Enquiry into the Perception on Food Quality among Urban People’, above n 183, 229.
\textsuperscript{582} Food Safety Project Team (FSPT), \textit{Improving Food Safety, Quality and Food Control in Bangladesh: Review of Food Safety and Quality Related Policies in Bangladesh} (Food and Agriculture Organization of the United Nations, June 2010) 10 (‘Review of Food Safety and Quality Related Policies in Bangladesh’).
\textsuperscript{583} Ministry of Finance, ‘Grant No 34: 39 Ministry of Industries: Medium Term Expenditure’ (Government of Bangladesh, 2010) 464.
In Australia, all food labels must conform to the labelling provisions of the national Food Standards Code. Food Standards Australia New Zealand (FSANZ) develops this code and state authorities, like the NSW Food Authority, enforce it locally. In addition, the Authority administers the NSW Food Act 2003, including sections relating to the provision of information that can mislead the consumer.585

The updated food laws and standards continue to contribute significantly to the FSLF in NSW and it is one of the keys to success in ensuring safe food for consumers.

Following the above discussion in this section, it can be recommended that Bangladesh repeal the unnecessary and limited jurisdiction laws mentioned in this section. Or least these laws can be amended where necessary and amalgamated with the currently operational laws. Finally the laws that are functional — as mentioned in section 4.3.1 — should be updated considering the contemporary needs and standards.

4.4. Summary and Conclusions

The discussion of this chapter unveils the reasons why the FSLF of Bangladesh has become unsuccessful in ensuring the production of safe food for consumers. This chapter identifies some of the tribulations of the FSLF of Bangladesh, with simultaneous discussion of the equivalent provisions of the NSW FSLF. From the discussion there are some issues that arise for Bangladesh that need to be worked out without further delay.

There are multiple enacted laws for maintaining food safety without any coordination among them. Neither the laws nor the food standards are updated. Despite the existence of numerous laws there is no provision for building an effective coordinating body. And among the bulk of laws, many pieces of legislation are outdated, applied in limited jurisdictions and so forth. Therefore, recognising these shortcomings, Bangladesh needs to create an integrated legal framework to deal with food safety issues. The GoB needs to proceed to a coordinated legal

system for food safety issues, and in that case Bangladesh can follow the equivalent framework of NSW as recommended in this chapter. This would replace several incongruent laws governing the food manufacturing industries. Bangladesh can consider enacting a single law similar to the FA 2003 that will deal with the entire gamut of food safety issues so that confusion generated by a multiplicity of laws can be avoided. The present study proposes that the single law can be named as the ‘Food Act 2013’. It is imperative that all relevant laws should be taken into account during the creation and introduction of an integrated legal framework for the efficiency of the food safety mechanism. However, until the multiplicity of laws is addressed, there should be MOUs between the enforcing authorities of the respective laws and the laws concerned can be updated following the MOU.

The legal framework for food safety in Bangladesh requires all the legislation as well as food standards to be updated and harmonised. The world has changed, as have the technology used and the food making standards. Most countries are adopting the updated standards of Codex for food safety. Bangladesh too should proceed to update the laws as well as the standards by incorporating and maintaining the latest Codex standards.

It is the time to realise that the continued consumption of adulterated food will necessarily affect the population, and, ‘there might not be enough healthy and intelligent people left or forthcoming to represent a knowledge-based society in the near future’. While some may view this as an exaggeration, the deleterious effects of adulteration and unsafe and unsuitable food are well documented. Enjoyment of safe food is a prerequisite for progress, and without it the lives of the individuals affected, their families and society in general is by far the poorer.

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589 Quddusi, above n 241, 283.
At last, it can be said that the legal framework of the NSW food safety may not be the best one in the world, as the concept of ‘best’ is a relative one. But this dissertation demonstrates that the FSLF of NSW is better than other equivalent frameworks because it has been praised at home and abroad and it has been described as an effective legal framework by different authorities.590 Both Bangladesh and NSW belongs to the common law family which may help Bangladesh to borrow the necessary and appropriate tools of the FSLF of NSW. Finally, it is imperative that the necessary changes are made in order to guarantee the consumption of safe food for all in Bangladesh.

Chapter 5: Regulatory Framework of Food Safety in Bangladesh

5.1. Introduction

The food safety crisis is an enduring concern and the ways that safety regulators deal with this issue has been reflected upon in various research literatures, which have focussed on the strengths and weaknesses of various regulatory regimes.\(^{591}\) The regulatory framework for implementing legislation is the main way to effectively execute food safety policy. The current chapter will examine the food safety regulatory framework (FSRF) of Bangladesh in order to identify the weaknesses of the main regulatory or administrative bodies\(^{592}\) that work to implement the food safety laws. The FSRF of Bangladesh will also be investigated in light of their (the FSRF of NSW and its associated regulatory or administrative bodies) equivalents in NSW.

The meaning of regulatory framework is quite broad — it encompasses all relevant legislation, rules, decrees, and regulations in a country; it also includes all the regulatory bodies, their activities and the relationship or involvement of the regulatory agencies with other state organs.\(^{593}\) The laws relevant to food safety have already been discussed in chapter 4 and the issues relevant to administrative enforcement and the judicial enforcement of regulations will be discussed in chapter 8 of this thesis. The present chapter will explain the existing food safety regulatory or administrative bodies focusing on to their functions, composition, effectiveness and other relevant aspects concerned with the scope of this thesis.


\(^{592}\) For the purpose of this chapter a ‘regulatory or administrative body’ will mean as an agent that usually administers, interprets and enforces the laws, rules and so on.

The existing FSRF of Bangladesh is maintained by several ministries, directorates and different other subordinate bodies. Considering this presence of numerous regulatory devices to deal with the food safety situations in Bangladesh, and the existence of such a severe lack of food safety (as detailed in sections 2.4 and 2.5 of chapter 2 in this thesis), the present study presupposes that the food safety regulatory mechanism of Bangladesh might have included several weaknesses. To unveil those drawbacks, this chapter will go forward in three main stages. In the first phase, the FSRF of NSW will be illustrated to show a model FSRF. In the second stage, the FSRF of Bangladesh will be depicted to identify its shortcomings in light of their equivalents in NSW. In the last segment an analytical evaluation will follow, based on the issues identified from the previous deliberations. Including the discussion of advantages and disadvantages, the entire chapter will take the following shape.

As above, section 5.1 provides an introduction. Section 5.2 will discuss the current food safety regulatory mechanism in NSW to demonstrate a model FSRF for Bangladesh. Immediately after this an extensive discussion will follow relating to the present FSRF of Bangladesh in section 5.3, where various regulatory bodies together with their composition and functions will be described. Section 5.4 will examine some issues concerning the FSRF of Bangladesh, bearing in mind their NSW equivalents. The major issues, such as, the non-coordination, overlapping of regulatory bodies, lack of transparency, autonomy and lack of adequate personnel and testing facilities of the FSRF of Bangladesh will be discussed. Finally section 5.5 will summarise and conclude the chapter.

594 See section 5.3 of this chapter.
5.2. Current Regulatory Framework of Food Safety in NSW

The FSRF in NSW is maintained by a few regulatory bodies from the Commonwealth and from the State. The NSW Food Authority (NSWFA) is the main regulatory body for food safety and is responsible to the Minister for Primary Industries. The NSWFA works with Ministry of Local Government and with Ministry of Health for the better administration and enforcement of the food safety regulations throughout NSW. Besides this, the Australian Competition and Consumer Council (ACCC) works as a countrywide regulator for consumer related issues and works through the Fair Trading Office in NSW (under the Ministry of Fair Trading). The following section will be a discussion of the FSRF of NSW. But prior to introducing the discussion, the Figure 5.1 (below) will illustrate the current FSRF of NSW.

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5.2.1. Australian Competition and Consumer Commission

Established in 1995, the ACCC performs as an independent statutory regulatory and administrative authority to administer the Consumer and Competition Law 2010 (CCA...
The ACCC basically works for the welfare of consumers and businesses to encourage competition and fair trading in the market. It is responsible for ensuring that individual manufacturers comply with the consumer protection laws provided by the Commonwealth.\textsuperscript{597} The \textit{CCA 2010} includes the \textit{Australian Consumer Law (ACL)} as schedule 2 to that Act.\textsuperscript{598} The ACCC is responsible for the enforcement of the \textit{ACL} provisions regarding ‘misleading and deceptive conduct’ and ‘false and misleading representations’ in relation to foodstuffs. Every State (for example, NSW) has an ‘office of fair trading’\textsuperscript{599} and a fair trading law (in case of NSW, it is the \textit{Fair Trading Act 1987}) which incorporates the schedule 2 of the \textit{CCA 2010}, that is the \textit{ACL}.\textsuperscript{600}

\textbf{5.2.2. Australia New Zealand Food Regulations Ministerial Council}

The Australia and New Zealand Food Regulation Ministerial Council (ANZFRMC) was established by the Food Agreement signed by all Australian State/Territory governments and by a Joint Food Standards Treaty between Australia and New Zealand. The ANZFRMC is responsible for developing food policy. It also sets the policy guidelines for food standards for the Commonwealth. In fact, these policies are made to unite the entire food safety issues in a single framework. The ANZFRMC has the power to approve, alter or reject the food standards developed by Food Standards Australia New Zealand (FSANZ) (see further below); it can also request FSANZ to review the food standards once again. The ANZFRMC is comprised of ministers from each State and Territory of Australia and representatives from the two national governments (Australia and New Zealand). From among their countries’

\textsuperscript{596} Part 2 of chapter 4 has discussed various provisions of \textit{CCA 2010} relevant to food safety.\textsuperscript{597} \textit{Australian Competition and Consumer Commission, What We Do} (2011) <http://www.accc.gov.au/content/index.phtml/itemId/54137>.\textsuperscript{598} See section 4.2.4 of chapter 4 for more on the \textit{ACL}.\textsuperscript{599} For example, see NSW Government, \textit{Fair Trading} (17 May 2013) <http://www.fairtrading.nsw.gov.au/default.html>.\textsuperscript{600} \textit{Food Regulatory Compliance Framework in Australia}, above n 446. The related Fair Trading Law in NSW with its relevant provisions has been mentioned in section 4.2.4 of chapter 4 of the thesis.
various ministers, the health ministers from all Australian States and Territories generally become members of the ANZFRMC. However, NSW has nominated the Minister of the Department of Primary Industries (as the responsible minister for a related portfolio) to be its member instead of health minister. The ANZFRMC is helped by another regulatory body, the Food Regulation Standing Committee (FRSC), a body comprised of the high level officials. It advises the ANZFRMC in its development of different food related policy and standards. The FRSC also helps the stakeholders by engaging them in policy development. To fulfil its role, the FRSC works through a number of working groups, such as the Strategic Planning Working Group, Food Safety Management Working Group, ‘Front of Pack’ Working Group, Primary Production and Processing Working Group, Principles and Protocols Working Group, and the Infant Formula Working Group. Importantly, the FRSC works together with the Food Standards Implementation Sub Committee (ISC), a subcommittee comprised of a group of senior government officials and local government representatives. The ISC facilitates regular execution, observance and enforcement of different food related policy, regulations and standards. It has the objective of reducing costs to industry in the effective implementation of the food regulations.601

Food Standards Australia New Zealand

The responsibility for the actual development of the food standards rests with FSANZ.602 It is a bi-national agency responsible for researching, developing and submitting proposals for food standards to the ANZFRMC. Generally the FSANZ consults with the relevant State and Territory jurisdictions, other stakeholders and so on while developing and updating the

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602 For a diagrammatic representation of FSANZ, see Food Standards Australia New Zealand (FSANZ), FSANZ Organisation Chart (12 July 2011). Note: There is also a FSANZ Board.
Australia New Zealand Food Standard Code (ANZFSC).\textsuperscript{603} The ANZFSC has four chapters: in chapter one, there are standards applying to all foods in regard to labelling, substances added to food, contaminants and chemical residues, foods requiring pre-market clearance and microbiological and processing requirements; in chapter 2 there are food product requirements applying to particular types of foods (for example, cereals, meat, eggs, fruit, vegetables, edible oils and alcoholic beverages); in chapter 3 there are food hygiene related matters (including requirements for food premises and equipment, as well as safety programs); and chapter 4 deals with different food standards for primary production and processing.\textsuperscript{604} However, after the making or amending of the ANZFSC, it is incorporated into the Food Act of each of the States and Territories of Australia. In case of NSW the legislation is called as the Food Act 2003 (NSW) (\textit{FA} 2003).\textsuperscript{605} The ANZFSC comply with the standards of the \textit{Codex Alimentarius}, an international food standards code developed by the Codex Alimentarius Commission (CAC).\textsuperscript{606} The ANZFSC is also based on the Hazard Analysis of Critical Control Points (HACCP)\textsuperscript{607} rule.\textsuperscript{608} The HACCP is internationally

\begin{footnotes}
\item[605] The details of the \textit{FA 2003} have been discussed in various parts of this thesis, especially in section 4.2.3 of chapter 4 and in section 7.3 of chapter 7 of the thesis.
\item[606] The Codex Alimentarius Commission is an international food standards agency which was established jointly by the Food and Agriculture Organization of the United Nations and the World Health Organization in 1963. The Codex Alimentarius Commission develops food standards for all of its member states that are intended to protect the health of consumers. See ‘Codex’, above n 36. See also \textit{Productivity Commission Report on Food Safety}, above n 267, 21–2.
\end{footnotes}
recognised by governments and industries as an effective way to produce safe food.\textsuperscript{609} In fact, the world community considers the HACCP-based food safety program to be the most effective program for controlling food-borne pathogens at every level of food manufacturing and processing.\textsuperscript{610} Apart from the above, the FSANZ coordinates the food surveillance and food recall systems. It also advises consumers in relation to food handling.\textsuperscript{611}

In practice both the ACCC and the FSANZ have a role to play in ensuring food safety in Australia. But until 2004 there was difficulty regarding duplication between the two in regard to the examination of deception and misleading activities in food businesses. On 29 April 2004, a Memorandum of Understanding (MOU) was signed on coordination between the ACCC and the FSANZ\textsuperscript{612} (as has been mentioned in section 4.2.5 of Chapter 4 of this dissertation).\textsuperscript{613} Now these two regulatory bodies work within a coordinated mechanism.

\textbf{5.2.3. Department of Primary Industry}

In NSW, the Department of Primary Industries (DPI) fulfils an important role in maintaining food safety. The NSWFA (see further below), the central regulatory authority for food safety in NSW, is mainly responsible and accountable\textsuperscript{614} to the DPI. The Chief Executive Officer of the NSWFA reports directly to the NSW Minister for DPI also for all of the activities of the organisation.\textsuperscript{615} The DPI also helps to uphold food safety by controlling animal and plant

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\textsuperscript{609} Food Standards Australia New Zealand, Food Safety Standards – Costs and Benefits: An Analysis of the Regulatory Impact of the Proposed National Food Safety Reforms: Proposed Food Safety Standards (1999) [7].
\textsuperscript{610} Khandaker and Alauddin, above n 608, 768.
\textsuperscript{611} Productivity Commission Report on Food Safety, above n 267,20.
\textsuperscript{612} ACCC, ‘Regulators Cooperate to Improve Food Regulation’, above n 476.
\textsuperscript{613} For details of the MOU, see ‘Explanatory Memorandum between FSANZ and ACCC’, above n 477.
\textsuperscript{614} For details on the accountability of the NSWFA, see section 5.4.2 of this chapter.
\textsuperscript{615} NSW Food Authority, Who We Are (16 June 2011) <http://www.foodauthority.nsw.gov.au/aboutus/about-the-authority/who-we-are/>.}
\end{flushleft}
disease; it works to identify and trace pest diseases and monitors use of medicines in animal feed.616

New South Wales Food Authority

Each State and Territory of Australia is responsible for the implementation of the ANZFSC in their respective area through their own regulatory mechanism. To fulfil this goal, some States have adopted a total government approach while others have created a single authority to take care of the whole food safety system. NSW has the latter type of food authority, prioritising the food safety issue as one of the important and serious concerns. This single authority is called as the NSW Food Authority (abbreviated as the ‘NSWFA’ in previous sections). The NSWFA, as an autonomous617 statutory body headed by a Chief Executive Officer,618 and ‘provides a single point of contact on food safety for industry, local government and consumers’.619

Historically, the Government of NSW has been committed to making the State a leader in food safety by establishing an efficient food safety regulatory mechanism. To achieve this goal, in 1998 under the then Food Production (Safety) Act 1998, the NSW Government established ‘SafeFood Production NSW’. This statutory body (responsible to the Minister for Agriculture) was recognised in its 2001-2002 Annual Report as a step towards the creation of a single NSW food safety regulatory authority which would be responsible for food safety, that is the ‘safe production, processing, wholesale and distribution of all primary produce and seafood for human consumption from the paddock or the ocean’ (emphasis added). Due to

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617 For details, see section 5.4.2 of this chapter.
618 FA 2003 s 107.
some shortcomings (such as its scope being limited to primary produce from ocean or paddock to the ‘back door’ of the retailer with additional coverage only of butchers and butcher sections in supermarkets) — and the requirement under its own legislation for such a review to occur — in 2002 an independent committee chaired by John Kerin conducted a review of the activities of the Safe Food Production NSW.620 The Report recommended the establishment of a separate agency for food safety which would be responsible for food regulation ‘from farm to fork’, a far more inclusive goal.621 On the basis of the Kerin Report, SafeFood Production NSW and the food regulatory activities of the NSW Department of Health were merged on 5 April 2004,622 and the NSWFA is the result of the amalgamation of these two statutory agencies.623

The NSWFA has a coordinated approach to deal with the food safety concerns and effective implementation procedures to implement the applicable rules, regulations and policies. Basically, the NSWFA works to ensure that foods sold in NSW are safe for consumption. In particular, the NSWFA ensures the food safety in the manufacturing food industry.624 The functions of the NSWFA as articulated in the *FA 2003* are,

(a) to keep under review the construction, hygiene and operating procedures of premises, vehicles and equipment used for the handling or sale of food, (b) to provide advice or recommendations to the Minister on the establishment, development or alteration of food safety schemes, (c) to regulate the handling and sale of food the subject of food safety schemes to ensure that it is safe and suitable for human consumption, (d) to encourage businesses engaged in the handling or sale of food to minimise food safety risks, (e) to undertake or facilitate the education and training of persons to enable them to meet the requirements of the Food Standards Code and food safety schemes, (f) to provide advice, information, community education and assistance in relation to matters connected with food

622 NSWFA, ‘Annual Report 2008–09’, above n 483, 4. See also ‘Circular from NSW Division of Local Government (DLS) to Councils’, 15 December 2003 (File No-AF01/0028) [1].
623 *FLAA 2004*. See also Victorian Competition and Efficiency Commission, above n 616, 1.
624 The manufacturing food industry is the central focal point of the current study. See the scope of the thesis in section 2.11 of chapter 2.
The NSWFA, as the single authority of contact helps to lower the regulatory burden, thus lowering the cost of compliance for the regulatee and the cost to government by reducing and streamlining the bureaucracy. It is claimed that the NSWFA is the Australia’s first food safety regulatory body which is regulating and monitoring the entirety of food safety matters across NSW from the day of harvesting to consumption. It provides a well-structured regulatory mechanism for the food industry by administering and enforcing State and Commonwealth food legislation.

The NSWFA conducts its activities through a number of branches, namely, the Science and Policy branch, the Compliance, Investigation and Enforcement branch, and the Communication and Corporate Resources branch. Regarding the information and education of the consumers, the NSWFA has taken a notable initiative known as the ‘Name and Shame’, which allows it to publish/ register the name of the food businesses that receive on-the-spot fines (penalty notices) and court fines (prosecutions) for violating the food laws. The ‘name and shame’ as negative publicity of the offending food manufacturers has been advocated in a number of pieces of legal research. The ‘name and shame’ mechanism can lessen public

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625 FA 2003 s 108(2).
627 Ibid.
Chapter 5: Regulatory Framework of Food Safety in Bangladesh

ignorance of manufacturers who have been guilty of selling unsafe foods. When a particular food business is fined and its name placed on the name and shame, the overall image of its employees, shareholders is significantly damaged. This situation may deter the regulatees from committing further food safety offences. This is why the NSWFA website related to the register of penalty notices is a praiseworthy initiative, combining an educative role for manufacturers, retailers, food handlers and consumers alike. The response to the site has been overwhelming. In 2008–09, traffic to the main website of the NSWFA increased by a record 173 per cent to 938,000 visits, with hits exceeding 5.4 million. Of those visits, more than 570,000 visited this web portal, which directly generated 2.9 million hits. The site also facilitates consumer initiated complaints that can be dealt with by the NSWFA or local council authorities.

5.2.4. Division of Local Government

The NSWFA works closely with local councils (LCs) to ensure food safety in every corner of the State. For this purpose, the NSWFA has created a Food Regulation Partnership (FRP) with LCs to build a coordinated and integrated regulatory framework. The FRP was established in 2008 between the NSWFA and local government and 152 NSW LCs were

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633 In the increasingly online community of NSW, it is a valuable resource, but not one that is easily emulated in developing countries where far fewer people are connected to the internet or have computer access though a similar website could be generated by well-educated public servants in the relevant department. A website can only be as good as ease of access and legislative and enforcement efficiency that deal with the issues raised can make it.
appointed as the enforcement agencies. To establish the FRP, the *FA 2003* was amended to elucidate the duties and responsibilities of LCs regarding food regulation in NSW. The amendment was also intended to increase coordination between the NSWFA and LCs in areas such as food inspections and emergency response capabilities. This coordination facilitates both regulatory agencies (LCs and NSWFA) to work together effectively under the FRP for the enforcement of the food safety laws in NSW. In fact, the responsive regulation model which is applied in the FSRF of NSW is basically enforced and implemented through the FRP.

5.2.5. Department of Fair Trading

The NSW Office of Fair Trading under the Department of Fair Trading (DFT) is empowered to investigate cases related to misleading and deceptive conduct with regard to weights and measures of foodstuffs. It is worth mentioning that changing the weights and measures of the foodstuffs and/or their ingredients may cause the food to be unsafe for human consumption. The ACL imposes certain obligations regarding misleading and deceptive conducts in relation to the sale of food to the public, including provisions related to food

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635 NSW Food Authority (NSWFA), ‘Summary Report of NSW Enforcement Agencies’ Activities for 1 July 2008 to 30 June 2009’ (2009) 4 (‘Summary Report of NSW Enforcement Agencies’). Note: The enforcement mechanism of the food safety regulations will be discussed in the chapter 8 of the thesis. An example of such coordination is the education drive and new training that arose from the *Bankstown Bakehouse* case and which resulted in vastly improved the standard of food handling in the area and far greater compliance than had previously been the case: NSW Food Authority, ‘Bankstown Bakehouse Prosecuted over Food Poisoning Outbreak’ (Media Release, 9 October 2012).


638 See more on FRP in section 8.2.1 of chapter 8 of this thesis.

product safety and information. It is claimed that if there is no particular food safety regulation in Australia, the food manufacturers will still have certain responsibilities to consumers in relation to the safety and information about their product due to the current role of the DFT.640

5.2.6. Department of Health

The Department of Health (DOH) in NSW contributes to food safety by monitoring outbreaks of the foodborne illness. If any notifiable foodborne illness occurs in NSW, the DOH along with the NSWFA soon starts an investigation to discover the cause and source of that outbreak; the NSWFA investigates the role of food businesses while the DOH investigates the notifiable disease system and epidemiological concerns.641 Once the cause of an outbreak is discovered, the DOH advises the food handlers and other respective authorities and persons with the object of halting the then discovered source of the incident of food poisoning as soon as possible (so as to prevent similar outbreaks). Liaison between the DOH and the NSWFA during foodborne events is outlined in the Investigation of Foodborne Illness Response Protocol-Operational Procedures Manual.642

The above discussion concerning the regulatory bodies engaged with food safety affairs in NSW indicates that a few regulatory bodies are carrying out their jobs to ensure that the overall issues of food safety are dealt with. Among all the bodies the NSWFA exists as the central point which performs its function of maintaining good coordination with other regulatory bodies. The LCs, in particular, under the Division of Local Government perform a

641 For example, see the reasons published by the magistrate (G J T Hart) for the decision in the Bankstown Case (9 September 2012) at, <http://www.foodauthority.nsw.gov.au/_Documents/corporate_pdf/bankstown_decision.pdf> 2 where the salmonella outbreak that made 83 people sick was notified by the MOH to the NSWFA.
noteworthy role for the administrative enforcement of the food safety laws in NSW which will be discussed details in chapter 8 of the thesis. Overall, the regulatory bodies are well-coordinated with one another in respect to dealing with any problem arising relevant to food safety in NSW.

5.3. Current Food Safety Regulatory Framework in Bangladesh

The regulatory authority for the laws mentioned in Chapter 4 of this dissertation is vested on a number of bodies, including the parliament, and ministries together with their subordinate agencies created by the government. Although all the ministries and their subordinate bodies will not be detailed in this thesis due to space constraints, it is necessary to briefly discuss basic information on these regulatory agencies in this chapter to demonstrate their lack of coordination and the presence of overlapping in the entire food safety regulatory mechanism in Bangladesh. The main regulatory bodies that are involved with the FSRF of Bangladesh are: the House of the Nation (Parliament), Ministry of Agriculture (MOA), Ministry of Health and Family Welfare (MOHFW), Ministry of Local Government, Rural Development and Co-operatives (MOLGRD), Ministry of Law, Justice and Parliamentary Affairs (MOLJPA), Ministry of Food and Disaster Management (MOFDM), Ministry of Industry (MOI), Ministry of Fisheries and Livestock (MOFL), Ministry of Commerce (MOC), Ministry of Home Affairs (MOHA), Ministry of Science, Information and Communication Technology (MOSICT), Ministry of Public Administration (MOPA). But as mentioned

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643 For a list of the Ministries and other regulatory bodies relevant to food safety in Bangladesh, see FSPT, *Food Inspection and Enforcement in Bangladesh*, above n 549. Note: Although this report has included more than a dozen ministers and bodies regarding the food safety issues in Bangladesh, however, the current study will only entail the ministries and bodies within the scope of this thesis.

previously, several sub-ordinate directorates and institutions are operating under the Bangladesh FSRF. Figure 5.2 (below) illustrates the overall picture of the current FSRF.645

Figure 5.2: Current Food Safety Regulatory Framework in Bangladesh
The above figure portrays the FSRF of Bangladesh and indicates that it consists of quite a large number of regulatory bodies. The following sub-sections will entail a discussion of these regulatory bodies along with their composition, powers and functions in regard to food safety concerns in Bangladesh.

### 5.3.1. House of the Nation (Parliament)

The Parliament is empowered to enact, amend, modify and repeal laws by and large. It means that all laws relating to food safety are made by the Parliament. Many of the laws relating to food safety in Bangladesh (as elaborated in chapter 4 of this thesis) were made after the emergence of the People’s Republic of Bangladesh in 1971. Thus, the laws made before 1971 have been inherited or adopted from Pakistan, of which Bangladesh was a part at that time (and sometimes the laws are a reflection of even earlier legislation as a carry-over of colonial-era legislation made before the independence of Pakistan).

Parliament is the primary regulatory body for food safety in Bangladesh. It is involved in the food safety mechanism through one of its Standing Committees, namely the Parliamentary Standing Committee on Food and Disaster Management. This parliamentary standing committee consists of 10 members, all of whom are Members of Parliament of Bangladesh. This committee’s functions include recommending to Parliament new legislation or amendments or policies in relation to food safety in Bangladesh. Therefore, from this perspective the Parliament takes the prime place in the regulatory framework of food safety of Bangladesh.

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5.3.2. Ministry of Agriculture

The Ministry of Agriculture (MOA) works for food safety in Bangladesh through its Department of Agricultural Extension (DAE) while DAE works through its Plant Protection Wing (PPW) (one of its seven wings). Generally it looks after and controls the use of pesticide on food under the Pesticide Ordinance 1971. The director of the PPW is responsible for the development, incorporation and maintenance of the pesticide rules, pesticide registration and licences, the list of banned pesticides, records of pesticides marketing and care of its production, sale and usage in Bangladesh. The PPW works through five sections: the Plant Quarantine Section, Pesticide Administration and Quality Control, Operation (Aerial and Ground), Surveillance and Forecasting, and Integrated Pest Management. To help monitor the presence of pesticides in agricultural products, the DAE accepts the help of the Bangladesh Atomic Energy Commission. The MOA controls the pesticides residue in agricultural foods at District and Upazila level through the District Agricultural Officer, the Upazila Agriculture Officer and Block Supervisors under the

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648 See the responsibilities of the Plant Protection Wing at the Department of Agricultural Extension (DAE), Plant Protection Wing (2013) <http://www.dae.gov.bd/category/dae-wings/planet-protection-wing/> ('Plant Protection Wing').


653 FSPT, Review of Food Safety and Quality Related Policies in Bangladesh, above n 582, 3. See more on Bangladesh Atomic Energy Commission in section 5.3.10 of the chapter.
Integrated Pest Management mechanism. In fact these officers are responsible to ensure that pesticides are not used for other than their intended purpose or other than in the approved manner. Additionally, the MOA is also responsible for publicity through the mass media to create awareness among people about the dangers of pesticides resides in food.

It is iterated in previous chapters that the use of pesticide in food is a serious concern in Bangladesh and is a major cause of death day after day. However, in practice the use of pesticide has remained largely unrestricted in Bangladesh. Because the District Agricultural Officer and Upazila Agriculture Officer are responsible for the control of the sale and usage of pesticides in Bangladesh, the unrestricted use of pesticides in food products denotes a sore failure of the regulatory agencies concerned.

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654 Rahman and Ismail, above n 495, 3.
655 National Integrated Pest Management Policy 2002 (Bangladesh). An example of the use of mass media in a positive manner is a song sung at the launch of the Food Safety Network of Bangladesh in late 2011. Although only available to those with internet access, it highlights the groundswell of community activism in regard to food safety. See Aleya Begum singing ‘We Need Safe Food’ <http://www.youtube.com/watch?v=Yp3g3vJ21HM> and it also highlights a way that GoB regulatory authorities could use such media.
657 See, eg, Asadullah Sarkar, ‘Pesticides Poisoning: 13 Children Died in Dinajpur by Eating Lichi’, Prothom Alo (online), 29 June 2012 <http://www.prothom-alo.com/detail/date/2012-06-29/news/269655> [author’s trans]; Abdur Razzak, ‘Applying Poison in Sutki (Dried Fish)’, Prothom Alo (online), 22 March 2011 <http://www.prothom-alo.com/detail/date/2011-03-22/news/140580> [authors trans’]. In this news it is revealed that different kinds of dangerous pesticides were being used by the manufacturing workers while processing dried fish in the industry to keep the dried fish safe from pests.
This thesis argues that due to the lack of proper cooperation with other regulatory bodies relevant to food safety and the absence of a proper monitoring mechanism result in the broad availability of pesticides for buying and selling in the market; and this situation allows the uncontrolled treatment of pesticides in food products in Bangladesh.659

5.3.3. Ministry of Health and Family Welfare

The MOHFW plays the key role in ensuring food safety in the rural areas of Bangladesh as it works to control the food quality at district and upazila level.660 The Directorate General of Health Services (DGHS)661 in cooperation with the Institute of Public Health (IPH) under the Ministry work to maintain food safety throughout the country. Both of these regulatory bodies are discussed below.

Directorate General of Health Services

The DGHS is the wing of the MOHFW charged with numerous responsibilities related to health issues in Bangladesh, among which food safety is one.662 The DGHS performs its functions through different directors, institution heads, and health managers at divisional, district, upazila and union parishad levels and by other health staff.663 In fact, the DGHS


661 For the English language homepage of the DGHS that is, the Directorate General of Health Services, Ministry of Health and Family Welfare of the Government of People’s Republic of Bangladesh see DGHS <http://www.dghs.gov.bd/>. Note: Though practically, the DGHS deals with food safety but the webpage includes no information about the food or food safety for general consumers nor even a link to an appropriate area of the site.


conducts a great part of the food safety and food quality affairs in every district, upazila and union parishads in order to protect public health nationwide.\(^{664}\) It is worth mentioning that the DGHS is not responsible for ensuring food safety in the city corporations and paurashava areas.\(^{665}\) There is one Sanitary Inspector (SI) in every district (District Sanitary Inspector) and upazila (Upazila Sanitary Inspector) under the DGHS. Also there are some sanitary inspectors at the headquarters of the MOHFW. The Sanitary Inspectors (SIs) are key players in the implementation of the *Pure Food Ordinance 1959 (PFO 1959)* and the *Bangladesh Pure Food Rules 1967* in the rural areas in regard to maintaining food safety because the main responsibility of monitoring the food quality lies with them.\(^{666}\)

It is alleged that the DGHS seldom makes any effort to increase public awareness about food adulteration although such efforts are considered necessary.\(^{667}\) Additionally, the anti-adulteration drive by the SIs under the DGHS at divisional, district and upazila levels are done without any plan, coordination and integrated decisions.\(^{668}\) The DGHS do not have any effective coordination with the Ministry of Local Government, Rural Development and Cooperatives (MOLGRD), which also regulates food safety activities in the urban areas. Such a lack of effective coordination and lack of publicity and consumer education might have given local (in rural areas) manufacturers the change to continue their food adulteration.\(^{669}\)

**Institute of Public Health**

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\(^{664}\) FSPT, *Food Inspection and Enforcement in Bangladesh*, above n 549, 13.

\(^{665}\) The MOLGRD ensures food safety in the urban areas like city corporations and municipalities. For details, see section 5.3.4 of this chapter (MOLGRD, NFSAC).

\(^{666}\) See the details of the job responsibilities of Sanitary Inspectors regarding food safety laws in section 8.3 of chapter 8 of the thesis.

\(^{667}\) For example, see a discussion on the consumer awareness and education in section 2.7 in chapter 2 of the thesis.

\(^{668}\) See generally FAO, ‘Report on a Workshop on Food Inspection Arrangements in Bangladesh’, above n 506, 5.

\(^{669}\) Food adulteration by the local food manufacturers is so rampant. For example, ‘Adulterated Oil Manufacturing Unit in the Village House of Awami Leader’, *Prothom Alo* (Dhaka, Bangladesh), 11 August 2012 [author’s trans]; ‘Adulterated Palm Sugar Manufacturing Unit’, *Prothom Alo* (Dhaka, Bangladesh), 29 May 2012 [author’s trans].
The DGHS works through the Institute of Public Health (IPH) (situated in Dhaka) in regard to laboratory assistance. The role of the IPH as a regulatory body that helps to ensure food safety in Bangladesh cannot be ignored. A sanitary inspector needs to confirm the safety of a particular food from the relevant report of the IPH analyst before taking any legal action. In practice, the IPH through Public Health Laboratory (PHL) plays a noteworthy role in guaranteeing food quality and safety in the rural areas of Bangladesh. More than 5000 food samples are tested at the PHL annually; such samples are sent to the PHL by the SIs from different regions of Bangladesh.

Sadly the IPH does not have the equipment and trained personnel necessary to detect adulteration of the foods. Thus, the absence of necessary equipment and skilled personnel negatively impacts on this laboratory in regard to testing different food colours, hazardous synthetic colours and so forth.

5.3.4. Ministry of Local Government, Rural Development and Co-operatives

The MOLGRD covers the city corporation and municipal (paurashava) areas in regard to ensuring food safety and quality, seeking to protect public health through the work of SIs. The MOLGRD plays an important role by implementing the various food safety laws (such

671 Section 2.4 and section 2.5 of chapter 2 of this thesis has mentioned some significant findings of the IPH in relation to food safety concerns in Bangladesh.
672 For details of the judicial enforcement of the food safety laws in Bangladesh, see section 8.6.2 of chapter 8 of the thesis.
673 See generally MOHFW, Objectives, above n 660.
674 Rahman and Ismail, above n 495, 4.
675  FAO Food Safety Project Team (FAO FSPT), ‘Improving Food Safety, Quality and Food Control in Bangladesh: Assessment of the Capabilities and Capacities of Laboratories Analyzing Foods in Bangladesh, (Food and Agriculture Organization of the United Nations, June 2010) 5 (‘Assessment of the Capabilities and Capacities’).
677 FSPT, Food Inspection and Enforcement in Bangladesh, above n 549, 13.
as the *PFO 1959* and *PC 1860* in urban localities.\(^{678}\) The MOLGRD is responsible for the coordination of the overall food safety issues in Bangladesh through its subordinate body, the National Food Safety Advisory Council (NFSAC) (see further below). Similar to the IPH, there is a Public Health Food Laboratory under the MOLGRD in Dhaka City Corporation which analyses food samples to check their safety standards.\(^{679}\) The Public Health Food Laboratory faces difficulties similar to those of the PHL mentioned above.\(^{680}\)

**National Food Safety Advisory Council**

The NFSAC is established under the MOLGRD with the purpose of fulfilling the objectives of s 4A of the *PFO 1959*. The NFSAC is chaired by the minister for the MOLGRD. A representative of the MOLGRD who is not below the rank of joint secretary is the member secretary of this council. There is one member from each of the MOA, MOC, MOFDM, MOHFW, MOI, Ministry of Environment and Forest, MOHA, MOFL, MOPA; none of the members are to be below the rank of joint secretary. In addition to them, the Deputy Commissioner of Dhaka, Director General of the Bangladesh Standards and Testing Institution (BSTI), Chairman of the Department of Food and Nutrition of Dhaka University (DU), Chairman of the Department of Chemistry of DU and a representative of the Federation of Bangladesh Chambers of Commerce and Industries are also members of the NFSAC.

In regard to the functions of the NFSAC, s 4A (2) of *PFO 1959* states that the NFSAC shall advise the Government on matters related to food safety and to the administration of *PFO*.

\(^{678}\) For the enforcement of the food safety laws by the MOLGRD, see section 8.2.2 of chapter 8 of the thesis. See generally Ferdous Arfina Osman, ‘Public Health, Urban Governance and the Poor in Bangladesh: Policy and Practice’ (2009) 16(1) *Asia-Pacific Development Journal* 27, 32–3. Note: Osman considers that public health mostly depends on the safety of the food which is consumed by the people. MOLGRD is the implementing authority which makes it an important regulatory agency.


\(^{680}\) Ibid 6.
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1959, and is to maintain national and international standards, is responsible for technical matters arising out of the administration of this Ordinance, and policies and strategies related to food safety and quality control.

However, the MOLGRD — while working for the food safety through the city corporations and paurashavas — faces the following problems.

i. Food inspectors (under the MOFDM\textsuperscript{681}) and the sanitary inspectors (under the MOHFW) both work to ensure food safety but they have no coordination in their activities in the city corporation and municipal areas because they are under different ministries and there is no coordination between their respective ministries.

ii. The NFSAC was supposed to be formed many years ago, yet it was established only five years ago and just held its third meeting (its first in five years) on 22 August 2010,\textsuperscript{682} which suggests that this regulatory body is not functioning perfectly. More pathetically, the NFSAC has undertaken no activities worthy of being remarked upon\textsuperscript{683} and it has failed to organise coordination with other food safety regulatory bodies in Bangladesh, although it was instituted for coordinating purposes.\textsuperscript{684}

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\textsuperscript{681} See section 5.3.6 of this chapter for further details.


\textsuperscript{683} See, eg, ‘Government Orders Countrywide Drive against Food Adulteration: National Food Safety Body Holds Meeting after Five Years’, New Age (Dhaka), 24 February 2010, National (‘Government Orders Countrywide Drive’).

\textsuperscript{684} See generally Staff Correspondent, ‘Make Food Safety Council Functional’, above n 682.

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5.3.5. Ministry of Law, Justice and Parliamentary Affairs

The MOLJPA is vested with the responsibility for formulating laws and submitting them for parliamentary approval. The MOLJPA also revises existing rules, laws and ordinances to update and correct according to the demand of the time.\textsuperscript{685} So it is an important regulatory body in regard to addressing food safety concerns in Bangladesh.

5.3.6. Ministry of Food and Disaster Management

The MOFDM operates through the Directorate General of Food (DGF) and works for food security at district and upazila level through the Food Inspectors.\textsuperscript{686} The MOFDM is responsible for the entire food system in regard to food security, food reserves, internal (domestic) procurement and distribution, and the distribution system for public food relief in the event of a disaster (natural or manmade).\textsuperscript{687} At all these stages the DGF have to maintain the food safety standards.\textsuperscript{688} The DGF has a food testing laboratory established in 1967 (situated in Dhaka and known as the ‘food testing laboratory’).\textsuperscript{689} With its admittedly limited equipment, this laboratory conducts physical and chemical analysis of various locally procured agricultural food products, such as paddy, rice, wheat, oil as well as imported food.\textsuperscript{690} It is noteworthy that the DGF is not directly related to safety concerns in regard to

\textsuperscript{685} Rahman and Ismail, above n 495, 3.
\textsuperscript{686} Ibid.
\textsuperscript{688} Ministry of Food, Directorate General of Food (2013) <http://www.dgfood.gov.bd/>; Rouf, above n 652, 90–1. See also Saqib, above n 687, 301.
\textsuperscript{690} Ibid; FSPT, Review of Food Safety and Quality Related Policies in Bangladesh, above n 582, 2.
the manufacturing of food, which is the main issue for discussion in this thesis, although it works for the overall food safety as mentioned.\footnote{International Monetary Fund (IMF), ‘Bangladesh: Poverty Reduction Strategy Paper’ (IMF Country Report No 05/410, 2005) 147–8 (‘Poverty Reduction Strategy Paper’).}

**5.3.7. Ministry of Industry**

The MOI generally executes its activities concerning the standardisation of food products through the BSTI.\footnote{NTFS, ‘Bangladesh Country Paper - Seremban’ above n 196, 4 [2.1.6].} This organisation is responsible for certification marks, and monitoring and quality control of food items.\footnote{Rahman and Ismail, above n 495, 3.} Admirably, BSTI is one of the most important regulatory bodies in regard to food safety in Bangladesh. The following section of this chapter will be a discussion of BSTI.

**Bangladesh Standard Testing Institute**

The preamble of the *Bangladesh Standards and Testing Institution Ordinance, 1985 (BSTIO 1985)* establishes an institution for the standardisation, testing, metrology, quality control, grading and marking of goods.\footnote{BSTIO 1985 preamble.} Within the framework of this law, the Government of Bangladesh (GoB) created the Bangladesh Standards and Testing Institution (BSTI).\footnote{Ibid s 3.} It was created by the amalgamation of the Central Testing Laboratories and the Bangladesh Standards Institution in 1985.\footnote{Bangladesh Standard Testing Institute (2013) <http://www.bsti.gov.bd/>.}

**Composition of BSTI**

BSTI is comprised of the BSTI Council, the Sectional Committees (SCs) and the Director General along with some staff.\footnote{Bangladesh Standard Testing Institute, *Organs of Bangladesh Standard Testing Institute* (2013) <http://www.bsti.gov.bd/bsti_organs.html>.} The BSTI Council is the highest decision making organ of
this institution. The current minister in charge of the MOI becomes the chairman of the council. The Secretary of the MOI and the Director General of BSTI act as the vice chairman and the secretary of the council respectively. In addition to them, there are a number of representatives from different ministries, business chambers, scientific organisations and universities. The Council is occasionally guided to work according to the instructions of the government.\textsuperscript{698} Regarding the Sectional Committees there is a Chairman, at least one BSTI member, different representatives from relevant government autonomous bodies, representatives from universities, and from the Chambers of Commerce and Industry. The SCs are selected or elected for three years. The SCs approve the draft standards prepared by the preparatory groups concerned as Bangladesh Standards and adopt compulsory implementation decisions on some standards.\textsuperscript{699} The Director General is the head of all Directors\textsuperscript{700} (and staff) of the six wings of BSTI (namely, the Standards Wing, Physical Testing Wing, Chemical Testing Wing, Metrology Wing, Administration Wing and Certification Marks Wing.\textsuperscript{701} Among these six wings of BSTI, the Standards Wing, Chemical Testing Wing and Certification Marks (CM) Wing take care of the food quality and safety issues. The Standards Wing works for the preparation of standards and this wing operates through different committees such as the Technical or Sectional Committees, Divisional Committees and Specialised Committees. The Chemical Testing Wing analyses and tests for the existence of pathogenic micro-organisms in food by its Food and Bacteriological Laboratories.\textsuperscript{702} The Certification Marks Wing inspects the general information, raw

\textsuperscript{698} Ibid.
\textsuperscript{700} Each BSTI wing is headed by a Director: see FAO, ‘Report on a Workshop on Food Inspection Arrangements in Bangladesh’, above n 506, 18.
materials, and manufacturing process of food products. It also checks for the hygienic and environmental conditions at factory premises, and storage facilities for food products. However, BSTI inspectors collect food samples for testing in its laboratory after the primary inspection and grant or renew the licence of a business for the manufacture or processing of the particular food product if the result is satisfactory. There are few food testing laboratories under the Chemical Wing of BSTI: in Dhaka (Central Laboratory), Khulna, Chittagong, and in Rajshahi. The BSTI is the contact point of Codex Alimentarius Commission for Bangladesh, and BSTI regularly accepts the food standards and technical literature from the Codex. Additionally, BSTI has already adopted some International Organization for Standardization (ISO) standards and the HACCP as Bangladesh Standards.

**Functions of BSTI**

The BSTI has numerous functions. It establishes the standards of quality and acceptable dimensions for different products, and prepares and promotes the general adoption (nationally and internationally) of standards relating to materials, commodities, structures, practices and operations. It works to promote standardisation, quality control, and simplification across industry and commerce. It also endeavours to secure the compliance of producers with the standards adopted by the BSTI, in regard to the certification of the quality of commodities, materials, produce, products and other things including food ingredients, whether for local...
consumption, export or import. It also grants, renews, rejects, suspends or cancels (in such manner as may be prescribed) a licence for the use of a standard mark. It make inspections and take samples of any material or substance as may be necessary to see whether any article or process in relation to which the standard mark has been used or is proposed to be used conforms to the Bangladesh standard and determines whether the standard mark has been improperly used in relation to any ‘article or process’ with or without licence. Under the BSTIO 1985, ‘food product’ has been included in the word ‘article’ and ‘article’ means any substance, artificial or natural, or partly artificial or partly natural, whether raw or partly or wholly processed or manufactured. To perform its functions, BSTI has appointed a number of inspectors to check the mandatory use of the BSTI standard mark, or to check whether the standard mark is used properly or not, or to check whether the producers have the appropriate BSTI licence and maintain the necessary quality and standard of products. According to s 24(1) of this Ordinance, the Government can prohibit the sale, distribution and commercial advertisement of any article which does not conform to the standard established by BSTI by publication in any issue of the Official Gazette. Section 30(1) specifies that using any kind improper standard mark is a punishable offence.

Generally, BSTI considers the national perspective, the needs of the manufacturers, and the health and welfare issues of the public when food standards are developed. Up until late2010 BSTI had developed 3300 standards. While the standards are developed, BSTI also considers the consent of the six divisional committees along with the opinion of the 73 technical committees which are comprised of research organisations, consumers associations, government bodies, business chambers, laboratory experts and different stakeholders from

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709 BSTIO 1985 s 3.
710 Ibid s 2(1)(a).
711 See generally ibid s 25(1).
industry. The BSTI reviews the standards every five years so as to keep up to date with national and international requirements.712

The BSTI has several problems. These are as follows.

i. It is alleged that most consumers do not have faith in BSTI’s performance,713 because the national and international standards mentioned above such as Codex standards, ISO and HACCP are not satisfactorily observed and maintained for food safety. Standards are reviewed generally every five years in order to ‘keep track with modern technological advancement’ and align them with international requirements.714 But five years is a long time and many changes happen in food standards in this timeframe. Hence, a 2010 publication by the Asian Development Bank contains the criticism that BSTI’s certification mark and its seal of quality have failed to gain credibility both at home and abroad.715

ii. The BSTI deals with the standards of numerous products in the country, food is just one among them. Not only this, the regulatory authority of BSTI also is limited in regard to food standards. This regulatory agency is responsible merely for determining the quality of manufactured packaged food items, not for non-packaged (but processed) food items, such as sutki.716

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713 Huda, Muzaffar and Ahmed, ‘An Enquiry into the Perception on Food Quality among Urban People” Working Paper’, above n 244, 6[1].
714 ITC, ‘Country Paper on National Standards Bodies’, above n 704, [2.3].
iii. The BSTI is a not an autonomous body, however, because it is an affiliated institution under the MOI and guided by the instructions of the political Government. The above discussion suggests that the ministers and secretaries have filled posts in the wings and bodies within the BSTI. The Director General of BSTI is appointed by the government. Moreover, BSTI is also not financially independent and its lack of adequate funding does not allow this regulatory body to buy modern technological equipment for the food testing laboratories as well as to appoint an adequate number of personnel to run such operations smoothly.  

iv. BSTI inspectors are responsible only for determining the quality of packaged food items but they are not responsible for non-packaged but (often minimally) processed food items like fish, meat, eggs, vegetables, and so on. In addition, BSTI inspectors have the power to check only the first batch of food products but the subsequent batches are sold in market without even random checking and there is no monitoring of storage facilities. Often goods lie in store rooms for months after their expiry dates and may therefore be available for later sale.

5.3.8. Ministry of Fisheries and Livestock

The MOFL works for food safety through its Department of Fisheries (DOF), which ‘is the principal institution for the management and development of fish resources of Bangladesh’. However, the DOF works through the Fish Inspection and Quality Control (FIQC) wing. The FIQC generally controls the quality of the processed fish products such as

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718 ‘BSTI Denies any Role in Quality Control in Non-packet products’, above n 716.
719 Amin et al, above n 175.
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sutki and certifies them for the domestic market.\textsuperscript{721} There are three inspection and quality control stations with laboratory facilities under the DOF situated in Dhaka, Chittagong and Khulna.\textsuperscript{722} The FIQC is responsible for the prevention and control of fish diseases,\textsuperscript{723} and to ensure that fish are not contaminated.\textsuperscript{724} The FIQC has introduced the HACCP in fish processing industries and it carries out regular inspections to check the hygiene of different raw fish materials and their handling, processing, and sanitation of the premises in which they are prepared and stored. The FIQC actually implements a quality management program based on HACCP principles to satisfy the Codex guidelines.\textsuperscript{725}

It has been discussed in the earlier chapters that fish and fish products are often contaminated all over Bangladesh. Although the FIQC has the sole responsibility for inspection and quality control of all processed fish and fish products, it has a little or no control over the processed fish quality.

There are a few reasons behind it. These are as follows.

i. The city corporations have the responsibility to assure the quality of fish and food, and the hygienic management of markets, but they seldom do so.\textsuperscript{726} In this area, there is no coordination between the MOLGRD and the MOFL.\textsuperscript{727} The same happens in the rural areas and there is also minimal coordination between the DGHS and the MOFL. Thus, the MOFL seems to be an unnecessary agent in regard to this particular point of food safety.

\textsuperscript{721} NTFS, ‘Bangladesh Country Paper - Seremban’ above n 196, 4.
\textsuperscript{723} FSPT, \textit{Review of Food Safety and Quality Related Policies in Bangladesh}, above n 582, 3.
\textsuperscript{724} Rouf, above n 652, 90.
\textsuperscript{725} Rahman and Ismail, above n 495, 3–4.
\textsuperscript{726} Islam et al, ‘Urban and Peri-urban Aquaculture as an Immediate Source of Food Fish’, above n 525, 357–8.
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ii. The FIQC is more concerned about the exporting,\(^\text{728}\) and importing of fish.\(^\text{729}\) Therefore, fish and fish products that are chemically treated by the ‘aratdars’/‘mahajans’ (commission agents)\(^\text{730}\) for selling on the domestic market are hardly contemplated for checking by FIQC.

iii. The marketing of fish is largely in the hands of the private sector rather than the public sector. It is managed, financed, and controlled by a group of intermediaries known as ‘aratdars’ and ‘mahajans’ where the regulatory bodies barely possess control.\(^\text{731}\) The FIQC only can control this private sector by monitoring their premises once these persons are in market and registered as a fish business. But many of the fish and fish products sold in the market are processed in home factories or fields of the fishermen after they collect the fish from the river or pond or sea. They seldom bother to be registered. The overall situation is depressing in that the Bangladesh fish industry is facing a scarcity of effective management by the regulatory bodies and consumers are suffering due to the government and industry’s ongoing failure to ensure safe fish products for consumers.\(^\text{732}\)

5.3.9. Ministry of Commerce

Prior to the enactment of the Consumer Rights Protection Act (CRPA2009), the MOC had rarely participated in food safety. However, after the promulgation of CRPA 2009, the MOC got involved in that issue. The MOC plays a role in ensuring food safety as part of the consumer protection regime in Bangladesh. Section 5 of CRPA 2009 provides for the creation of a national regulatory body for the protection of consumer rights—the National Consumer

\(^{728}\) FSPT, Review of Food Safety and Quality Related Policies in Bangladesh, above n 582, 3.

\(^{729}\) FSPT, Food Inspection and Enforcement in Bangladesh, above n 549, 11.


\(^{731}\) See generally ibid.

\(^{732}\) For details, see generally ibid.
Rights Protection Council (NCRPC). Accordingly, on November 2009, GoB established the NCRPC under the MOC. The following two sub-sections will discuss the structure and functions of the NCRPC.

**National Consumer Rights Protection Council**

The NCRPC is comprised of several members. The minister of MOC is the chairman of the NCRPC and there is an appointed Director General (DG) who works as the secretary of this regulatory agency. Other members are the Secretary of MOC, DG of the National Security Intelligence (NSI), DG of BSTI, an officer not below the rank of joint secretary from each ministry (the MOI, MOA, MOFL, MOFDM, MOH, MOLJPA, Ministry of Energy and Mineral Resources), and Chairman of the *Jatiya Mohila Sangstha*. Further members are the Additional Inspector General (AIG) of the Special Branch of Police, the Director of the Directorate of Drug Administration, President of the Federation of Bangladesh Chamber of Commerce and Industry, Chairman of the Bangladesh Medicine Industry Association, Chairman of the Consumers Association of Bangladesh (CAB), three respected citizens nominated by the GoB, and two women members (nominated by the GoB) who have expertise on economics/business/industry/public administration. It is quite noticeable that many of the members of NCRPC come from the government executives and politicians.

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734 For the purpose of the *CRPA 2009*, Director General (DG) will mean the Director General of the Directorate of National Consumer Rights Protection (DNCRP); see *CRPA 2009* s 2(21). However, for the purpose of this Chapter any other abbreviated Director General (DG) will mean the DG of that respective organisation mentioned thereby.

735 *Jatiya Mohila Sangstha* [National Women’s Association] [author’s trans]. *Jatiya Mohila Sangstha* is a human rights watchdog upholding the women’s rights in Bangladesh.

736 Consumers Association of Bangladesh (CAB) is a non-governmental body that works for consumer rights in Bangladesh, and claims itself to be a non-political and non-profit charitable organisation. For more information, see the webpage of CAB <http://www.consumerbd.org/>.

737 *CRPA 2009* s 5 [author’s trans].
rather than having several consumer representatives on this regulatory body, which is basically supposed to deal with consumer rights.

**Functions of the NCRPC Concerning Food Safety**

As per s 8 of the *CRPA 2009*, the NCRPC works to make rules for the protection of consumer rights and can direct the DG along with the District Consumer Rights Protection Committees, which are said to be established under s 10 of the *CRPA 2009*. The Council has the authority to consider any opinion on any issue referred to it by the GoB pertaining to consumer rights. It can advise the GoB in regard to upholding consumer rights as well as make people aware of positive aspects of the protection of consumer rights and negative aspects of *acts against consumer rights*. The NCRPC can monitor and oversee the functions of the Directorate of National Consumer Rights Protection (DNCRP), which has been established under s 18 of the *CRPA 2009* to administer the functions of this law. The NCRPC is also empowered to monitor and guide the functions and activities of the District Consumer Rights Protection Committees and take the steps necessary for performing the above functions.

There are two issues in regard to the regulatory body, the NCRPC.

i. The NCRPC cannot be considered an autonomous body since it is headed by the Minister of MOC, who is part of the Government and who usually represents a political party in Bangladesh. There is sometimes political influence in decision making but the NCRPC should be independent and autonomous in a true sense for the better protection of the consumer rights.

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738 See the definition of the ‘acts against consumer rights’ in *CRPA 2009* s 2(20).
739 See the details of DNCRP in section 8.2.2 of chapter 8 of the thesis.
ii. The NCRPC deals with the entire gamut of consumer rights related issues, where there may be hundreds of issues, including (but not exclusively comprising) food safety related issues. But food safety is an extremely sensitive topic which deserves a separate body to deal with food safety related issues independently.

5.3.10. Ministry of Science, Information and Communication Technology

The MOSICT primarily works through the Bangladesh Atomic Energy Commission (as mentioned in section 5.3.2) for checking for pesticides residues in food items. It also works with the Bangladesh Council of Scientific and Industrial Research through the Institute of Food Science and Technology (IFST) for testing of food items in its laboratory.\textsuperscript{741} The IFST helps the BSTI to prepare various food standards.\textsuperscript{742}

5.3.11. Ministry of Home Affairs

The MOHA is basically related to or involved in the administrative enforcement of the food safety regulations in Bangladesh, although it does not regulate any rules or law directly. The MOHA works for food safety through the Bangladesh Police (BP), which supplies police to accompany the magistrates of mobile courts when they go for an inspection as part of the operation of the mobile court. They also assist the inspection agencies.\textsuperscript{743} The Mobile Court’s role in implementing the food safety regulations will be discussed in chapter 8 of this thesis.

\textsuperscript{741} NTFS, ‘Bangladesh Country Paper - Seremban’ above n 196, 4.
\textsuperscript{743} NTFS, ‘Bangladesh Country Paper - Seremban’, above n 196, 4.
5.3.12. Ministry of Public Administration

The sanitary inspectors (SIs) cannot enforce the food safety laws directly in Bangladesh. Only an executive magistrate can penalise the adulterant food manufacturer for their offence. And for this purpose, similar to the MOHA, the Ministry of Public Administration (also called the Ministry of Establishment) supplies the executive magistrates for the mobile courts’ enforcement of the food safety laws.

5.4. Issues Concerned in the Food Safety Regulatory Framework of Bangladesh

The above discussion on the FSRF of Bangladesh unveils various issues while discussing the subject of the regulatory bodies of Bangladesh. The following sub-sections will analyse these identified issues in light of their NSW equivalents. It is noticeable that quite a large number of regulatory bodies are dealing with single food safety concerns in Bangladesh without effective coordination which is creating great perplexity. Furthermore, the whole regulatory mechanism lacks transparency, accountability and autonomy. In addition, there is a shortage of suitably qualified personnel, as well as an inadequate number of laboratories available for food testing. The FSRF of Bangladesh also suffers a number of shortcomings concerned with the maintenance of updated food standards.

5.4.1. Non-coordination and Overlapping of Regulatory Bodies

In an effective FSRF the role of the regulatory bodies must be well defined and they should be coordinated, consistent in achieving a single mission. The discussion on the FSRF of

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744 For details, Part I of chapter 8 of the thesis.
745 Chapter 8 of the thesis will discuss the details of the enforcement of the food safety laws in Bangladesh.
746 For a detailed discussion on the ‘non-coordination and overlapping of regulatory bodies’ relevant to the food safety regulatory regime of Bangladesh, see Ali, ‘Food Safety and Public Health’, above n 260, 37–8.
747 Committee to Ensure Safe Food from Production to Consumption, Ensuring Safe Food from Production to Consumption (National Academy Press, Washington DC, 1998) 77 (‘Ensuring Safe Food from Production to Consumption’); see generally Osman, above n 678, 33.
Bangladesh reveals that a large number of ministries along with their sub-ordinate agencies are involved with the regulatory framework. The entire FSRF in Bangladesh is fragmented and there is a lack of effective coordination among various ministries, directories and government agencies and other officials dealing with food safety.  

Even in regard to food testing laboratories, it is observed above that there are at least four food testing laboratories that are operating under the supervision of four different regulatory agencies with grossly inadequate coordination. This lack of coordination and overlapping of jurisdiction among the regulatory bodies have been portrayed in the reports of investigations conducted by the FAO, which said that the roles and responsibilities of the ministries are not always defined properly and thus gaps and overlapping still exist in the FSRF of Bangladesh. In practice, numerous pieces of research suggest the view that the lack of coordination among the regulatory bodies in the FSRF of Bangladesh is a significant reason for the failure of regulatory mechanisms to ensure food safety.

An example of the non-coordination among food safety administrative bodies is given here. Some anti-adulteration drives are conducted by the MOC; some are undertaken by the BSTI (which is under the MOI); sometimes the same drives are even conducted by the city corporation food safety inspectors or by city corporation magistrates who are under the MOLGRD. The entire situation is confusing and overlapping. It is difficult for the

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750 ‘FAO Report - Seminar on Food Safety Challenges in Bangladesh’, above n 144, 3.  
manufacturers to understand who is actually responsible for ensuring food safety and to whom they have to answer. This problem was recognised in a 2010 workshop where it was said that imperfect coordination and communication between enforcement agencies is one of the main food inspection challenges in Bangladesh. The participants of the workshop found that in regard to food safety, there is no coordination among the MOA, MOLGRDC and MOHFW. 753

The above problems of non-coordination and overlapping could be easily solved by introducing and exercising coordination among the regulatory bodies or by setting up one coordinating authority. The regulatory agencies can then undertake a planned strategy for inspections and can have arrangements for collaboration which may minimise the burden on the regulated entity. 754 For the correct operation of the entire regulatory process and to ensure its smooth running, there is no alternative to coordination and communications among all, including the regulators, regulatees and other bodies and stakeholders involved in the process. Any kind of meeting, seminars or interpersonal conversations may take place among all of them.

The issue of the highest, integrated and coordinated regulatory body for food safety has been addressed in a paper presented by the National Taskforce on Food Safety at a FAO/WHO international food safety conference in 2004. 755 The Taskforce argued that Cabinet is the universal coordination authority for everything in Bangladesh. 756 But in practice the Cabinet is extremely busy dealing with thousands of other national and international issues in Bangladesh. This makes it impracticable for the Cabinet to work on food safety with

756 Ibid 4.
emphasis required. Further, although the NFSAC is formed for the coordination of the food safety issues, the above discussion suggests that it is yet to be an effective administrative body.

In summary, it can be said that the Bangladesh food safety regulatory framework is neither integrated nor coordinated. It is maintained by numerous ministries and their subordinate agencies or bodies. The current research indicates that the entire regulatory framework is overburdened not only by the sheer number of pieces of legislation (as discussed in chapter 4 of the thesis) but also by the number of regulatory agencies whose lack of coordination and overlapping of functions may not allow the food safety regime to be successful.

The following discussion will attempt to find a potential solution to non-coordination and overlapping in light of the equivalent NSW FSRF.

The foregoing discussion gives an impression of the necessity for Bangladesh to establish a food safety regulatory body like the NSWFA. The complete food safety regulatory structure of NSW is mostly looked after by the NSWFA. It also administers and enforces the ANZFSC, the FA 2003 and the Food Regulation 2010. The 2008–2009 report of NSWFA claims that it ‘has a key role at every stage of the food cycle — from the day the food is harvested/slaughtered to the moment it arrives on the dinner table’. This integrated and coordinated position of the NSWFA is basically the contribution of Food Regulation Partnership (FRP) as claimed by the Productivity Commission (PC). The PC added that the NSWFA can compulsorily obtain information regarding the enforcement activities of local government and that this is rare in other food safety authorities in Australia. This kind of information helps to have better coordination and so be in a better position to protect public

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758 Ibid.
759 Productivity Commission Report on Food Safety, above n 267.XII, 89.
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The NSWFA coordinates the local government bodies, the ACCC, FSANZ, DPI, NSW Health and other bodies necessary for maintaining the safety across the whole food area. Although local government and the NSWFA both are responsible for ensuring the enforcement of food safety laws, at the end of the day the NSWFA is the highest authority. Hence, it can be suggested that the DGHS under the MOHFW should be the key regulatory agency for all food safety issues. And a regulatory body like the NSWFA should be formed under the MOHFW. The current NFSAC which is not active under the MOLGRD should be dragged under the MOHFW and restructured as an apex coordinating body for all food safety purposes throughout Bangladesh. It is recommended in this thesis that the NFSAC can be renamed the ‘Bangladesh Food Safety Authority’ (BFSA). It is believed that setting up of the BFSA for the full range of food safety issues will not only reduce the lack of coordination and overlapping but will also reduce the regulatory costs; it can help to ensure the product quality, and safety standards along with greater consumer awareness as well. In addition, an integrated and coordinated FSRF would encourage manufacturers to maintain the food standards as required by law. Thus, there is no alternative to having an integrated and coordinated regulatory body for effective regulation of food safety.

760 See generally ibid xxiv.
761 Because the LCs submit their report for their food safety related activities to the NSWFA, not to the Division of Local Government (of NSW). Quite dissimilarly, though the MOHFW and MOLGED both regulatory bodies perform food safety activities, but the SIs under both bodies report to the respective ministry separately.
762 Akter, Fatima and Khan, above n 586, 173.
763 See generally ibid 178.
764 However, it is cautioned that an apex regulatory body alone cannot ensure food safety in Bangladesh unless the other regulatory bodies help in a constructive way, otherwise it may be an extra burden for the food businesses: see generally Hampton, above n 253,59.
Chapter 5: Regulatory Framework of Food Safety in Bangladesh

5.4.2. Lack of Transparency, Accountability and Autonomy

It is a widely recognised issue that a proper and effective regulatory system should embody transparency and accountability. A regulatory body should be transparent in policy making in deciding an issue and in implementing its regulations so that the consumers and all other related persons gain confidence in that particular body. This is because regulatory transparency engages the whole of a country’s governance infrastructure. Transparency is of two kinds, that is, external and internal; so a regulatory body should be transparent both externally and internally. The regulatory bodies for food safety in Bangladesh (as discussed above) are not only many in number but are themselves heavily burdened with numerous members and they are not transparent in their decision making. For example, the NFSAC and the NCRPC, both important regulatory bodies concerning food safety in Bangladesh, are comprised of several representatives from the ministries and secretariats. In both cases, there is no clear provision mentioned in the relevant laws (for example, the PFO 1959 and the CRPA 2009) regarding the decision making process. Further, in both bodies the Minister of the respective ministry is supposed to be the Chairman, who is basically a part of the political government. Furthermore, in both agencies a number of high ranking bureaucrats are engaged in decision making. Several studies have claimed that in

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765 For a detailed discussion on the ‘transparency, autonomy and bureaucracy issues’ relevant to the food safety regulatory regime of Bangladesh, see Ali, ‘Food Safety and Public Health’, above n 260, 38.
766 See generally Committee to Ensure Safe Food from Production to Consumption, Ensuring Safe Food from Production to Consumption, above n 747, 77.
769 Ibid 173.
770 At least 14 members of the NCRPC are government officials a point that has been stressed in newspapers report. See Khalid Yahia, ‘Consumer Cannot File a Suit’, Jai Jai Din (online), 12 February 2012 <http://www.jjdin.com/?view=details&archivet=yes&arch_date=12-02-2012&feature=yes&type=single&pub_no=36&cat_id=3&menu_id=76&news_type_id=1&index=0>.
771 The current study did not find any rules or guidelines regarding the process of decision making for regulatory bodies discussed in section 5.3 of this chapter.
772 For example, the minister of the MOLGRD in the case of NFSAC and the minister of the MOC in the case of NCRPC.
Bangladesh the high-ranking bureaucrats are politically involved.773 Hence, when the ministers and high ranking bureaucrats are similarly politically engaged in an administrative body, this may usually influence the direction and transparency of the decision making. In addition to this, consumer opinions are mostly overlooked while taking decisions. Food safety is a sensitive issue and citizens also have the desire to participate in decision making. Regulatory bodies should certainly take the opinion of consumers seriously and they should not take a decision while ignoring the necessity for transparency of decision making.774 Hence, the lack of transparency in decisions renders their decisions dubious or at least places them under suspicion as to political (or personal) intent and furthermore leads the regulatory bodies of Bangladesh to become gradually of little use. And as an obvious consequence of the absence of transparency in these regulatory bodies, corruption has become a serious problem in Bangladesh for last couple of decades.775

The regulatory bodies of Bangladesh lack accountability; most of them as discussed above do not submit their annual report on time. The present research could not find all updated reports of the respective ministries and their subordinate bodies despite all his efforts.776 Even though some regulatory bodies prepare a report, they are not always available for the general public to view either on the internet or in a printed copy. The entire situation shows a serious lack of accountability on the part of those regulatory agencies because it is a general criteria that a

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774 EACSR, Smart Regulation, above n 297, 36.
food safety regulatory mechanism must contain responsibility with accountability. The regulatory bodies should be accountable for the efficiency and effectiveness of their activities. Accountability’ means that a particular regulatory body has to answer to and show reasonable causes to the superior body for the work it has done. In fact, a regulatory body cannot run in a smooth and effective way unless it is subject to proper accountability. Thus the serious lack of accountability in the food safety regulatory bodies in Bangladesh has resulted in administrative enforcement failure, which will be discussed in chapter 8 of this thesis.

In relation to the autonomy of a regulatory body, researchers argue that for good governance, regulatory autonomy is indeed necessary. Unfortunately none of the regulatory bodies under the FSRF in Bangladesh is practically autonomous and financially independent. It is readily evident that most of the regulatory bodies are filled with the government representatives (like the ministers, secretaries and the like) which make it dependent on the government for every purpose. The regulatory bodies cannot decide independently as the laws and principles set out by the government do not permit their autonomy in practice.

The below discussion will attempt to find a potential solution to the lack of transparency, accountability and autonomy issues in light of the equivalent NSW FSRF.

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777 Committee to Ensure Safe Food from Production to Consumption, Ensuring Safe Food from Production to Consumption, above n 747, 71.
778 Hampton, above n 253, 7, 43.
780 Ibid 59–60. Note: Administrative enforcement of the food safety laws in Bangladesh and its loopholes will be discussed in part I of chapter 8 of this thesis.
782 See generally Osman, above n 678, 56. The author specially mentioned the autonomy of the local government bodies concerning the public health (food safety is generally a part of public health in Bangladesh).
783 For more discussion on how to ensure the transparency and accountability of the regulatory bodies, see section 3.6.1 of chapter 3 of the thesis.
In regard to NSW, the above discussion demonstrates that the NSW FSRF is quite transparent. For example, the developing of ANZFSC is not in the hands of one regulatory authority rather it is a process which step by step engages the participation all concerned. The ANZFRMC is the uppermost authority to decide on the food standard but it cannot decide arbitrarily without the help of the FRSC. Again, the FRSC cannot work without the help of FSANZ. It is noteworthy that, while updating and developing a food standard, the regulatory bodies seek the opinions of the consumers and various stakeholders. For example, at the 50th meeting of FSANZ on 25–26 July 2012 four variations of the ANZFSC were approved; but before finalising those food standards FSANZ took until 31 October 2012 for further review and to consult with consumers, public health groups, food industries and so forth.784 This whole process of developing food standards demonstrate a transparency in decision making in the FSRF of Australia. The Productivity Commission (PC) report of Australia stated that the FSANZ has an effective, transparent and accountable regulatory framework. For this reason, the food industry can work efficiently and produce good quality and safe food for consumers.785

In another example, the NSWFA is the main regulatory authority for food safety in NSW but it is responsible to the Minister of Primary Industries; the NSWFA can develop food policy but it cannot do it arbitrarily because it needs the LCs for implementation. So, there are checks and balances and overall transparency in decision making.786 This checks and balances system in the regulatory process has made it a successful mechanism.

786 See another example of transparency in the FSRF of NSW, New South Wales Food Authority, ‘Scores on Doors Pilot Seeks Feedback from Public and Industry’ (Media Release, 15 November 2010)
Chapter 5: Regulatory Framework of Food Safety in Bangladesh

The NSWFA, as the central coordinating regulatory body for overseeing the entire food safety area, is accountable for its activities to the MPI. Truly, the accountability of the NSWFA as a regulatory body is notable. The official webpage of the NSWFA demonstrates that this regulatory body regularly submits its annual reports to the MPI, \(^{787}\) a statutory requirement under the *FA 2003*.\(^{788}\) In the same way, the LCs regularly report regarding their food safety activities to the main regulatory body, the NSWFA. In the NSW FSRF, it is argued that ‘reporting is the mechanism by which the NSW Food Authority and local councils can provide accountability to the general public and regulated food businesses.’\(^{789}\)

Finally, the NSWFA is an autonomous body both financially\(^{790}\) as well as in decision making. Though the NSWFA is responsible to the MPI, the autonomy of its decision making in relation to ensure food safety through the State is easily understood from the provision of the *FA 2003*. This enactment provides that the MPI has no control over the activities of the NSWFA with regard to ‘(a) the contents of any advice, report or recommendation given to the Minister, (b) decisions whether to grant, suspend or cancel a licence held by a particular person under the regulations, (c) decisions whether to institute criminal proceedings in a particular case.’\(^{791}\) This section demonstrates that, when submitting its annual report or penalising a food manufacturer, the MPI has no influence in the NSFA’s decision making. This transparent regulatory framework has led NSW to have a lower regulatory burden for maintaining food safety than might otherwise be the case. The latest PC report praised the central agency transparency indicators that bore witness to the NSWFA as a body that


\(^{788}\) *FA 2003* s 109.


\(^{790}\) Financially the NSWFA is autonomous and independent: see *FA 2003* s 117A.

\(^{791}\) *FA 2003* s 109.
practises good governance and one that leads to the lowest business compliance burdens in Australia.\textsuperscript{792}

Therefore, recognising the above discussion, it can be recommended that Bangladesh can borrow three ideas from the NSW FSRF. Firstly, the regulatory authorities under the FSRF of Bangladesh should consider the opinions of the consumers, public health groups, and food businesses prior to taking any policy decision, either to update the food standards or to endorse new legal principles in relation to foods safety. Secondly, the GoB should insert an obligatory stipulation for submitting an annual report by the regulatory bodies. Thirdly, the autonomy of a regulatory body should not be simply rhetoric in Bangladesh;\textsuperscript{793} rather the statutes should provide provisions similar to s 109 of the FA 2003, where a regulatory body will not be liable for the decisions they take for the sake of ensuring food safety.

5.4.3. Lack of Adequate Personnel, Laboratory Facilities and Food Standards

There is a shortage of the adequate personnel in most of the regulatory agencies discussed in section 5.3 of the chapter. The number of sanitary inspectors and BSTI inspectors is insufficient to conduct the implementation of the food safety laws.\textsuperscript{794} In a recent media conference, the Director General of the BSTI expressed his concern in regard to this shortage of the personnel.\textsuperscript{795} It has been recognised by the DG of BSTI that there are no adequate laboratory facilities for testing the food samples sent by the inspectors. The limited number of laboratory facilities as well as their inadequate testing capacities is also a major concern for

\textsuperscript{792} Productivity Commission Report on Food Safety, above n 267, 154.
\textsuperscript{793} For example, PFO 1959 s 4A provides the provisions of the NFSAC which is supposed to be autonomous, but in fact it is not due to the presence of several government political personnel who dominate the decisions making.
\textsuperscript{794} The details of this issue will be discussed in section 8.5 of chapter 8 of the thesis.
\textsuperscript{795} ‘BSTI Will Increase the Anti-adulteration Drive’, above n 752.
Chapter 5: Regulatory Framework of Food Safety in Bangladesh

The food safety regulatory regime of Bangladesh.\textsuperscript{796} The major laboratories (especially BSTI) do not have any branch at a district level; this is contributing to the ineffectiveness of this regulatory body day after day.\textsuperscript{797} The laboratory facilities under the DGHS and the MOLGRD both are also situated in the capital city of Dhaka. It is quite unusual for an inspector to send food to the capital city after collecting it from the field and only few laboratories are analysing the foods for detecting its lack of safety.\textsuperscript{798} It is time consuming and certainly denies justice to consumers and allows the errant food manufacturers to continue their activities undetected and not subject to any sanction.

Furthermore, most of the laboratories are not equipped with modernised machinery and equipment which can accurately detect the food safety related problems.\textsuperscript{799} The Food and Agricultural Organisation (FAO) food safety project team stressed that, ‘the analytical facilities and arrangements for testing food in Bangladesh are considered to be very weak. While there are a number of laboratories undertaking food analysis, most are only testing food for proximate or compositional parameters.’\textsuperscript{800}

Finally, the BSTI deals with developing and maintaining several product standards. Therefore, the need to update food standards are sometimes ignored by this regulatory body regularly due to a lack of personnel and the time needed to maintain all the other standards. Food standards change over time all over the world based on the scientific research. Thus, the updating of food standards once in five years is a significant delay that certainly ignores the consumer’s right to have safe and quality foods.

\textsuperscript{796} FAO Report - Seminar on Food Safety Challenges in Bangladesh’, above n 144, 4. See also Rouf, above n 652, 92.
\textsuperscript{797} See generally Rouf, above n 652, 92.
\textsuperscript{798} See a diagram of the food testing lab facilities in Bangladesh, at FAO FSPT, ‘Assessment of the Capabilities and Capacities’, above n 675, 9.
\textsuperscript{799} See generally Rouf, above n 652, 92.
\textsuperscript{800} FAO FSPT, ‘Assessment of the Capabilities and Capacities’, above n 675, 8.
The following discussion will have an effort to find a potential solution to the lack of adequate personnel, laboratory facilities and food standards in Bangladesh in light of the NSW FSRF.

In NSW, s 80 of the FA 2003 requires the listing of laboratories approved by NSW where only the approved chemical analysts can analyse food products in regard to safety concerns. The webpage of the NSWFA has provided a list of approved chemical and microbiological laboratories along with the approved chemical microbiological analysts. As per the list, there are at least seven public and private laboratories for chemical tests and six microbiological laboratories available for food testing.

It is noteworthy that in NSW all the food testing labs are not government owned, some are privately owned. This is a good example which Bangladesh can follow and the GoB may consider allowing the private sector to establish food testing laboratories until the government itself can afford to build an adequate number of laboratories throughout the country. It is hoped that the private sector will be encouraged to invest in this sector since examples of such organisations are seen in the private health services and private education sectors that are already a rising sector in Bangladesh.

In regard to the food standard issue, as discussed in section 5.2.2 of this chapter the FSANZ is the main regulatory body for developing and updating the food standards for Australia. The FSANZ closely works with the ANZFSMC (see section 5.2.2). The FSANZ regularly updates the food standards without a delay. Therefore, Bangladesh can borrow the ideas of Australia in two ways. Firstly, the BSTI can be released from all other responsibilities except


developing and maintaining the food standards; or secondly, a separate regulatory authority (similar to the FSANZ) can be formed to work solely for food standards, and which will update the food standards every year so that they keep up with the international standards.

5.5. Summary and Conclusions

This chapter discusses the various regulatory bodies available in the FSRF of Bangladesh. The discussion reveals that there are numerous regulatory bodies in the framework without the least coordination. Sometimes their responsibilities even overlap. This chapter has therefore discussed the equivalent regulatory framework of NSW to demonstrate a model mechanism. The analysis of the issues has revealed that there are several others problems which need to be addressed.

Despite the various objectives and purposes of a regulatory regime, it needs to focus on common goals; it should function as an integrated enterprise; it must be nimble, coordinated and transparent. The ministries and the directorates that deal with the food safety affairs in Bangladesh should be increasingly harmonised in order to make the system effective. In fact, an effective FSRF requires close engagement of properly trained authorities equipped with adequate resources and a strong commitment to their purpose. When there are many bodies assigned to a single purpose like ensuring ‘food safety’, it may allow any particular body be reluctant to do the job with dedication in the absence of appropriate coordination by a proactive competent authority. Therefore, it is a good idea to have a coordinated and

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803 Note: However, this option is not encouraged in the current situation as the FSRF of Bangladesh is already overburdened with the quantity of regulatory bodies. However, in the case of food safety activities of all other regulatory bodies, these are merged in the proposed BFSA, then a separate body like the FSANZ can be formed.

804 Committee to Ensure Safe Food from Production to Consumption, above n 747, 77–8.

integrated framework for food safety as this guarantees a more effective mechanism. Bangladesh can introduce a body like the NSWFA which will effectively work on the food safety related issues. The NFSAC can be renamed the ‘Bangladesh Food Safety Authority’ (BFSA). The BFSA should be an autonomous body like the NSWFA. This kind of autonomous body will help to reduce the regulatory costs, the workload of the different ministries and departments. Finally, it can cease the regulatory confusion currently existing in the FSRF of Bangladesh.

Because the FSRF lacks transparency and accountability in Bangladesh, it is a good idea to bring the entire FSRF under one ministry, most preferably under the MOHFW as it is the only ministry which currently performs its most important role of ensuring food safety in Bangladesh. Bangladesh needs to focus on the laboratory facilities for the detection of proper food safety. The laboratories should be extended to the district and upazila level. For this purpose, private investors can be encouraged to come forward and invest in this sector.

The food standards should be updated regularly by the responsible regulatory body. In this case the existence of a particular regulatory body like the FSANZ is necessary. At last, an updated and organised regulatory framework would play a significant role in the effectiveness of the entire regulatory regime. Unfortunately the FSRF of Bangladesh is facing some serious drawbacks. Now it is necessary to ‘hit at the root causes’ of these problems. The government has to consider developing a trustworthy FSRF to detect adulteration and unhygienic practices at different levels of food production. It is believed that a proper and

806 Akter, Fatima and Khan, above n 586, 168.
807 Note: it is important to mention that, emphasis on coordination by the NFSAC and the empowering, strengthening of its activities is also recommended by the FAO food safety project currently working in Bangladesh. See ‘FAO Report - Seminar on Food Safety Challenges in Bangladesh’, above n 144, 4. See also Improving Food Safety: The Workplan - January 2009 – June 2012, above n 544.
808 Mondal, ‘Combating Food Adulteration’, above n 727.
effective FSRF which has been proposed categorically in this chapter can ensure safe food for all consumers in Bangladesh.
Chapter 6: Civil Liability of Food Manufacturers for Damages in

Bangladesh

6.1. Introduction

The purpose of civil liability in regard to the manufacture of unsafe (or defective/dangerous) food is to obtain compensation for those harmed or otherwise deleteriously affected. A consumer should not suffer a loss in a state where the government is working to protect the rights of its citizens. From that perspective, the key purpose of the provision of civil liability is to ensure that a consumer is able to obtain damages from the food manufacturer if that consumer suffers a loss, either physically or financially, in buying or consuming any unsafe food. Such a provision allows the consumer to offset his or her loss by being awarded monetary compensation commensurate with that loss or damage (that is, ‘compensatory damages’).

The previous chapters has discussed that in Bangladesh food adulteration and unhygienic production and processing of food products so as to produce unsafe food products has been a serious concern for last couple of decades. Widespread food adulteration and the prevalence of unhygienic attitudes in food processing have severely affected public health. A number of laws have been introduced under the criminal liability regime to penalise those

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810 This chapter will merely discuss the damages as the remedy of product liability cases. No other remedy (such as injunctive remedy) will be discussed. Among the damages, the present study will only discuss the ‘compensatory damages’ and ‘punitive damages’ for the consumers affected by unsafe foods.

811 See especially section 2.4 and 2.5 of chapter 2 and section 1.5 of chapter 1 of the thesis.

812 For details of the outrageous picture of food adulteration in Bangladesh, see DGHS, Public Health Interventions by Selected Institutions, above n 195.

who manufacture the unsafe foods in Bangladesh. But only one statute deals with damages for the affected consumers. It is titled the Consumer Rights Protection Act 2009 (Bangladesh) (CRPA 2009), which nevertheless presents several problems both in its scope and implementation. Therefore, the main purpose of this chapter is to investigate the ways in which a consumer can seek compensations from the manufacturers of unsafe food products. To reach this objective the product liabilities of the manufacturers for producing unsafe foods under the law of torts will be broadly examined in this chapter.

Since this study has chosen the counterpart NSW regulations to update the food safety laws of Bangladesh, the Australian Consumer Law (NSW) (ACLNSW) will be discussed as an example of the latest development in Australia. In addition, the Civil Liability Act 2002 (NSW) (CLA 2002) will be discussed to examine the manufacturer’s liability for negligence under tort law. However, the product liability laws are a comparatively relatively recent development in Australian law unlike the USA, where product liability legislation has long been operating for many years and so has a vast array of published cases on the area. Australia has had a shorter time span for such legislation to operate and therefore (it

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814 As mentioned in section 2.11 (scope of the study) of chapter 2 of the thesis, the word ‘manufacturing’ in this chapter will include the ‘processing’ of the food. Accordingly the ‘food manufacturer’ will be meant as ‘food processor’ where appropriate and necessary.
815 For example, the Penal Code 1860 (BD), the Pure Food Ordinance 1959 (Bangladesh), the Special Powers Act 1974 (Bangladesh), the Bangladesh Standard and Testing Institute Ordinance 1985 and so on. For a complete and detailed chart of the statutes that deal with the food safety issues in Bangladesh see, Ali, ‘Food Safety and Public Health’, above n 260, 31–40.
816 Law of tort is considered as the hybrid of both statutory law and common law as well as civil law and criminal law: See generally, Caroline Forell, ‘Statutory Duty Action in Tort: A Statutory/Common Law Hybrid’ (1990) 23 Indiana Law Review, 781, 781–2; see also Pam Stewart and Anita Stuhlmecke, Australian Principles of Tort Law (Cavendish Publishing, 2005) 3. For the purposes of this study civil liabilities of the food manufacturers under both statutory laws and common law principles will be treated as the law of torts.
817 This study will not discuss any contractual liability of the food manufacturers. This is because consumers generally buy food from retailers. Thus, consumers do not have any direct contractual relation with the food manufacturers. According to the doctrine of ‘privity of contract’ only a party to the contract can be made liable for the violation of the contractual obligations. See more on ‘privity of contract’ in section 6.3.2.
818 Australian Consumer Law is set out in the sch 2 of the CCA 2010 (formerly the Trade Practices Act 1974 (Cth)). For more details, see section 4.2.4 of chapter 4 of the thesis.
819 That is, compared with their development in the USA. For comments on the 1974 Australian legislation made some 20 years after its inception, see David Harland, ‘Influence of European Law on Product Liability in
has been argued) fewer cases or lawsuits to peruse.\footnote{820} The ACL and its state counterparts are not just a reiteration of the 1974 legislation but also incorporate some additional aspects in terms of consumer rights and introduce a single generally consistent legislative framework across the whole of Australia. While Blunt may have earlier argued that, “‘product liability’ in the Anglo-Australian jurisdictions, unlike in the United States, is not yet a term of art’,\footnote{821} as legal action in regard to product liability issues had been widely exercised in USA for longer, Australia’s legislation has clearly made great progress. Nevertheless the sheer population of the USA and its traditionally more litigious society as well as the existence of even earlier legislation has resulted in numerous judicial decisions having been reported. Hence, besides citing the counterpart Australian literatures, the judicial references and practices of the USA will be discussed in the current chapter where appropriate and necessary. It will be done with the intention that the relevant product liability provisions and practices can be borrowed in the Bangladeshi food safety civil liability regime if needed. The present study anticipates that it will facilitate the injured consumers for obtaining damages under product liability laws.

This chapter has been divided into few sections. Section 6.1 provides an introduction. Section 6.2 will discuss the manufacture’s existing product liability in Bangladesh for damages in the CRPA 2009. The product liabilities of the unsafe food manufacturers in relation to damages under the law of torts will be discussed in section 6.3. This portion will be divided into three subsections. Section 6.3.1 will discuss the product liability provisions of the 1980 legislation. Section 6.3.2 will explain the consumer guarantees mentioned in point 9 is new to the ACL. By inserting these sections (CCA 2010 sch 2 ss 51–103), the statute has introduced implied warranty in Australian consumer law (see below section 6.3.2). This is the reason why Australian law is considered ‘new’ compared to the US product liability law in this regard.\footnote{823} Roger Gaire Blunt, ‘The Tort System and Liability of Manufacturers for Product-related Injuries and Death: The Australian Viewpoint’ (1980) 54 The Australian Law Journal 472, 472; Gay R Clarke, ‘Product Liability Actions in Australia: Is the Collateral Contract Remedy an Option?’ (1989) 5 Queensland University of Technology Law and Justice Journal 111, 111.\footnote{821} Blunt, above n 820, 472.
subsections. Sub-section 6.3.1 will explain the manufacturer’s liabilities for negligence. Accordingly, sub-section 6.3.2 and sub-section 6.3.3 will discuss the manufacturer’s product responsibilities under the principle of implied warranty and principle of strict product liability. Section 6.4 will clarify the provisions related to the damages of the product liabilities of the manufacturers. Section 6.5 will elucidate the application of product liabilities under the law of torts for manufacturing defective foods in Bangladesh. This section will offer recommendations based on the reasons for the non-development of the product liability laws in Bangladesh. Finally section 6.6 will summarise the chapter with conclusions.

6.2. Manufacturer’s Product Liability under the Consumer Rights Protection Act 2009 (Bangladesh)

The following section will explain the provisions of the CRPA 2009 that offer consumers a right to damages for injury from unsafe food and impose civil product liability upon the food manufacturers.

Section 66 of the CRPA 2009 provides that an affected consumer can file a civil suit in order to claim remedies (for example, damages) from a ‘particular person’ against whom the suit is filed (for example, a food manufacturer), when the consumer has been affected by, or is a victim of ‘acts against consumer rights’ by the defendant. The ‘acts against consumer rights’ are defined in s 2(20) of the statute. An act or omission is treated as ‘acts against consumer rights’ if anyone sells or offers for sale any adulterated goods, or if anyone admixes any chemical or poisonous substances to any food, which admixture has been

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822 Consumer Rights Protection Act 2009 (Bangladesh) s 66(1): The section also mentions that, it is immaterial whether that particular person has already been penalised in a criminal court or whether such proceedings have been instituted against him.
823 Ibid s 2(20)(b).
prohibited under any law, or if anyone manufacturers ‘fake’ goods (that is, goods purporting to be what they are not, whether by false declaration of contents or misuse of brand name), or if anyone sells or offers to sale any date expired goods, and so on. Where the loss is assessable in a pecuniary manner, the consumer can take legal action against that particular person claiming damages up to but not exceeding five times of the pecuniary compensation due for the loss sustained. The CRPA 2009 does not define ‘loss’, and thus whether such loss includes only the value of the product or that of other related injuries (sickness, hospital bills, work loss, depression and so on) is uncertain. The law is not clear in this regard but restricts compensation to up to five times the value of the 'loss'. It is therefore suggested that the term ‘loss’ be defined, perhaps from the ACLNSW or the CLA 2002.

Section 67 of the CRPA 2009 states that, if any person is liable for any civil wrong under this law, the court can arrange for various remedies. The court can issue an order to the defendant to change or substitute the proper product for the defective one, or to return money paid to the plaintiff in exchange for the return of the defective product. In addition, the court can grant an order that the defendant bear the expense of the suit.

Regrettably, the CRPA 2009 has several shortcomings in regard to a plaintiff accessing damages from food manufacturers. These are as follows.

**All Involved Persons Not Liable**

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824 For example, mixing of poisonous substances has been prohibited in s 6A of the Pure Food Ordinance 1959 (Bangladesh).
825 Consumer Rights Protection Act 2009 (Bangladesh) s 2(20)(c).
826 Ibid s 2(20)(j).
827 Ibid s 2(20)(k).
828 Ibid s 66(3).
The *CRPA 2009* falls short in regard to encompassing all persons who are involved in producing unsafe foods. Section 66 of the Act sets out that a consumer only can claim damages against the specific person who is ‘directly’ involved in contravening the law. But plaintiff cannot sue ‘any other persons involved’, where they are engaged in the contravention of the law. For example, when an unsafe food product is sold in the market, it is hard to assert that either the manufacturer or the processor or anyone else is exclusively liable. In some cases, for example, the identity of the manufacturer is not disclosed on the food items (unidentified manufacturers).829 Further, the relevant manufacturer may be located far from the affected person and, in such an instance, the law may be ineffective in providing remedy to an affected consumer. Thus, the current provisions of the *CRPA 2009* may deprive consumers of the opportunity of obtaining damages in some cases.

As to a means to address these issues, the provisions of *ACLNSW* can here be mentioned. The civil liability of the wrongdoers has been clearly articulated in the *ACLNSW*. The ACLNSW provides that a victim of unsafe food can immediately go to the court to seek damages for the loss sustained. Regarding an action for damages by the claimant, s 236(1) of the *ACLNSW* states that when ‘a person (the claimant) suffers loss or damage because of the conduct of another person … the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention’ [emphasis added]. The court may give the order for compensating the victim. The court also may include other remedies for example, refunding money, under s 243 of the *ACLNSW*.


830 See *CCA 2010* sch 2 ss 246–50 for more remedies.
The provision of the *ACLNSW* has a broader view and includes all those engaged in wrongdoing. Section 236(1) uses the words ‘against any person involved in the contravention’, which means that a manufacturer cannot evade liability where they manufacture unsafe food by engaging in any deceptive, misleading or unconscionable conduct. However, whether a manufacturer cannot be identified and thus evades liability for the manufacture unsafe food, or whether a manufacturer is identifiable as manufacturing unsafe food by engaging in deceptive, misleading or unconscionable conduct and cannot evade such liability, in either event, every wrongdoer involved in the total process of making a food unsafe should be liable in accordance with the proportion they contributed. In a noted British case, *Barker v Corus UK Ltd*, Lord Hoffmann mentioned, ‘...if more than one person may have been responsible, liability should be divided according to the probability that one or other caused the harm.’

Finally, Bangladesh can borrow the aforesaid provisions from the *ACL NSW* for updating the *CRPA 2009* in regard to the defendants, against whom an affected consumer can take legal action for damages. Section 66 of the *CRPA 2009* should be amended to include the words ‘any other persons involved’ along with mentioning the ‘particular person involved’ so that every person involved in the production (including manufacture, processing and sale) of unsafe foods can be liable to compensate the affected consumers.

**Limited Amount of Compensation**

The *CRPA 2009* restricts the amount of damages available to the affected consumer. The court has a limited scope within which to vary the award; damages up to five times the loss are specified by the statute.

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831 [2006] 2 AC 572, 592 [43].
This limitation of the damages cannot be positively advocated. An affected consumer may lose many things due to illness caused by the unsafe food products. Their losses may include money (paid for the defective product, or for actual outlays for treatment, as well as in consideration of anticipated ongoing treatment that may be required, as well as for loss of pay due to absence from work or leave having to be taken that might have otherwise have been the case), physical health (including non-monetary aspects such as pain and suffering), resulting loss of employment, and/or income generating capacity, or loss of a breadwinner in a family situation due to illness or death from ingestion or contact with the product. An injured consumer affected by contaminated food may suffer from insomnia, anxiety, tension, depression, embarrassment, emotional distress, damage of self-esteem, otherwise unwarranted tiredness and so forth. The specified compensation limit under the CRPA 2009 may not always cover all these losses. A court may feel that it is necessary in the circumstances to have the opportunity to provide a significant amount of compensation which would justly compensate all the possible losses but this would require that there be no statutory restriction. Once one injured consumer has received what can be described as adequate compensation, manufacturers may be more cautious in regard to ensuring the production of safe food since other consumers may be encouraged to sue for similar amounts for the same range of concerns.

By contrast, s 236 of the ACLNSW does not limit damages able to be awarded to consumers; a court is free to decide adequate damages for the affected consumer. Thus, considering the above rationales and following the example of ACLNSW, the CRPA 2009 may remove the provision of limiting the court’s capacity while deciding the damages for the affected consumers.

**Inadequate Time Limit on Appeals**
Section 68 of the *CRPA 2009* limits the time for appeal. Where an affected consumer fails to acquire damages in the lower court, he or she may appeal in the High Court Division (HCD) of the Supreme Court of Bangladesh but within 90 days of the judgement of the trial court. This time span is insufficient as many consumers live in villages; in addition, they are not highly educated and certainly not educated about or aware of what is involved in legal proceedings. Given this situation, they may be unsuccessful in attempting to file an appeal within 90 days or simply fail to do so. Furthermore, the HCD is situated in the capital city of Dhaka which is far from many districts and rural areas in Bangladesh. Poor rural consumers may not be interested or able to easily come in Dhaka and file an appeal in the HCD once their suit fails in the local trial courts. Further, the fees of the HCD lawyers are significantly higher than those of the local court lawyers. All consumers may not be capable of managing to meet the expenses of proceedings in the HCD. Although s 67(c) of the *CRPA 2009* has provided that an affected consumer will be given the expenses for the suit in the court, nevertheless it is unlikely that poor consumer-victims will appeal once their suit fails in the court of first instance, which failure also involves a loss money at the local court level. Therefore, an extended time limit for appeal as well as an appellate court within the local jurisdiction would be more convenient for the affected consumer and foster a greatly likelihood of matters being appealed.

To address this issue, the current study suggests that the time limit for the appeal should be lengthened (to at least six months) and an appellate court be accessible to local consumers and, therefore, a local district court should be chosen for an appeal.

The above discussion suggests that, though the *CRPA 2009* has provisions that enable a consumer to claim damages, this can hardly be successful due to the above mentioned loopholes in or shortfalls of the legislation. This study hopes that the recommendations
offered in each phase can make the law effective. However, in order to explore more ways for claiming damages from manufacturers of unsafe foods, the following section will discuss the product liabilities of the manufacturers in tort law.

6.3. Manufacturer’s Product Liability under the Law of Torts

Manufacturer product liability for producing unsafe foods under the law of torts is hardly ever invoked in Bangladesh. Many consumers are not aware that a manufacturer is legally responsible to pay damages for producing unsafe foods. Even manufacturers are all barely educated in regard to being aware of their liability in tort law concerning what they produce. The object of incorporating the following sections in this study is to address the key product liability principles in relation to food safety issues in Bangladesh. They are also included for the purpose of popularising this legal scholarship among consumers, manufacturers, processors and other persons concerned with the food industry so that industry parties are more aware of their obligations and so that an injured party can seek redress under product liabilities of manufacturers using tortious liability principles.

The law of torts settles the product liabilities of the food manufacturers under the negligence, implied warranty, or strict liability doctrines. An analysis in the following sections addresses these three principles with regard to food safety concerns.

6.3.1. Manufacturer’s Liability for Negligence

In the ordinary sense, negligence indicates the failure of the defendant to take reasonable care and apply appropriate skill. A food manufacture is liable for the negligent activities which render the food unsafe. Negligence occurs when a manufacturer does not take due and

832 See the detailed discussion on the manufacturer’s liability for defective goods: John Goldring et al, Consumer Protection Law (Federation Press, 1998) 96–145.

833 Civil Liability Act 2002 (NSW) s 5.
reasonable care during the production of any food or food ingredient and this results in personal injury. In Common Law, where there is a breach of duty of care owed to the plaintiff that has been infringed by the defendant, the plaintiff has the right to claim damages.

Proving negligence against food manufacturers for defective and adulterated food products was difficult in earlier times, despite the fact that negligence had been the main approach for consumers to seek compensation. In establishing negligence, particular focus was on the conduct of the manufacturers. The applicant needed to show that the defendant had neglected to take proper care and that this lack of care resulted in the production of a defective product and one that harmed the consumer. Lord Justice-Clerk Alness pointed out in *Mullen v AG Barr*, a 1929 case, that the manufacturer is liable for the activity if it intentionally places a product that it knows to be dangerous on the market and conceals this information from the buyer; likewise, such a person or entity is also liable if he or she is dealing in articles that are dangerous by their very nature and does not give any warning to the buyer of the fact. In this lawsuit, the manufacturer of the ginger beer was not found liable (though a bottle was found to contain the remains of a rodent) as he took all the necessary and reasonable safety measures. Hence the required negligence on the part of the manufacturer was not demonstrated by the plaintiffs (‘pursuers’ in Scottish law). Thus, the concept of ‘duty of

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835 *Mullen v AG Barr & Co Ltd* (Scotland) [1929] CSIH 3 (20 March 1929) (Lord Justice-Clerk Alness).
837 Buzby and Frenzen, above n 834, 640.
838 *Mullen v AG Barr & Co Ltd* (Scotland) [1929] CSIH 3 (20 March 1929) (Lord Justice-Clerk Alness).
839 Ibid. Lord Justice-Clerk Alness moreover appeared to doubt whether the necessary relationship was established as there was an intervening retailer. He alludes to possible action against the retailer. By contrast, Lord Ormidale opines that though there be no contract there is a relationship between manufacturer and ultimate consumer but comments that the authorities note that ‘such considerations ... have been held to be irrelevant in analogous circumstances’. But again he finds no negligence on the part of this modern manufacturer. Lord
care’ can thus be said to have existed (even if in a contested manner) prior to the famous *Donoghue v Stevenson*, a case in the House of Lords, (see details below) where the modern concept of negligence is considered to have been established in English Common Law.

*Mullen v AG Barr* sets out some general principles regarding ‘duty of care’, but it is *Donoghue v Stevenson* where the duty is first formed. Turner and Hodge state that the decision in *Donoghue v Stevenson* has established the main foundation of the modern tort of negligence. Hence, in relation to liability issues for food safety, the *Donoghue v Stevenson* case deserves to be discussed in greater detail due to its significance.

The facts of the case were simple. A friend of the appellant had purchased a bottle of ginger beer which had been manufactured by the respondents. The bottle was found to contain the decomposed remains of a snail after the appellant had already consumed some of its contents.

The ginger beer was in a dark glass bottle, which had been sealed by a metal cap, so the appellant could not examine the contents unless she had poured them out. The appellant filed the case for damages as a result of her injury (shock and severe gastro-enteritis). The House of Lords held that:

> [T]he manufacturer of an article of drink sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.

Hunter agrees the relationship exists but argues that on this basis the plaintiffs could pursue damages. Lord Anderson maintains that the required relationship did not exist, nor could the manufacturer know of the contamination or be regarded as negligent. An action for damages was subsequently dismissed as there was no legal authority for it to proceed.

For details of this case, see *Donoghue v Stevenson* (Scotland) [1932] UKHL 100, [1932] AC 562. Another case related to the contamination of ginger beer — in this instance by the remains of a snail.


In both this case and *Mullen v AG Barr*, the bottles were of dark glass. In the latter, Lord Justice-Clerk Alness stated: ‘The bottles being dark in colour, it is manifest that the defenders’ servants concerned could not have detected a mouse in the bottle. At the best it would have represented to them certain foreign matter’.

See *Donoghue v Stevenson* (Scotland) [1932] UKHL 100, [1932] AC 562 (Lord Aitkin).
In this case it was held that there had been a negligent breach of duty of care and that the respondents were liable[^844] under the common law of tort. On the question of whether a relationship existed (between consumer and manufacturer) on which the basis of a duty of care could exist, Lord Atkin elaborated on what he termed the ‘good neighbour principle’:

[Y]ou must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.^[845]

The above discussion portrays that the tort of negligence is an old product liability principle which imposed the civil liability upon the food manufacturers to provide damages to the affected consumers in the event of injury to the consumer attributable to the manufacturer’s act or omission. Initiated in the previous century, some noteworthy case decisions mentioned above have helped to develop the tortious product liability for manufacturer negligence.

**Elements of Negligence**

The plaintiff, a consumer affected by unsafe food products produced by the manufacturer, has to prove the following elements in his or her claim under the law of torts. These elements are, (a) the defendant must have a duty of the care to the plaintiff, (b) there must be a breach of this duty, and (c) the breach has caused damage or harm to the plaintiff.^[846] Succeeding discussion will explain these elements.^[847]

a. **Duty of Care**


[^845]: McAlister (or Donoghue) v Stevenson[1932] AC 562, 580.


[^847]: For a detailed scholarly discussion on the elements of negligence under tortuous liability, see Blunt, above n 820, 473–5.
The ‘good neighbour principle’ as established in *Donoghue v Stevenson* denotes that a particular food manufacturer has the duty of taking care so that the food manufactured does not cause any injury to other persons, especially consumers. Later, some leading judicial decisions, such as *Hedley Byrne & Co v Heller & Partners Ltd*, and *Dorset Yacht Co Ltd v Home Office*, have developed the issue regarding the ‘duty to care’. These cases established that for proving negligence the wrongdoer and the victim must have a significant relationship of proximity or neighbourhood as well as any careless behaviour of the wrongdoer having resulted in loss or damage being sustained by the victim. More precisely, it needs to be proved that a food manufacturer could ‘reasonably’ have foreseen injury due to the food and taken ‘reasonable care’ to avoid conduct that could result in such injury to a consumer. Owen mentions:

> While the standard of care must be adjusted for certain special relationships, as classically was the norm, modern negligence law imposes a duty on most persons in most situations to act with *reasonable* care, often referred to as “due care”, for the safety of others and themselves. A person who acts carelessly — unreasonably, without *due care* — breaches the duty of care, and such conduct is characterized as “negligent.”

Manufacturing defects are a major concern that is worth taking care of in regard to food safety. When a consumer finds any defect in a particular food product, it is considered that the respective manufacturer owed the consumer an obligation to take due care while making that food. Dillard and Hart assert that the manufacturer’s duty even extends to distribution (for example, the need for temperature control in delivery vehicles) and ‘down the line’ use of the products (for example, in further processing or by the consumer), as it is not just a matter of production but also the foreseeable transport and use of the products manufactured.
that must be considered. 854 Therefore ‘the manufacturer is under the positive duty to speak out if the product is capable of harm and does not itself carry a message of danger’. 855 Directions for appropriate use of a product to guide consumers who might otherwise be ignorant of the potential for harm must therefore be considered. In the context of foodstuffs, a simple example could be the need to dilute certain products before use in order to render them fit for consumption. This would apply particularly to ingredients (for example, chemicals, preservatives or other ingredients) used in food manufacture. It could be argued that this should also apply where consumption of a certain food product (itself apparently innocuous) in excess might be hazardous to consumer health. For such reasons, this issue should be given greater priority.

Proving the existence of duty of care is a significant concern for establishing a case of negligence under the law of torts. In its decision in Anns v Merton London Borough Council, 856 a noteworthy case, the House of Lords gave some important indications as to the ‘duty of care’. 857 Lord Wilberforce characterised a two stage test for determining the existence of ‘duty of care’ of the defendant in a negligence case. The court referred to a trilogy of negligence cases decided in the House of Lords, namely, Donoghue v Stevenson, Hedley Byrne & Co Ltd v Heller & Partners Ltd and Dorset Yacht Co Ltd v Home Office (all mentioned above). 858 These cases signify that in a particular situation to establish the existence of ‘duty of care’, it is not essential to consider the facts of that situation within

855 Ibid.
858 For the details of the case and verdict, see British and Irish Legal Information Institute, United Kingdom House of Lords Decisions (2012) <http://www.bailii.org/uk/cases/UKHL/1977/4.html>; see also ibid 9.
those of preceding circumstances wherein a duty of care has been held to exist;\(^{859}\) instead, the Court suggested a two-step test to determine the presence of a defendant’s ‘duty of care’. The two step test is as follows:

First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a \textit{prima facie} duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ….\(^{860}\)

However, in 2002, in \textit{Glencar Exploration PLC v Mayo County},\(^{861}\) the court added a third step to the previous two step test of Lord Wilberforce; Keane CJ in his verdict suggested that before imposing a liability for negligence upon the defendant, the court need to be satisfied that it would be ‘just and reasonable’ to do so.\(^{862}\)

\(\text{b. Breach of the Duty of Care}\)

Negligence will not occur if the food manufacturers accurately fulfil their duty of care. But in view of the dire nature of the food safety situation in Bangladesh,\(^{863}\) it is realised that those involved in the manufacture and processing of food products are not observing their actual duty in this regard. That engages the second element of the negligence, breach of the duty of care. Nevertheless, it depends upon the circumstances to what extent a food manufacturer is

\(^{860}\) Ibid.
\(^{861}\) [2002] 1 ILRM 481 (SC).
\(^{862}\) Binchy, above n 857, 10.
considered liable for the breach of the duty of care. Sometimes it is strictly considered with circumstances and tried according to the principle of *res ispa loquitur*, where the breach of the duty of care is understood from the circumstances of the facts of the case. In *Samson v Riesing*, the plaintiff consumed the turkey salad and suffered food poisoning. The court applied the *res ispa loquitur* doctrine and held that the defendants owed a duty of care to the plaintiff. The defendant was held liable for the breach of their duty of care to the consumer.

Derrington mentions in this regard, ‘… in order to determine whether a duty of care which exists has been breached, it is necessary to look to the standard of the care which is required, and in the classical formulation of the doctrine this has been set at that which is reasonable in the circumstances.’

The *CLA 2002* clarifies that the breach of duty occurs when a defendant can foresee the risk, which appears is a significant concern. A breach does not occur where a reasonable person would have applied the same safety measures in the same situation as the defendant. Glass JA stated in the *Minister Administering the Environmental Planning and Assessment Act, 1979 v San Sebastian Pty Ltd*, that to prove the breach of duty to care, a plaintiff needed to prove that ‘it was reasonably foreseeable as a possibility that the kind of carelessness charged against the defendant might cause damage of some kind to the plaintiff’s person or property.’ However, civil proceeding in relation to negligence under the common law of

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865 See, eg, *Gordon v Aztec Brewing Co*, 33 2d 514, 517 (Cal, 1951).

866 62 Wis 2d 698 (1974).


868 *Civil Liability Act 2002* (NSW) s 5B(1).

869 Ibid.

870 (1983) 2 NSWLR 268, 295–6 (Glass JA).

871 Sappideen, Vines and Watson,above n 846, 380.
torts does not satisfy the breach of duty of care if the violation of the duty relates to any statutory obligation.  

\[872\]

c. **Causation of Harm for Breach of Duty**

An injured consumer of the unsafe food (as plaintiff) is required to prove that the *harm* he or she has suffered is the direct result of the defendant’s breach of duty. For example, a consumer must become ill or somehow have suffered economic, physical or mental loss as a result of eating the defective food produced by the manufacturer. The word ‘harm’ is significant in this point relating to food safety matters. The *CLA 2002* clarifies the word ‘harm’ when being used in regard to a negligence case as indicating that harm by an unsafe food may include a personal injury,\[873\] or death, or an economic loss for the consumer.\[874\]

The cause of the harm has to be the result of ‘direct’ consumption of unsafe food product. In particular, the injured consumer of the unsafe food product needs to ‘establish a cause-and-effect relationship between the negligence and the harm.’\[875\] This relationship in a true sense should be close and proximate. The proximity of harm of the consumer should be measured with a reasonably close connection existing between the food manufacturers’ wrong and the harm to the victim (which is not remote).\[876\] However, food safety is a most sensitive matter as it directly affects human health. A manufacturer is always liable no matter who buys the food and who eats it. Here the relationship between the victim and the harm is always proximate since a manufacturer cannot deny the liability once he or she produces an unsafe food which is reachable by the consumers. Thus, negligence occurs against a manufacturer in

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\[872\] For example, see *Tucker v McCann* [1948] VLR 222; Sappideen, Vines and Watson, above n 846, 378–9.

\[873\] Personal injury has been clarified in s 5 of the *Civil Liability Act 2002* (NSW) which can include ‘(a) pre-natal injury, and (b) impairment of a person’s physical or mental condition, and (c) disease.’

\[874\] *Civil Liability Act 2002* (NSW) s 5.

\[875\] Owen, ‘Five Elements of Negligence’, above n 853, 1680.

\[876\] Ibid 1681.
tort law no matter how simple the carelessness that exists, because ordinary irresponsible preparation of food can make it quite dangerous for consumption. Yet specific rules are always helpful to decide the remoteness of the negligence and harm. The **CLA 2002** provides two elements to determine whether claimed negligence has caused particular harm or not. These elements are, whether the negligence was an essential condition of the incidence related to the harm, and whether it is appropriate for the scope of liability. In practice, the cases may differ in terms of the facts and therefore a court may need to study the whole circumstances while deciding a case under the law of torts.

**Defences to Negligence**

Manufacturers of food products can defend their civil liability for negligence on few grounds.

i. **Contributory Negligence**

Contributory negligence is sometimes treated as a defence to negligence in the matter of product safety. A manufacturer’s liability may be decreased for the injury of the consumer in cases where the infringement of duty of care that a manufacturer owes to consumers is breached partly by the consumer himself or herself which act or omission is termed ‘contributory negligence’. Bohlen, while explaining contributory negligence, says that, ‘a plaintiff who by his [or her] own misconduct in conjunction with that of the defendant has brought harm upon himself [or herself] cannot recover damages’. In practice, the doctrine...
of contributory negligence is usually applied to discern whether the plaintiff has been partly
careless in the use of safeguards against the danger of that harm\textsuperscript{882} or to minimise the damage.

However, applying the defence of contributory negligence in food safety cases is difficult. A
consumer will almost never intentionally and knowingly attempt to eat an unsafe food to
endanger his or her own life. In respect of food safety incidents in Bangladesh, consumers are
scarcely able to visit a doctor once they are ill from consumption of unsafe food because
there are not enough doctors across the country (especially the more remote parts) and the
doctor’s fees are expensive in many cases and thus unaffordable for the poorer consumers.
Further, consumers are less educated (and trusting) in Bangladesh and they generally do
consume food in the belief that it is safe for human consumption.

Given elsewhere the growing knowledge of the existence of consumer protection laws,
Keeton utilises\textsuperscript{883} a quotation from Chew which asserts that, ‘\textit{caveat emptor} is far from
death,… it’s now the manufacturer who’d better beware if his products prove defective.’\textsuperscript{884} A
manufacturer can only produce a food thinking of or anticipating the ‘reasonable foreseeable
use’ but if a consumer misuses this use of food, in that case a manufacturer can claim the
misuse as a defence. For example, a fruit juice is generally manufactured for storage in a cool
dry place. Unless made with preservative, its quality should hardly long endure. Where a
consumer stores a packaged fruit juice made without preservative in an extremely hot storage

\textsuperscript{882} \textit{Civil Liability Act 2002} (NSW) s 5R(1). For more details see Sappideen, Vines and Watson, above n 846, 674.
\textit{Virginia Law Review} 675, 675).Note: The doctrine of \textit{caveat emptor} means that the buyer should be aware
before buying anything. Now it is argued that \textit{caveat venditor} doctrine is more useful which stands for ‘let the
seller be aware’: See Charles T LeViness, ‘Caveat Emptor versus Caveat Venditor’ (1943) 7 \textit{Maryland Law
Review} 177, 200.
area for one month, this juice will be rotten although a label may indicate that the contents are still within the package’s expiry date. In that case a manufacturer can defend him or herself on the basis of contributory negligence. But if there is no warning written on the label of that fruit juice regarding how to store or preserve it, the defence of contributory negligence may not apply. In regard to that scenario, it should be noted that food labelling practices in developed nations are quite different to those in Bangladesh. Numerous examples can be presented of manufactured food marketed for sale to consumers without any food labelling at all. 885 Hence, it is argued that the defence of contributory negligence by the food manufacturers in food safety case is rarely possible in Bangladesh due to the lack of what elsewhere would be considered the appropriate labelling.

ii.  Foreseeability of the Danger

Food manufacturers can defend their negligent conduct on the basis of the foreseeability of the danger. 886 Thus if the wrongdoer can show that he or she couldn’t anticipate the possible risk(s) of the (negligent) act, liability would not adhere to their act or omission. 887 Foreseeability of the danger in negligent conduct in product liability cases is a notable issue and this should be justified with every related issue. A manufacturer can predict the danger of his or her conduct in regard to producing a food product only if he or she possesses the knowledge or specific information about the properties and components of the food made. 888


Whilst smaller manufacturers may claim ignorance of risks involved in substitution or other adulteration or storage and so forth, many of the food manufacturers that are adulterating foods in Bangladesh are enormous and have their own special food experts as well as nutritionists (and lawyers) for checking food safety at every level.\(^{889}\) Therefore, when these large manufacturers adulterate food products, it is difficult for that particular manufacturer to argue that they could not see the danger of the negligent production (whether ingredient or process) which made the food unsafe, and for them to use a ‘lack of foreseeability’ as a defence. Hence (as an example from another jurisdiction), in *Sylvania ElecProds Inc v Barker*,\(^ {890}\) the court held that a manufacturer is presumed to have knowledge when the plaintiff proves the existence of the danger in the product and no warning about this danger is provided by the manufacturer (and the onus is on the manufacturer to prove that he lacked such knowledge if he is to use this defence).

iii. **Observance of Regulatory Requirements**

A manufacturer can claim the observance of regulatory requirements while manufacturing the particular food which has been alleged to be defective or dangerous.\(^ {891}\) This means a manufacturer can defend the tortious negligence liability by establishing that it had fulfilled

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\(^{889}\) For example, see the webpage information of the Pran (a large food manufacturing company) at [http://www.pranfoods.net/product.php](http://www.pranfoods.net/product.php). Recently Pran has been alleged in the Highest Court of Bangladesh to have produced adulterated fruit juice; see Staff Reporter, ‘HC Issues Rule on Pran Authorities’, *The Independent* (online), 5 November 2012 [http://www.theindependentbd.com/index.php?option=com_content&view=article&id=139486:hc-issues-rule-on-pran-authorities&catid=129:frontpage&Itemid=121]. Disclosing the company information on the website is not a popular in Bangladesh culturally. But the name cited here demonstrates that amongst the large food companies in Bangladesh there are those who adulterate food.

\(^{890}\) 228 F 2d 842, 848–9 (1\(^{st}\) Cir, 1955).

the regulatory requirements imposed on the food industry.⁸⁹² This serves as a good defence for a food manufacturer; but it is rare.

Finally, considering the above discussion, it can be said that manufacturers have open to them limited defences to avoid product liability for the unsafe food products whereby they otherwise would be required to pay damages in a negligence case under the law of torts.

**Codification of Product Liabilities for Negligence in NSW**

The *ACLNSW* has codified the product liabilities for the negligence of the manufacturers and permitted the consumers to apply for damages. Sections 20, 21 and 22 of the *ACLNSW* make provisions about ‘unconscionable conduct’ in its different forms.⁸⁹³ Section 20 prohibits those in trade or commerce engaging in unconscionable conduct that falls within the meaning of the unwritten law (that is, the Common Law). No one must engage in trade or commerce by supplying any goods to another person (the consumer) in a manner that comprises unconscionable conduct.⁸⁹⁴ Unconscionable conduct in business transactions in connection with the supply of goods to a business consumer (other than to a publicly listed company) is proscribed in s 22 of the *ACLNSW*.

In addition to the *ACLNSW*, the *CLA 2002* in ‘Part 1A’ has incorporated detailed provisions regarding negligence which has been referred to above. Section 5A(1) of the *CLA 2002* specifies that this statute applies not only for a negligence related case under statutory law but that it is also valid for a claim under the Common Law.

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⁸⁹² Ibid 249.
⁸⁹³ *CCA 2010* sch 2 ss 20–22.
⁸⁹⁴ Ibid s 21(1). It is worth mentioning that s 21 of the *ACLNSW* is not intended to limit the common law doctrines of unconscionable conduct. For greater detail, see Fitzroy Legal Service, *The Law Handbook* (1 July 2010) <http://www.lawhandbook.org.au/handbook/ch12s03s01.php>.
But as detailed previously, in Bangladesh there is no codified law under which food manufacturers can be sued for their negligence in producing unsafe foods. There are, however, options to sue at common law in accordance with the above discussions. Codification of common law is positively argued in section 6.5.1 of this chapter. Therefore, following the example of Australia, Bangladesh also can codify the negligence related issues in tort law. Provisions can be added in the CRPA 2009 to prescribe negligence in the manufacture of food products.

### 6.3.2. Manufacturer’s Liability for Implied Warranty

Warranties are of two types; express warranty and implied warranty. After defining both types, this section will elaborate implied warranties under the law of torts for claiming damages from food manufacturers. Various judicial references as well as codified laws from Australia will be discussed in this section in order to show the potential application of this principle in the civil liability for food safety regime in Bangladesh.

Express warranties are usually a creation of a contract[^895]. When a consumer buys any food product, an express warranty can be given to him or her during the negotiations as a part of the contract; it can be a kind of promise by the seller to the buyer in regard the quality of the product. An express warranty can be written as part of the food label[^896]. For example, an express warranty of product can be that it will be free from defects for one year from the date of the purchase. Express warranties are rarely seen in the case of food products.

Note: As this study merely discusses the tortious concerns of the product liabilities, express warranties as a part of the contractual liability will not be elaborated in this study.

In general, an implied warranty may be for the merchantable or acceptable quality of the products which is presumed to be fit for the purpose. Thus, implied warranty for a food product means that it should to be fit for the consumption when it is offered for sale or sold by the seller (including the manufacturer). Implied warranty of the products is imposed by law which is founded on public welfare policy. In practice, an implied warranty is presumed to exist for the product when it is sold to the consumer unless or until the consumer himself or herself denies it deliberately. Implied warranties are not given by any person or by any parties to the dispute. Based on public policy, implied warranties for food product are widely offered under the Common Law which might have strengthened the tortious character of this doctrine. Nevertheless, implied warranty, whether it is considered as a ‘contractual liability’ or ‘tortious liability’, is an issue worthy of further clarifications.

**Implied Warranty: Contractual or Tortious Liability?**

Historically at the early stage of its inception, breach of implied warranty was a tort. Prosser mentions, ‘the action was upon the case, for breach of an assumed duty, and the wrong was conceived to be a form of misrepresentation, in the nature of deceit…’ A Harvard scholar in 1888 showed that breaches of warranties originally had been ‘a pure action of tort’ until the decision of *Stuart v Wilkins* (of 1778), which is considered the

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899 See generally Garner, above n 896, 1619.
900 James, above n 898, 924.
901 Fisher III, above n 898, 268.
903 Prosser, ‘Implied Warranty’, above n 895, 118.
first\textsuperscript{906} or the earliest\textsuperscript{907} recorded case on contractual implied warranty. In practice, from the 1815 decision of the \textit{Gardiner v Wilkins}\textsuperscript{908} case, ‘courts have developed implied warranty of merchantable quality’. \textsuperscript{909} Nevertheless for long time there has been a great debate as to whether implied warranties are a concern of tort law or of contract law. \textsuperscript{910} Several legal studies argue that implied warranties are rather a hybrid of both contract and tort. \textsuperscript{911} In \textit{Greco v S S Kresge Co},\textsuperscript{912} the court recognised this hybrid character of implied warranty; it declares that ‘the duty rested on the defendant [the retailer in this instance] to see, at its peril, that the food was fit for human consumption and it is based on considerations of public health and public policy… the breach is a wrongful act and, in its essential nature, a tort.’

So it can be argued that implied warranty contains its tortious character from the beginning of the emergence of the concept and today it is an important measure for claiming damages for defective products which are not of merchantable quality. \textsuperscript{913} To establish the breach of implied warranty under the law of torts, it does not need any further requirements regarding intentional misrepresentation or negligence. \textsuperscript{914}

\textit{Implied Warranty: ‘Privity of Contract’ Issue}

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\textsuperscript{905} (1778) 1 Doug l 18.
\textsuperscript{906} ‘Tort Liability for Breach of Warranty’, above n 904, 124.
\textsuperscript{907} Charles F Groom, ‘Sales, Implied Warranty, Manufacturer Liable to Ultimate Consumer on Theory of Public Policy’ (1960) 2(2) \textit{William and Mary Law Review} 510, 512.
\textsuperscript{908} (1815) 4 Camp 144.
\textsuperscript{909} Groom, above n 907, 512.
\textsuperscript{910} For example, see Lindsey R Jeanblanc, ‘Manufacturers’ Liability to Persons Other Than Their Immediate Vendees’ (1937) 24(2) \textit{Virginia Law Review} 134–58; ‘Recent Case — Sales — Implied Warranties — Manufacturer’s Liability to Donee’ (1927–1928) 41 \textit{Harvard Law Review} 248, 263; ‘Recent Case — Sales — Liability of Wholesaler to Consumer of Unwholesome Food’ (1935–1936) 30 \textit{Illinois Law Review} 288, 298.
\textsuperscript{911} For example, David W Slook, ‘Tort Defenses to Strict Products Liability’ (1968) 20 \textit{Syracuse Law Review} 924, 924; Groom, above n 907, 511; ‘Sales — Warranty of Food — Liability of the Manufacturer to the Consumer’ (1940) 15(3) \textit{Indiana Law Journal} 242, 243.
\textsuperscript{912} 12 NE 2d 557, 561.
\textsuperscript{913} Prosser, ‘Implied Warranty’, above n 895, 119.
\textsuperscript{914} Ibid.
‘Privity of contract’ is necessary for trying the breach of implied warranty under the law of contract. The doctrine of privity of contract denotes that only the parties to a contract can be liable. In other words, an action cannot be brought against someone, such as, a third party beneficiary, who is not a party to the contract where the aggrieved party is deprived of the expected benefit.\footnote{James A Spruill Jr, ‘Privity of Contract as a Requisite for Recovery on Warranty’ (1940–1941) 19 \textit{North Carolina Law Review} 551, 551. For details, see generally Jesse W Lilienthal, ‘Privity of Contract’ (1887) 1(5) \textit{Harvard Law Review} 226–32.} An example in regard to the doctrine of the privity of contract is given here. A consumer named ‘X’ buys a fruit juice from a retailer and find it adulterated, in that it does not contain any fruit content.\footnote{In Bangladesh fruit juices are rampantly adulterated and many fruit juices do not contain any fruit content. For example, see Star Business Report, ‘BSTI Cancels Fruit Drinks Licences of Seven Companies’, \textit{The Daily Star} (online), 18 October 2012 <http://www.thedailystar.net/newDesign/news-details.php?nid=254298>; Hana Shams Ahmed, ‘Special Feature: What’s on Your Plate Today?’, \textit{The Daily Star} (online), 6 April 2007 <http://www.thedailystar.net/magazine/2007/04/01/sfeature.htm>.
} The contract of sale that existed in this instance is between the retailer and the consumer, ‘X’. However, the manufacturer of this adulterated fruit juice that ‘X’ has bought is here the beneficiary without being a party to the contract. Therefore, following the general doctrine of privity of contract, the manufacturer of this adulterated juice is not under any contractual liability because of he or she is not party to the contract.

Contractual liability of manufacturers for the breach of implied warranty is advocated in various different studies. A Harvard study suggests that where someone sells any food for immediate human consumption, there is an implied warranty of quality and wholesomeness.\footnote{‘Implied Warranty of Food’ (1918) 32 \textit{Harvard Law Review} 71, 71; Loretta Jones and Michael Jones v GMRI Inc and Rich Products Corporation Inc, 551 SE 2d 867, 869 (NC Ct App, 2001); Owen, ‘Manufacturing Defects’, above n 836, 891.} Referring to a number of cases,\footnote{See, eg, \textit{Wallis v Russell} [1902] 2 IR 585; \textit{Sloan v F W Woolworth} [1915] 193 Ill Ct App 620.} this study notes the following:

Where the buyer himself examines and selects the food which he [or she] purchases, the existence of a warranty has been denied, on the ground that the buyer does not rely on the seller’s skill and judgement but his [or her] own. The reasoning seems inconclusive. Such a buyer may rely on the seller’s judgement by assuming, as he [or she] fairly may, that all the

\footnote{‘Implied Warranty of Food’ (1918) 32 \textit{Harvard Law Review} 71, 71; Loretta Jones and Michael Jones v GMRI Inc and Rich Products Corporation Inc, 551 SE 2d 867, 869 (NC Ct App, 2001); Owen, ‘Manufacturing Defects’, above n 836, 891.}
\footnote{See, eg, \textit{Wallis v Russell} [1902] 2 IR 585; \textit{Sloan v F W Woolworth} [1915] 193 Ill Ct App 620.}
articles offered to him [or her] are suitable for food, and when he [or she] chooses one article rather than another, he [or she] should be regarded, unless the defect is an obvious one, as seeking merely the best of a number of things all of which are at least not dangerous to eat.919

A Yale Law Journal study notes some case law,920 and points out that where the buyer places his or her faith on the judgement of the seller and does not bother to inspect the goods, there is an implied warranty that such goods will be reasonably fit for the purpose.921 In 1914, an analysis of a case in the American Law Review states that ‘if an article is sold for food, and is unfit for food, the condition is broken, and the contract fails’.922 In Wiedeman v Keller, it is said that foods sold for immediate human consumption are supposed to be sound impliedly.923 Similarly, when a food manufacturer claims that a particular kind of food is made of any definite ingredients and in reality it is not, it is considered as breach of warranty if the buyer is injured or becomes sick by consuming this food product.924

But in the above example of adulterated fruit juice the doctrine of privity of contract seems frustrating and consumer protection issues should not be preoccupied with it.925 For this reason several studies have advocated that food manufacturers are liable for the safety of their food in cases where a consumer suffers any damage for the impurity of the particular food and privity of contract between the manufacturer and consumer is not required for this.926 In practice, today it is an established concept that manufacturers are responsible for damages to the affected consumers under the implied warranty principle for the unsafe food they produced. In Klein v Duchess Sandwich Co Ltd,927 the plaintiffs (husband and wife) bought

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919 ‘Implied Warranty of Food’, above n 917, 71.
920 See, eg, Troy Grocery Co v Potter 139 Ala 359; Burch v Spencer, 15 Hun (NY) 504.
922 ‘Sale of Food in Original Package — Implied Warranties’ (1914) 48 American Law Review 445, 446.
923 Wiedeman v Keller 171 Ill 93; ‘Recent Cases — Sales — Implied Warranty of Soundness — Food’, above n 1921, 692.
924 See generally Owen, ‘Manufacturing Defects’, above n 836, 891.
925 Groom, above n 907, 511.
926 Decker & Sons Inc v Capps, 139 Tex 609 (1942); ibid 510.
927 93 P 2d 799 (Cal 1939).
from a retailer a cheese sandwich that contained some maggots. But the sandwich was originally manufactured and processed by the Duchess Sandwich Co Ltd, the defendant. The plaintiffs sued the defendant to recover damages for breach of warranty (also for the negligence of the defendant). Despite the nonexistence of the privity of contract between the manufacturer (defendant) and the consumer (the plaintiff), the court decided in favour of the plaintiffs on the basis of the tortious liability of the manufacturer.\textsuperscript{928} In 1959 the Supreme Court of Virginia (USA) tried the \textit{Swift &Co v Wells}\textsuperscript{929} case in similar regard, where the husband of the plaintiff bought from the supermarket a pork shoulder that was wrapped in cellophane and labelled by the processor, as ‘Swift’s Premium Picnic Shoulder’. After consuming the pork, the wife became ill as the pork contained a deleterious substance (perhaps a microbiological pathogen) that had been in the meat at the time of processing.\textsuperscript{930} The court rejected the requirements of privity and held that the food manufacturer impliedly warrants his or her product to be safe for the consumer-purchaser.\textsuperscript{931} While deciding the \textit{Swift} case the court in fact relied on public policy,\textsuperscript{932} because the manufacturers of food products are truly in the best position for preventing the adulteration and unwholesomeness of the foods they manufacture.\textsuperscript{933}

The decision in the \textit{Swift} case is significant because a consumer can now get more efficient redress from the manufacturers for the injury caused by consumption of the unsafe foodstuffs that the manufacturers have produced.\textsuperscript{934} And for the convenience of consumers, public

\begin{footnotes}
\item[928] ‘Sales ─ Warranty of Food ─ Liability of the Manufacturer to the Consumer’, above n 911, 242.
\item[931] Ibid.
\item[932] Groom, above n 907, 511.
\item[934] ‘Implied Warranties in the Sale of Food’, above n 930, 168.
\end{footnotes}
welfare is a more focused issue in business dealings between the manufacturer and the consumer. As mentioned previously, the *caveat emptor* doctrine is hardly a useful notion here, and the ‘burden imposed by defective food products should be borne by the party best able to bear it — the seller’ (in the case cited — *Goodman v Wenco Foods Inc* — the ‘seller’ is the manufacturer of the defective patties not the mincemeat supplier). That is, the manufacturer (seller) of the food not the consumer should bear the greater burden, the former having generally the greater advantage in terms of product knowledge and in the best position to ensure the safety of the food in its manufacture, and well placed to communicate any necessary storage directions and so on when compared to the consumer who is essentially dependent on the actions of the manufacturer for the safety of the food he or she consumes (particularly in terms of adulteration, substitution, contamination). Finally, the aforementioned discussion directs that implied warranty is an effective measure to claim damages from the food manufacturers and maintain food safety under tortious product liability laws.

**Elements of Implied Warranty**

To establish the breach of the implied warranty of merchantable quality of a food product, an affected consumer (as plaintiff) has to prove the following elements.

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935 For details see, LeViness, above n 884, 177–200.

936 Eller, above n 933, 2169. When a restaurant makes patties and sells them, the restaurant becomes both manufacturer and seller. In that case ‘seller’ was in the best position to compensate. The ‘seller’ in this case and article meant the ‘manufacturer’. See also Groom, above n 907 at 511 who cites *Swift v Wells*, 201 Va., 110 SE 2d. 203 (1959): ‘This [not insisting on privity] permits the placing of the loss occasioned upon the manufacturer who is in the best position to prevent the production and sale of unwholesome food.’

937 Courts are more interested to employ public policy on consumer protection issues to try the breach of implied warranty related cases and thus it is now considered as a tortious liability: For more examples, see *Flessher v Carstens Packing Co* (1916) 93 Wash 48, 160 Pac 14, 14. The court commented in this case, ‘where there is a positive duty created by implication of law independent of the contract, though arising out of a relation or state of facts created by the contract, an action on the case as for a tort will lie for a violation or disregard of that duty’: at 15.
a. The manufacturer has produced a particular food product which is not merchantable or acceptable quality\textsuperscript{938} or fit for the human consumption.\textsuperscript{939}

b. The consumer has suffered an injury that is caused by that particular food which was not of merchantable quality.\textsuperscript{940}

It is notable that, an injured consumer can acquire damages in an implied warranty case by proving that the particular food he or she ate was unsafe or adulterated as such food can hardly be defended as being of merchantable quality. Unlike a negligence case, consumers are not required to prove the duty of the manufacturers to manufacture safe foods. Existence of the unsafe food is enough.

**Defences to Implied Warranty**

The main defence of a manufacturer (as a defendant) in an implied warranty case is to prove that the alleged food fulfilled the requirement that it be of merchantable quality and it was fit for consumption. That means the food was not defective or unsafe or adulterated. However for proving this, a manufacturer can employ the relevant defences which are referred to in the discussion in this thesis of defences to negligence and strict product liabilities.\textsuperscript{941}

**Codification of Product Liability for Implied Warranty in NSW**

Australian consumer law long suffered from the contractual obligation of privity in claims regarding the implied warranty of food products; but in 2010, the *ACLNSW* incorporated the provision of statutory consumer guarantees\textsuperscript{942} replacing the conservative system of implied

\textsuperscript{938} Crawford, above n 897, 1175.
\textsuperscript{939} See generally ‘Tort Liability for Breach of Warranty’, above n 904, 126.
\textsuperscript{940} Crawford, above n 897, 1175.
\textsuperscript{941} For more discussion on the defences of implied warranty, see Crawford, above n 897, 1176–7.
\textsuperscript{942} *CCA 2010* sch 2 ss 51–103.
contractual warranties. The *ACLNSW* finally developed implied warranty, releasing the fetters of contractual privity. The *ACLNSW* provides that the guarantee of acceptable or merchantable quality of goods exists unless such good is sold by auction. 943 ‘Acceptable quality’ includes those goods that are ‘fit for all the purposes for which goods of that kind are commonly supplied … and free from defects …and safe’ and so forth. 944 Similarly, s 55(1) of the *ACLNSW* states that in the supply of goods in a trade or commerce, goods are guaranteed to be reasonably fit for the disclosed or represented purpose. Most importantly, s 64 of the *ACLNSW* clearly articulates that any of the guarantees are not to be excluded or restricted by a contract. 945 Therefore today Australian consumers have been blessed with the implied warranty for the goods, although this is still to be generally understood by consumers. Additionally the *ACLNSW* declares that where express warranties or statutory guarantees that have stipulated, a product has to conform to the express warranty provisions given by the manufacturer. 946

By contrast, in Bangladesh the implied warranty issues are yet to be codified or practised.

Similarly to the above recommendations on negligence, Bangladesh can codify the implied warranties principles in the *CRPA 2009* following the example of the *ACLNSW* mentioned above.

### 6.3.3. Manufacturer’s Strict Product Liability

Strict liability can be both civil and criminal in nature. But for the purpose of the present chapter, only the strict product liability (SPL) which is applicable under the law of torts and

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943 Ibid s 54(1).
944 Ibid s 54(2).
945 For details see ibids 64.
946 Ibid s 59.
947 The details of the benefits of codification have been discussed in section 6.5.1 of the chapter.
civil in nature will be detailed here. The SPL imposes legal responsibility upon the manufacturers of ‘defective’ or ‘unsafe’ products without considering the existence of negligence when a consumer suffers any injury or damage from the respective product.\footnote{Wade, above n 902, 5; see also Blunt, above n 820, 475.} SPL does not take into account the food manufacturer’s awareness or the foreseeability of any event in regard to the impurity of the food.\footnote{See generally Wade, above n 902, 9.}

The original concept of strict liability began from the nineteenth century case of \textit{Rylands v Fletcher},\footnote{(1868) LR 3 HL 330.} which established the ‘liability of the occupiers for the escape of dangerous and hazardous materials from land’.\footnote{Blunt, above n 820, 475.} Later this principle of strict liability has developed its branches for product liability issues to offer redress to the consumers injured by the defective goods. In 1913 the Supreme Court of Washington decided \textit{Mazetti v Armour & Co}\footnote{(1913) 75 Wash 622, 135 P 633, 48 LRA (NS)213.} based on the SPL doctrine.\footnote{Wade, above n 902, 11.} But Roger Traynor J in his concurring opinion in the \textit{Escola v Coca Cola Bottling Co of Fresno}\footnote{24 Cal 2d 453 (1944).} case first recommended SPL for defective products in the Supreme Court of California.\footnote{Brian Daluiso, “‘Is the Meat Here Safe?’ How Strict Liability for Retailers Can Lead to Safer Meat’ (2012) 92 Boston University Law Review 1081, 1115.} The case was related to an injury caused by a Coca-Cola bottle that exploded in the hand of a waitress in a restaurant. Later in 1963 the full bench of the Supreme Court of California adopted the principle of SPL while deciding \textit{Greenman v Yuba Power Products Inc}\footnote{377 P 2d 897 (1963).} where it is stated that, ‘a manufacturer is strictly liable in tort when an article he [or she] places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.’\footnote{Ibid 900. See James P Maloney et al, ‘Introduction: Symposium on Products Liability’ (1974) 57(4) Marquette Law Review 623, 623; Dix W Noel, ‘Strict Liability of Manufacturers’ (1964) 50 American Bar}
rapidly developed in the 1960s and 1970s.\textsuperscript{958} For the last half century, several US courts have decided numerous cases based on the rule of SPL for unsafe food products.\textsuperscript{959} Prosser mentions, ‘the gradual process of acceptance of the strict liability rule in food cases continued, and in recent years has accelerated’.\textsuperscript{960}

**Elements of Strict Product Liability**

A plaintiff has to prove two elements for establishing SPL against a food manufacturer.\textsuperscript{961} These elements are explained below.

a. *Injury to Consumer*

The plaintiff has to be injured by the unsafe food, which is produced by the defendant.\textsuperscript{962} This means, the plaintiff’s injury is essential and this harm must be the consequence of the unsafe food product. On this particular point, SPL may give the impression that it is similar to implied warranty in tort law.\textsuperscript{963} But in case of implied warranty a plaintiff has to prove that the food was not of merchantable quality or was not fit for sale, while in case of SPL a plaintiff has to prove that the food was ‘unsafe’ or ‘defective’ or ‘dangerous for consumption’.\textsuperscript{964} Sometimes it may be difficult for the plaintiff to prove that he or she has

\textsuperscript{958} Owen, ‘Manufacturing Defects’, above n 836, 892.

\textsuperscript{959} For example, see Shoshone Coca-Cola Bottling Co v Dolinski (Nev 1966) 420 P 2d 855 (mice found in a softdrink container); Kilpatrick v Superior Court (Ct App 1991) 277 Cal Rptr 230, 232 (a case related to contaminated oysters); Creach v Sara Lee Corp, (1998) 331 SC 461, 502 SE 2d 923 (plaintiff found a piece of gravel or rock in the biscuit); Hickman v Wm Wrigley Jr Co (La Ct App 2000), 768 So 2d 812 (chewing gum unsafe for consumption due to the existence of a metal screw); see also Owen, ‘Manufacturing Defects’, above n 836, 892.

\textsuperscript{960} William L Prosser, ‘Assault upon the Citadel (Strict Liability to the Consumer)’ (1959) 69 Yale Law Journal 1099, 1107. Note: Prosser cited a large number of cases that have been decided in various States of the USA on food safety issues based on the strict tort liability doctrine; at 1107–10.


\textsuperscript{962} Buzby and Frenzen, above n 834, 639.

\textsuperscript{963} See generally Wade, above n 902, 11.

\textsuperscript{964} Ibid 11; Buzby and Frenzen, above n 834, 639.
become sick or injured by the particular food because in various instances there is often no food remaining to investigate. Where mass poisonings occur, involving disparate people, a common food may be determined to be the defective and injurious product. Then testing may often be conducted at the plant of a manufacturer to determine the possible point of origin. But when a person becomes ill immediately after the consumption of certain food, it can be assumed that that such food may be spoilt, or harmful or defective,\textsuperscript{965} or produced in an unhygienic environment. Certainly it may be worthy of further investigation. In Bangladesh there has been a large number of instances where persons have rapidly become sick, poisoned by a particular food.\textsuperscript{966} In these cases, a person injured by unsafe food can easily prove that he or she has become sick from the unsafe food produced by the defendant.

Foods are also made with various unapproved additives, or are contaminated or contain noxious substances (for instance formalin and even DDT), or utilise rotten ingredients (which can involve harmful bacteria, moulds and so forth) or are adulterated with poor quality materials thus lowering their nutritional value.\textsuperscript{967} This may not have an immediate effect on human health, though in the longer term deleterious effects can often be observed.\textsuperscript{968} In such cases, the particular harmful food can be proven to be unsafe or defective only after ingestion; sometimes it may take a longer time and therefore be more difficult for the consumers to

\textsuperscript{965} Owen, ‘Manufacturing Defects’, above n 836, 902–3.
\textsuperscript{967} See, eg, Staff Correspondent, ‘Traders Fined for Selling Toxic Chemicals as Food Colour’, above n 171; Monazzil Riaz, ‘Students Getting Sick with Different Diseases from Consuming Low Grade Foods’, \textit{Daily Vorer Kagoj} (Dhaka, Bangladesh), 19 October 2010 [author’s trans].
\textsuperscript{968} For details on the impact of unsafe foods on public health in Bangladesh see Ali, ‘Food Safety and Public Health’, above n 260, 31–40.
attribute their declining health or other impacts to a particular foodstuff in their diet, and accumulated damage to persons may be widespread by the time the unsafe foodstuff is isolated as the source. Nevertheless, in a true sense, a defective product is one that does not match the average quality for that foodstuff and thus manufacturers are liable for the injuries resulting from a deviation from the standard.\footnote{Traynor, above n 957, 367.} It is worth mentioning that, plaintiffs should prepare their claim to seek the redress under SPL on the basis of adequate medical evidence that they have particularly been injured due to the consumption (either regularly or occasionally) of the specific unsafe food product.

b. **Unsafe When the Food Left Manufacturer’s Control**

The plaintiff has to establish that the food was unsafe or defective for consumption when it left the control of the alleged food manufacturer.\footnote{See generally Owen, ‘Manufacturing Defects’, above n 836;901–2; see also William Lloyd Prosser, *Handbook of the Law of Torts* (West Publishing Co, 4th ed, 1971) 99; see also Keeton, ‘Products Liability — Proof of the Manufacturer’s Negligence’, above n 886, 563.} Manufacturers cannot defend themselves on the basis that it has delegated the responsibility of safety to others,\footnote{‘Torts — Product Liability — Strict Liability’ (1968) *Wisconsin Law Review* 592, 598.} for example, the retailers. In *Effem Foods Ltd v Nicholls*,\footnote{(2004) NSWCA 332.} an Australian case decided in 2004, the plaintiff consumer, Ms Nicholls, bought a ‘Snickers’ bar from the market. But while eating it she found an open safety pin that pierced her tongue and she was injured. The plaintiff sued Effem Food Limited, the manufacturer of the bar, for contravening s 74D of the *Trade Practices Act 1974* (the then applicable legislation)\footnote{*Trade Practice Act 1974* is the former version of the current *CCA 2010*. Most of the consumer related provisions of the *Trade Practice Act 1974* have been incorporated in the *CCA 2010* sch 2.} which speaks about the liability of a manufacturer for supplying of goods of unmerchantable quality. The NSW Court of Appeal held that the defect of the food product was in the control of the manufacturer and thus Effem Food Limited was held liable.
There are many occurrences in Bangladesh where manufacturers are liable for the impurity or unsafe state of the foods which consumers buy from retailers. For example, many manufacturers produce biscuits without providing any expiry date in Bangladesh. Sometimes manufacturers store these biscuits for a long time and then sell them to the retailers. Perhaps manufacturers do not include an expiry date so that they can manufacture at a time when input prices are low and then store a product for a long time and make more profit by selling into the market when demand rises or there is a shortage of similar products and prices are higher. But when these biscuits are stored for lengthy periods without proper arrangements for the conditions in which they are held, the products may become rotten and mouldy (at worst) and deleterious to the consumer’s health (or simply ‘stale’ and less palatable, in which instance the consumer is getting a product of a lower standard than anticipated). In such instances, though a consumer may buy these biscuits from the retailers, the manufacturers of the biscuits cannot deny their responsibility as there is no expiry date contained on the product. These biscuits have become unsafe while in the manufacturer’s control.

In a further example of unwitting consumers being marketed unsafe foodstuffs in Bangladesh, numerous processors apply formalin or DDT to sutki (dried fish) which is then on-sold to retailers. Retailers buy these products from the processors (also wholesalers) and sell it in the open market. A customer does not have any ‘direct’ relation with the processor as they

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generally buy the product from the retailer; but it is the processors who contaminate this food while it is under their control. Therefore the processors of the *sutki* cannot deny their SPL.

**Denial and Defences to Strict Product Liability**

Manufacturers may rarely establish a strong defence to avoid their SPL for their defective food product. However a manufacturer can deny the allegation of defective foods as a few defences are available as mentioned in the following discussion.

i. **Denial of Existence of Defects**

A manufacturer can deny the allegation that the particular food that it manufactured was defective. In *Newton v Standard Candy Co* the court held that a food manufacturer is not legally responsible for the defect in food if the defect is an ingredient which would naturally occur in the manufactured food. But in *Estate of Stanley Pinkham v Cargill Inc*, a 2012 case, the plaintiff had been injured by a bone while eating a turkey sandwich. The defendant (Cargill) was reputed to manufacture a boneless turkey product and they claimed that the food was not defective. The trial court held in favour of the defendant arguing that the turkey was not defective because an ordinary turkey may contain a small sized bone that consumers may eat. The higher court decided in favour of the plaintiff on the basis that, a food is defective where the consumer would not expect the particular foreign ingredient in it (in this case a bone in a reputedly ‘boneless’ product).

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978 2012 ME 85.
979 But see, *Pipitone v Biomatrix Inc*, 288 F 3d 239 (5th Cir, 2002).
A food manufacturer can also reason that the specific defect in the food, which harmed the plaintiff, did not exist when the product was released from the manufacturing unit. In 2004 the Federal Court of Australia decided the *Carey-Hazell v Getz Bros & Co* case where the defendant manufacturer claimed that the defect of the product was not present when it left the control of the producer. The court examined the whole manufacturing process where the product was made. It was found that the production system was good enough to detect the defect in the product. Thus the manufacturer was excused from the liability.

ii. *Defence of Unreasonable Compensation*

The defendant can say that the damages or compensation claimed by the plaintiff are unreasonable. Although it is not a defence to avoid the entire liability, a defendant can obtain part relief from burdensome damages. In fact, this is a right of the defendant and the duty of the court to determine the exact amount that the plaintiff has suffered in regard to a loss due to injury caused by the defective food.

iii. *State of the Art Defence*

It can be regarded as a defence to SPL that the safety defect occurred in the food although the manufacturer followed the mandatory food standard provided by the State. (Thus it is the standard that is defective, and the manufacturer should bear no responsibility or liability). This defence is often identical to the ‘state of the art defence’. In such a case, food manufacturers can protect themselves against any claim on the basis that the particular unsafe

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980 Owen, ‘Manufacturing Defects’, above n 836,856.
982 Owen, ‘Manufacturing Defects’, above n 836,856.
983 For instance, see *Kroger Co v Beck*, 375 NE 2d 640 (1978).
984 CCA 2010 sch 2 s 142(b).
practice or product and resulting injury happened because the manufacturer had maintained the food standard created by the relevant authority, in Bangladesh the Bangladesh Standard Testing Institute (BSTI). 986 In Australian law, the State will be liable for any loss or injury to a victim in this circumstance. 987 But with regard to a similar issue, in Gelsumino v E W Bliss Co, 988 a US case decided in 1973, a broader view that carries the consumer or victim’s interest was provided. The court held, ‘defendants in the instant case (cannot) avoid the issue of strict liability by attempting to show merely that they had done what the rest of their industry had done to make their products safe.’ 989

Lastly, the defendant can also show that the defect happened only because of the lack of the scientific and technological knowledge (the state of the art at the time) when it (defect) was necessary to detect the defect that was later found to have caused the injury. 990 That means at that time that particular defect was not discoverable by the contemporaneous technology.

**Why SPL is the Preferred Way of Claiming Damages for Unsafe Food Products**

In practice SPL has become the preferred way for consumers to obtain damages. 991 Keeton comments that most of the courts now impose SPL upon the manufacturers to solve food safety issues. 992 Various legal advantages of SPL make it favourite way to obtain compensation in relation to foodstuffs rather pursuing the matter under the negligence or implied warranty principles. 993

986 BSTI is the main authority to develop food standard for Bangladesh. For more details on BSTI, see section 5.3.7 of chapter 5 of the thesis.
987 CCA 2010 sch 2 s 148.
988 295 NE 2d 110 (1973).
989 Ibid 113.
990 CCA 2010 sch 2 S 142(c).
991 See generally Maloney et al, above n 957, 624.
Negligence and SPL

To establish SPL, a plaintiff has to prove that an unsafe food caused damage to the consumer and that food was unsafe when it left the manufacturing unit. By contrast, for establishing negligence a plaintiff not only has to prove these above two elements of SPL, but also he or she must provide evidence that the unsafe condition of the food was caused by the negligence of the manufacturer.\textsuperscript{994} Therefore, in a similar case of negligence, when the plaintiff is not required to establish that the food manufacturer was negligent, it becomes a matter of SPL.\textsuperscript{995}

Further, in a case of negligence a manufacturer can claim (as a defence) that he or she could not foresee the danger posed by or unsafe nature of the food. But failure by a producer of unsafe food to predict the danger posed or the presence of one or more impurities in that food product is not an excuse to evade the SPL.

These are the two legal reasons why a consumer affected by unsafe food should seek redress under the SPL rather choosing negligence. These are detailed further below.

Implied Warranty and SPL

In case of implied warranty, the plaintiff has to prove that an unsafe food caused the injury to him or her and that the particular food was not of merchantable quality. But to establish SPL proving the lack of merchantable quality of food is not necessary.

\textsuperscript{994} See generally the opinion of Peters J at the \textit{Jiminez v Sears, Roebuck & Co} (1971) 4 Cal 3d 379, 383.

\textsuperscript{995} See generally Wade, above n 902, 13.
Hence, Owen is perhaps right to assert that the SPL is significantly effective from its inception, and consumers increasingly prefer to claim redress for injuries or loss due to a lack of food safety under this doctrine rather than using negligence or implied warranty.996

Other Reasons

Apart from the above rationales, the greater effectiveness of SPL is argued on a number of other bases (see below).

(a) The imposition of SPL can reduce the ultimate financial consequences of the unsafe food products. This is because it creates an atmosphere conducive to investment by the manufacturer in improvements to manufacturing processes, the distribution of foodstuffs, their preparation, storage and sale (in particular to some minimum industry standard) so as to avoid the possibility of future legal action.997

(b) The manufacturers are in a strategic place to improve the safety of their products. Because manufacturers are often in the dominant economic position in the chain of production and distribution of their products, the pressure of SPL can be used to increase product safety.998 Reed Dickerson pointed out that if the injured person is given the choice to sue anyone in the sequence of a production of a particular product, he or she will naturally select the most financially responsible (also the most solvent) entity among those who are able to be sued and are located in a convenient jurisdiction.999

(c) Snyman supports the above two arguments for the imposition of SPL against the manufacturer and adds a number of additional logical arguments. Firstly, imposing strict

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997 James, above n 898, 925.
998 Ibid; see also Brody v Overlook Hospital, 121 NJ Super 299, 296 A 2d 668 (1972).
999 F Reed Dickerson, Product Liability and the Food Consumer (Greenwood Press, new ed, 1972); James, above n 898, 925.
liability upon the manufacturer can help avoid circuitous and costly lawsuits. Secondly, the manufacturing industry in the contemporary world deprives consumers of having any connection with the manufacturers while technological development has removed the consumer’s ability to recognise whether the particular product is safe or not (for example, a food that is ‘off’ may no longer emit a characteristically repulsive odour; or in the example of meat retain a ‘fresh’ coloured appearance due to colouring). Thirdly, consumers now-a-days are enchanted by various colourful advertisements and the use of trade-marks which has let them trust the fitness and fame of the manufacturers as portrayed by those devices.

Finally, from the above analysis it can be determined that amongst all the product liability laws in tort law to acquire damages from the manufacturers, SPL is a comparatively effective and easier method than the pursuit of other avenue for redress of loss. Moreover, historically SPL has been demonstrated to be a potential way to encourage manufacturers to produce safe products. Therefore, adopting SPL in the food safety civil liability regime in Bangladesh could help to ensure safe food for consumers as well as to obtain redress for them in the event of the manufacture of unsafe food.

**Codification of SPL in NSW**

SPL is a relatively recent idea that in 1992 was incorporated in the product liability law in Australia. In that year, the then *Trade Practices Act 1974* included ‘Part VA’ with its

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1001 Reed Dickerson, ‘Basis of Strict Product Liability’, above n 1000, 589.
1002 Harland, above n 819, 337.
provisions relating to the ‘liability of manufacturers and importers for defective goods’.\textsuperscript{1003} Later in 2010 when the Australian consumer law was promulgated, the same provisions have been inserted in the Part 3-5\textsuperscript{1004} of the \textit{ACLNSW} which deal with the manufacturers’ liability for products having safety defects, and that in fact provide SPL. The reason that these provisions are considered SPL is that there is no defence on the basis of a lack of negligence under this Part for the defect of the product.\textsuperscript{1005} An injured consumer (for example, someone who becomes ill from eating rotten or contaminated food) can bring an action against the manufacturer if he or she suffers any loss or damage ‘as a result of injuries sustained because of defective goods’.\textsuperscript{1006} It is noted that, nothing is considered an offence under Part 3-5 of the \textit{ACLNSW} rather it imposes civil liability. No other penalty or remedy is given under this part of the \textit{ACLNSW} and the action is purely filed against the manufacturer of the defective product to recover compensation for the victim consumer.\textsuperscript{1007}

Finally, given the previous discussion it can be recommended that identical to previous two recommendations, Bangladesh can codify the SPL provisions. Similarly to the \textit{ACLNSW}, the \textit{CRPA 2009} can include the provisions related to SPL making liable the food manufacturers for their food product and providing rights to the affected consumers for claiming damages.

\textbf{6.4. Damages}

As seen from the earlier discussion, consumers can claim compensatory damages in a product liability case. Punitive damages may also be available. The following section will discuss these two forms of damages.

\begin{itemize}
\item[\textsuperscript{1003}] Ibid.
\item[\textsuperscript{1004}] \textit{CCA 2010} sch 2 ss 138–41.
\item[\textsuperscript{1006}] Ibid.
\item[\textsuperscript{1007}] \textit{CCA 2010} sch 2, ss 138(1), 139(1), 140(1), 141(1).
\end{itemize}
6.4.1. Compensatory Damages

A consumer only can claim compensatory damages when he or she suffers any loss after consuming any unsafe food. Compensation is awarded by a competent court against the manufacturer for unsafe food products and paid in monetary value to the victim. A consumer not only suffers physical and mental injury for consuming an unsafe food, but also he or she may suffer monetary loss for medical treatment, job loss and so forth. A financial loss for medical treatment and medicines can be calculated and is recoverable upon the proof of receipt. But the physical or mental injury and other related consequences may not always be assessed by monetary value. For example, consumption of a date expired biscuit can result in diarrhoea for a poor daily labourer. A disease like diarrhoea may cause extreme physical and mental suffering; and this labourer may have to miss his or her daily job for a week; or it may be a cause of their losing their job. Here, while some results may be calculated (such as loss of income for the period of illness), others such as job loss may be more difficult to calculate (how far and for what period could such a job loss be attributed to the illness), while others are almost impossible to calculate (flow-on effects for family members) and many other similar issues cannot be assessed to an exact monetary value (pain and suffering). Nonetheless a court should not leave these concerns aside and perpetuate an injustice and fail to award any compensation. In fact, courts are required to resolve all ‘non-economic loss’ accurately when deciding a product liability case. In relation to past losses, courts attempt to do it considering the expenditures of the trial and total income loss from the day of trial. However, while determining the compensation, the court assesses all

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1008 See generally Sappideen, Vines and Watson, above n 846, 550.
1009 Ibid 558.
1010 See the severity of diarrhoea, DGHS, Communicable Diseases, above n 200, 5–6.
1011 For details, see Sappideen, Vines and Watson, above n 846, 589–604.
1012 Ibid 551.
the past, present and future costs considering the ‘one for all’ rule.\footnote{1013}{See the details of the ‘once for all’ rule in Francis Trindade and Peter Cane, \textit{The Law of Torts in Australia} (Oxford University Press, 3\textsuperscript{rd} ed, 2001) 509–10; see also ibid 552.} In \textit{Murphy v Stone-Wallwork (Charlton) Ltd}, Lord Pearce mentioned the following:\footnote{1014}{(1969) 1 WLR 1023, 1027.}

[O]ur courts have adopted the principle that damages are assessed at the trial once for all. If later the plaintiff suffers greater loss from an accident than was anticipated at the trial he [or she] cannot come back for more. Nor can the defendant come back if the loss is less than was anticipated. Thus, the assessment of damages for the future is necessarily compounded of prophecy and calculation. The court must do the best it can to reach what seems to be the right figure on a reasonable balance of the probabilities, avoiding undue optimism and undue pessimism.\footnote{1015}{Lord Reid et al, ‘Murphy v Stone-Wallwork (Charlton) Ltd’ (1969) 7(3) Managerial Law 203, 206.}

In a recent Australian case, \textit{Graham Barclay Oysters Pty Ltd v Ryan},\footnote{1016}{(2000) 102 FCR 307.} the victim Ryan and many other consumers were affected by hepatitis after consuming oysters from a lake near the NSW central coast. Ryan and other victims (more than 100 affected consumers) sued Barclay Oysters, the grower of the oysters in that particular lake (deemed public land). The Federal Court of Australia found the Barclay Company, the State of NSW, and the Council all liable for negligence (though this was later overturned in the High Court of Australia),\footnote{1017}{See the case summary at <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2002/hca54-2002-12-5.pdf>. Whilst the High Court later overturned the finding of negligence against the State and Council (as while it found that such authorities had a responsibility in regard to public health and safety, the Court also found that the plaintiff had not established that a ‘duty of care’ existed in regard to the individual consumers. The award against Barclay Company for damages, however, stood (awarded under the \textit{Trade Practices Act} s 74B ‘fitness for purpose’ and 74D ‘merchantable quality’).} and the victim was awarded the compensatory damages of $30 000 (which award stood under the \textit{TPA} sections on ‘fitness for purpose’ and ‘merchantable quality’).\footnote{1018}{See Ipsofactoj, ‘High Court of Australia, \textit{Graham Barclay Oysters Pty Ltd v Ryan}’ (2012) <http://www.ipsofactoj.com/international/2003/Part02/int2003(2)-015.htm>.} In deciding upon the extent of the award all the economic and non-economic losses had been measured.

The provisions in regard to the actions for damages are inserted in ss 143–149 of the \textit{ACLNSW}. Section 143(1) of the \textit{ACLNSW} states that a person can commence the action to acquire damages for losses at any time within 3 years of knowing of the defectiveness of the
Chapter 6: Civil Liability of Food Manufacturers for Damages in Bangladesh

goods. The action can be against the manufacturer; but in a case where the manufacturer is unidentified, the action can relate to identifying the producer of the particular food product.

On the contrary, in Bangladesh, the ss 66–68 of the CRPA 2009 have inserted the provision for compensatory damages for the unsafe food which has been discussed in section 6.2 of this chapter.

6.4.2. Punitive Damages

In the case of the manufacture of unsafe food products with gross negligence discussed under the law of torts (for example, intentional negligence), where the conduct of the manufacturer demonstrates a serious ongoing and ethical culpability, this is no longer considered a simple violation of product liability in tort law. It is evident from previous studies that most of the food adulteration or production or processing of unhygienic foods in Bangladesh are either the clear intention of the manufacturer or the result of gross negligence on their part. These culpable activities of the manufacturers cannot be ordinarily left to compensation alone. The example of the labourer provided above can again be cited here. A labourer affected by diarrhoea from eating a date expired biscuit may die from his or her illness. In that case merely awarding compensatory damage hardly suffices. Hence, when ongoing intentional negligence or reckless attitudes (or ill motive) in the manufacture of unsafe food rampantly

1019 See the provisions in regard to unidentified manufacturers, CCA 2010 sch 2 s 147.
1020 See generally Metzger, above n 631, 28.
continues, compensation alone under the ordinary law of torts may not provide sufficient
discouragement to the dangerous acts of omissions of the manufacturer. Several legal
scholars in common law have suggested that ‘punitive damages’ should be imposed upon the
manufacturers (or whoever the wrongdoer is) for their intentional negligence or reckless
behaviours in producing or processing defective, adulterated and overall unsafe food
products.  

The Code of Hammurabi (2000 BC), the Hindu Code of Manu (200 BC), the Hebrew
Covenant of Mosaic Law (1200 BC) and in the Hittite Laws (1400 BC) confirm the existence
of the idea of punitive damages in history. Common Law has accepted the punitive
damages concept in 18th century England in the Huckle v Money case. Punitive damages
are positively argued by legal scholars as they can discourage the intentional production or
processing of unsafe (food) products while a victim can be still compensated for the loss or
damage sustained. Owen asserts, ‘[A]bsent the punitive damages remedy, many
manufacturers may be tempted to maximize profits by marketing products known to be
defective and to absorb resulting injury claims as a cost of doing business. Manufacturers
may possess an opinion that many consumers will not be able to recognise the unsafe nature
of the food; and among the few consumers who could identify it, fewer of them would
attempt to access compensation. For such companies the profit of the business is greater than
the probable compensation to be awarded; few consumers who could identify the lack of

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1022 Generally, ‘punitive damages’ are applied where the negligence is ‘wilful’, ‘intentional’, or with ‘evil
motive’ that may be regarded as ‘gross negligence’; see John A Fulton, ‘Punitive Damages in Product Liability
Pepperdine Law Review 139, 147.
1024 2 Wil’s KB 205 (1763).
1025 Metzger, above n 631, 27.
1026 Ibid 28.
1257, 1291.
safety of the food may wish to proceed to the complex and expensive process of litigation.\textsuperscript{1028} Hence the imposition of punitive damages is necessary to discourage the manufacturers from producing unsafe food.\textsuperscript{1029} Or even if wrongdoers are found to be producing unsafe food, they may be encouraged to settle the issues out of the court in order to avoid the litigation since the provision of punitive damages significantly amplifies the risk of a lawsuit.\textsuperscript{1030}

Despite numerous positive reasons (some of which are included above) for having punitive damages available for imposition in the event of the intentional manufacture of impure consumer (food) products, many scholars\textsuperscript{1031} oppose the sanction of punitive damages, rather they argue for the imposition of criminal liability for managing corporate behaviours. Punitive damages are unlikely to suit civil liability rather it is better suited by the provision of criminal penalties, because it engages the punishment for the wrongdoers as well as providing compensation to the victim. For example, Long mentions, ‘…punitive damages are not really damages at all but penalties that should be removed from the civil and confined to the criminal law’;\textsuperscript{1032} Snyman also pointed out that ‘the realm of penalties belongs to the criminal law, and offending manufacturers should be prosecuted criminally for willfully or recklessly placing dangerous defective articles in the stream of commerce…’.\textsuperscript{1033}

However, the current chapter merely discusses the civil liability of the food manufacturers under the law of torts. No criminal issues are discussed in this chapter. Since punitive

\begin{thebibliography}{9}
\bibitem{1028} See generally Metzger, above n 631, 29.
\bibitem{1029} Ibid.
\bibitem{1032} Long, above n 1031, 889.
\bibitem{1033} Snyman, ‘Validity of Punitive Damages’, above n 1031, 407.
\end{thebibliography}
damages includes the penalty and imprisonments of the manufacturers, criminal liabilities of the food manufacturers for manufacturing the unsafe food products will be discussed in chapter 7 of the thesis.

6.5. Application of Product Liability under the Law of Torts in Bangladesh for the Manufacture of Unsafe Foods: Recommendations

Owing to the lack of development and practice of the law of torts in Bangladesh, the preceding discussion on the tortious product liability doctrines relating to food safety matters does not attract much attention in Bangladesh. The author of this thesis did not find any case reference in Bangladesh which applied the aforesaid product liability principles to manufacturers in relation to food safety matters. Although the previous discussion submits that manufacturers should be held liable to compensate consumers who have suffered loss by consuming unsafe food, Solaiman rightly suggests that in reality, tort law currently does not provide consumers with an extra means of remedy in this country. To address this issue, the current research recommends the following possible solutions.

6.5.1. Codifications of Product Liability under the Law of Torts

Doctrines under the law of torts, like implied warranty and the SPL, have not developed their grounds in the civil liability regime of Bangladesh. Though tort law can be independently applied as a part of the Common Law without incorporating such doctrines or principles in the statutes, nevertheless codification makes a law stronger. In the 18th century Blackstone

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1035 See generally Solaiman, Investor Protection, above n 151, 228.
1036 Ibid.
attempted what could be seen by some as a codification\(^{1038}\) (though he himself would not have so described it) of the Common Law in his volume ‘Commentaries on the Laws of England’, the four volumes of which brought an unprecedented degree of clarity to the Common Law across the English speaking world. His Commentaries are considered a noteworthy accompaniment to if not a foundation of the Common Law; it is rather that they are founded on the Common Law and seek to elucidate it.\(^{1039}\) Blackstone’s Commentaries were not only useful for England, but also played a great role in the legal regime of America, Australia and New Zealand.\(^{1040}\) Later Jeremy Bentham strongly advocated the codification of Common Law all over the world.\(^{1041}\) In practice, codification of Common Law is considered necessary as it is an instrument which can generate a ‘transformation of the structure and content of the law’ and has, of course, been the prevailing European practice.\(^{1042}\) Codified laws can aid the identification of duties, the burden of proofs in a concrete from which can be readily applied, and people involved in trial can be aware of obligations. Thus Gilmore properly mentions the following:

A “code,” … is a legislative enactment which entirely pre-empts the field and which is assumed to carry within it the answers to all possible questions: thus when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law …\(^{1043}\)

The preceding discussion in this study shows that in Australia the laws related to negligence have been codified and clarified in the \textit{CLA 2002}. The \textit{ACLNSW} has legislated the implied warranty and strict liability principles. Codification of common law doctrines in the form of

\(^{1038}\) Blackstone’s Commentaries is popularly mentioned as Blackstone’s Code: see ibid 474–5. See also Douglas L Rogers, ‘Ending the Circuit Split over Use of Competing Mark in Advertising — The Blackstone Code’ (2005) 5 \textit{John Marshall Review of Intellectual Property Law} 157, 159 (wherein it is stated that ‘… Commentaries are apt to be construed as strictly as if they were a code.’).

\(^{1039}\) Weiss, above n 1037, 474–5.

\(^{1040}\) Ibid 475.

\(^{1041}\) Ibid.

\(^{1042}\) Csaba Varga, \textit{Codification as a Socio-Historical Phenomenon} (Akadémiai Kiadó, 1991) 14; see also Pierre Legrand, ‘Strange Power of Words: Codification Situated’ (1994) 9 \textit{Tulane European and Civil Law Forum} 1, 2.

statutes is a noteworthy legal development in the USA as well. Calabresi in his 1982 research piece wrote that for the preceding fifty to eighty years American laws had been subject to some basic changes where the legal system controlled by Common Law had been transformed to statutes, and these statutory enactments became the primary foundation of law. Finally, the common law principles in the commercial laws along with the judicial decisions in regard to the doctrines were largely and notably codified in USA in 1951 in the ‘Uniform Commercial Code’.

Therefore, based on the above discussion it is recommended that the current product liability principles presented under the law of torts should be codified in the statutory laws of Bangladesh. However, the present study advocates that during the codification of the aforementioned product liability doctrines in the statutes, a detailed and clear articulation is necessary. In Bangladesh initially the judges can refer to the above-mentioned case laws of Australia, USA and UK as well as the statutory laws of Australia while imposing tortious product liabilities upon manufacturers for producing unsafe food products. The present researcher believes that the civil liability regime will be more effective in Bangladesh if product liability of manufacturers under the law of torts is applied using these references in order to combat the ongoing rampant food adulteration and contamination.

6.5.2. Awareness Regarding Product Liability Laws

A reason behind the non-development of product liability principles in the law of torts in Bangladesh is perhaps the existence of multiple statutory laws for penalising the

\[\text{(1044) Weiss, above n 1037, 516.}\]

\[\text{(1045) Guido Calabresi, A Common Law for the Age of Statutes (Lawbook Exchange, 1982) 1.}\]

\[\text{(1046) For details of the codification process of the Uniform Commercial Code in USA, see Weiss, above n 1037, 520–6.}\]

\[\text{(1047) See generally Solaiman, Investor Protection, above n 151, 248.}\]
manufacturers and their operation (or lack thereof), as well as the few provisions of the CRPA 2009 for damages. These laws may have suppressed the awareness of tortious product liabilities of the manufacturers. Consumers are not aware of the product liability issues under the law of torts nor do the courts practise these doctrines. Hence, once the product liability laws in tort law are codified, the judges can start applying the doctrines discussed in this study with a view to providing damages to affected consumers. Finally, in order to increase the awareness of consumers in regard to these matters, various electronic media can be used for widespread publication of relevant information. If consumers are conscious of their rights to damages, the manufacturers will be more cautious in regard to continued manufacture of unsafe foods due to the increased risk of being the target of legal action.

6.6. Summary and Conclusions

The present chapter has discussed the civil liability regime for food safety in Bangladesh. Each section has been followed by recommendations in line with consideration of the current practices and best possible solutions. The initial sections discussed the provisions and shortcomings of the CRPA 2009 — which is the one and only statute governing claims for damages. The loopholes in the CRPA 2009 have been addressed in the light of the relevant statutory provisions as applied in Australia, especially the ACLNSW. Recommendations include removing the various restraints to awarding damages, extending the time limit for appeal, and changing the appellate courts jurisdictions in order to keep them within the easier reach of the affected consumers.

A large portion of the chapter has discussed the product liabilities of the manufacturers under the law of torts that are applied to award damages to consumers affected by unsafe foods.

1048 For a list of the laws that deal with the food safety offences in Bangladesh, see Ali, ‘Food Safety and Public Health’, above n 260, 35–6.
Practices in regard to the application of the product liability principles regarding food safety issues in Australia and USA have been comprehensively reviewed, detailing numerous scholarly comments and case references. This discussion has been conducted in order to demonstrate the good practices of the product liabilities in tort law in developed nations so that Bangladesh can borrow these provisions for applying in the equivalent areas. No reported case reference regarding the practice of product liability of food manufacturers has been found in Bangladesh which shows the frustrating lack of practice of tort law in that jurisdiction. Therefore this chapter has suggested the codification of these product liability doctrines (negligence, implied warranty and strict product liability) in regard to food safety. Besides codifications, increased awareness of the consumers is also advocated. Finally, the current chapter has recommended that judges play a significant role in the application and development of the tortious product liability principles in the food safety civil liability regime of Bangladesh with the intention of providing proper damages to affected consumers.
Chapter 7: Criminal Liability of Food Manufacturers in Bangladesh

7.1. Introduction

Imposition of criminal liability represents the ultimate threat of law. Imposition of criminal liability is applied to identify and hold a natural person or corporate entity responsible for an action or omission and inflicts a penalty or punishment on the wrongdoer. The application of criminal liability for food manufacturers, either as individuals or as a body corporate, has been an issue for past few decades. Mann cited the judgement of Justice White in *Hicks v Feiock* and states that ‘the criminal law is meant to punish, while the civil law is meant to compensate’. The *Crimes (Sentencing Procedure) Act 1999* (NSW) outlines the purposes of criminal liability, especially the objectives of sentencing. As per this Act, the main objectives of the criminal sentencing is to guarantee the adequate punishment of the offenders, prevent future offences by providing deterrence, protect the society from criminals, encourage the rehabilitation of wrongdoers, ensure the accountability of criminals, condemn the conduct of criminals, make the criminal accountable for his or her actions, denounce the action of the criminal, and recognise the damage done to the victim of the crime and to the society.

This chapter will investigate the effectiveness of the criminal liabilities imposed upon the food manufacturers in Bangladesh with a view to identifying whether a consumer receives proper justice through the statutory laws. Major Bangladeshi statutes will be analysed to examine this goal. Since the NSW food safety regulatory regime has been taken as the model

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1053 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A (‘CSPA 1999’).
jurisdiction for the equivalents of Bangladesh, the Food Act 2003 (NSW) (FA 2003) will be examined in order to demonstrate a model of legislation where dangerous food safety conducts have been effectively criminalised considering the mens rea, actus reus, and defences to the respective offences. The FA 2003 will also be taken into account to show that it has efficiently encompassed the individuals and corporate bodies under criminal responsibility. However, except for the FA 2003, no other NSW laws (for example, the Australian Consumer Law\textsuperscript{1054}) will be analysed in this chapter with a view to keep the dissertation in a manageable size.

As mentioned in the research methodology\textsuperscript{1055} section of the thesis, apart from referring to the Australian enactments and case references for defining and conceptualising the food safety offences and relevant criminal liabilities of the food manufacturers, similar legal scholarship especially the case references from the USA and the UK will be referred to in this chapter. However, no statutory laws from the USA and the UK will be discussed.

The present chapter is divided into eight sections. Section 7.1 introduces the chapter. Section 7.2 will discuss the offences and their elements. This section will also review the literature in regard to the relaxation of the mens rea requirement for criminalising the food safety conducts. Section 7.3 will analyse the food safety offences articulated in the FA 2003 to demonstrate a model legislation that has effectively criminalised the dangerous food safety conducts. Section 7.4 will explore the main food safety offences defined under the major statutory laws of Bangladesh, such as, the Penal Code 1860 (PC 1860), the Pure Food Ordinance 1959 (PFO 1959), the Special Powers Act 1974 (SPA 1974), the Bangladesh Standard Testing Institute Ordinance 1985 (BSTIO 1985) and the Consumer Rights

\textsuperscript{1054}Australian Consumer Law (NSW) has been discussed in various sections of chapter 6 of the thesis.

\textsuperscript{1055}See section 2.12 of chapter 2 of the thesis.
Protection Act 2009 (CRPA 2009). Section 7.5 will evaluate the food safety offences of Bangladesh discussed in the previous section in light of their equivalents of the FA 2003. The liability of the individual, corporate entity and the government in regard to food safety affairs will be discussed in section 7.6 while the discussion in section 7.7 will involve the adequacy of penalties for manufacturing of unsafe foods in Bangladesh. Section 7.8 will summarise and conclude the chapter.

7.2. Offences and Their Elements

An offence consists of two major elements, namely the *actus reus* and *mens rea*. The following section will clarify the elements of an offence.

*Actus Reus*

*Actus reus* refers to the physical element (also referred as external or objective element) of an offence, which occurs by a wrongful act or a failure to act on the part of the accused. In criminal proceedings the prosecution has to first prove the *actus reus* of the offence. Where the prosecution fails to prove the *actus reus*, the court may refuse to proceed with this case as no offence has been committed. As mentioned previously, *actus reus* requirement can be fulfilled by both an act or an omission; for instance, a manufacturer can commit an offence either by producing adulterated food, or by producing foods while ignoring standard hygiene requirements.

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**Mens Rea**

*Mens rea* is the mental or fault element that signifies the criminal state of the mind. When an offender commits any offence having ill-intention, knowledge, negligence or recklessness, then it may be defined as the offender’s *mens rea*. It originated from the traditional English Common Law principle, ‘*actus non facit reum nisi mens sit rea*’, which means an act or omission is not an offence unless there is a guilty mind. This Latin proverb purportedly first comes into view in Sir Edward Coke’s *Third Institute*. Until the late 17th century the *mens rea* element of crime was not theoretically taken as an element in criminal jurisprudence. First, Hale in his *Pleas of the Crown*, and then Hawkins in the *Pleas of the Crown*, and finally Blackstone in his *Commentaries on the Laws of England* (1765) developed the *mens rea* principle in criminal responsibility. But among all of these remarkable jurists, Blackstone articulated the *mens rea* principle most elaborately in his *Commentaries* and said, ‘to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.’ After Blackstone, the *mens rea* element of the criminal law matures in a significant way in next few centuries all over the world. In *Williamson v Norris*, Lord Russell said, ‘the general rule

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1061 For a detailed discussion, see Lanham, above n 1057, ch 1C, 5. Note: This particular chapter (1C) is not available in the printed version of the book.


1067 Dubin, above n 1064, 351–2.


1069 [1899] 1 QB 7, 14.
of English law is, that no crime can be committed unless there is *mens rea*. Even the *mens rea* element was so strictly followed in the older legal literature that, in *Duncan v State*, a US court considered it a tyranny to make legally responsible a person who lacked *mens rea*.

**Forms of Mens Rea**

*Mens rea* can be split into different mental states of a person, such as, intention, knowledge, recklessness and negligence. These four forms are illustrated below.

**a. Intention**

Intention is commonly treated as the most serious ‘culpable or blameworthy type of *mens rea*’. In *He Kaw Teh v The Queen*, (*He Kaw Teh Case*) a noteworthy Australian case in regard to criminal liability, the High Court stated that, ‘intent, in one form, connotes a decision to bring about a situation so far as it is possible to do so — to bring about an act of a particular kind or a particular result. Such a decision implies a desire or wish to do such an act or to bring about such a result.’  

**b. Knowledge**

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1071 7 Humph 148, 150 (Tenn 1846).
1073 Spears, Quilter and Harfield, above n 1059, 17.
1074 *He Kaw Teh v The Queen* (1985) 60 ALR 449; [1985] HCA 43; (1985) 157 CLR 523 (*'He Kaw Teh Case'*).
1075 *He Kaw Teh Case* (1985) 60 ALR 449, 569.
1076 See Spears, Quilter and Harfield, above n 1059, 17.
Similar to intention, knowledge is also a subjective form of mens rea linked with circumstantial features of the actus reus. When a food manufacturer is aware that he or she is adulterating a food product, he or she is deemed to have satisfied the requirement for mens rea, as the accused has the knowledge of what occurred that made the food unsafe or defective. In an ordinary offence, mistaken belief is considered as a defence to knowledge unless the prosecution can prove otherwise.

c. Recklessness

Recklessness is also a subjective form of mens rea. The *Australian Criminal Code Act 1995* (Cth) defined ‘recklessness’ in the following language.

(1) A person is reckless with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. (2) A person is reckless with respect to a result if: (a) he or she is aware of a substantial risk that the result will occur; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

For example, recklessness occurs when a food manufacturer produces an adulterated food despite foreseeing that the food can harm the consumers. This is a behaviour by the accused indicates the mens rea necessary to constitute the offence. Recklessness in food product liability is a manufacturer producing such a food product which may cause a greater risk of injury than that which would have been generated by sheer negligence, because the manufacturer proceeds with manufacture aware of the substantial and unjustifiable risk of harm.

d. Negligence

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1077 Ibid 18.
1078 Ibid.
1079 Australian Criminal Code Act 1995 (Cth) div 5 s 5.4 (‘ACCA 1995’)
Negligence is an objective form of *mens rea*. Conduct can be treated as negligent if it fails to maintain the standard of care that a reasonable person would maintain in a similar situation, and/or the conduct involves such a high risk that it merits criminal sanctions.\textsuperscript{1081} In *Van Meter v Bent Construction Co*,\textsuperscript{1082} a Californian court defines negligence as denoting the absence of even scant care or a serious departure from the usual standard of behaviour.\textsuperscript{1083}

The above section portrays the traditional concept of the offence and its elements. This discussion shows that, from a traditional point of view, an offence cannot be committed unless *mens rea* is present in conjunction with the *actus reus*. However, today criminal jurisprudence has deviated from the compulsory *mens rea* requirement for the constitution of the food safety offences. The following section will address this issue.

### 7.2.1. Food Safety Offences and the Relaxation of the *Mens Rea* Requirement

In criminal law, establishing subjective *mens rea* by the prosecution can be challenging.\textsuperscript{1084} Perhaps this complexity has driven the criminal product liability regime to relax the *mens rea* requirement in regard to food safety offences.\textsuperscript{1085} It is important to mention that for the purpose of this study the ‘relaxation of the *mens rea* requirement’ is used to describe a statutory offence which expressly negates or displaces the traditional *mens rea* element for

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\textsuperscript{1081} ACCA 1995 div 5 s 5.5.
\textsuperscript{1082} (1956) 46 Cal 2d 588.
\textsuperscript{1085} Ibid.
establishing a criminal offence. This relaxation is only possible if this is provided by the statute.

Relaxing the *mens rea* requirement in regard to food safety offences is historically evident. Frank notes that public health and safety related laws in the 19th century ignored the traditional rule of *mens rea*. By doing so, the prerequisite of proving ‘a guilty mind’ introduced by Blackstone and his contemporaries was practically disregarded.

In practice, numerous cases bear witness to the relaxation of the *mens rea* requirement concerning food safety cases. At first, in 1846, the *R v Woodrow* case, (a case related to food adulteration) cancelled the *mens rea* of the defendant. In *Commonwealth v Boynton*, the court found the defendant guilty for supplying intoxicating liquor, even though the offender neither had the knowledge nor supposed the drink to be adulterated (and thus intoxicating). In *Commonwealth v Farren*, the defendant faced criminal liability for selling adulterated milk despite the absence of knowledge. In the *United States v Park*, the defendant Park was the Chief Executive Officer of a corporation, who failed to maintain the cleanliness of a food manufacturing unit to comply with the legal provisions of the statutory law. The court made the accused criminally responsible. The court observed that

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1086 For more, see Tier 3 offences in section 7.3 of this chapter.
1090 Ibid.
1091 15M & M 404 (Exch 1846).
1092 For details, see Sayre, ‘Public Welfare Offenses’ above n 1088, 58.
1093 (2 Allen) 160, 160 (1861).
1094 Sayre, ‘Public Welfare Offenses’, above n 1088, 64.
1095 49 Allen 489 (Mass 1864)
a criminal prosecution under that respective statute advised that it is not necessary for either the knowledge or intent to be established to convict an offender under this statute.\(^{1098}\) Similarly, in *State v Hartfel*\(^{1099}\) the defendant was convicted without having any *mens rea* and the court mentioned, ‘conviction without proof of intent was permissible because the law would be virtually unenforceable if proof of intent was required.’\(^{1100}\) In *State v Stepniewski*,\(^{1101}\) the defendant was liable for the failure to obey statutory regulations although there was an insufficient *mens rea* element of the offence in the case.\(^{1102}\) Finally Sayre endorses a list of the names of the cases that disregarded the prerequisite of *mens rea* in his 1933 research published in the *Columbia Law Review*.\(^{1103}\) This list shows that in hundreds of cases related to food safety decided in the 19\(^{th}\) and 20\(^{th}\) centuries, the courts relaxed the traditional *mens rea* equivalent while penalising the offenders who had either adulterated or contaminated food or drink.\(^{1104}\)

Section 7.3 and section 7.4 of the chapter will discuss the criminalisation of dangerous food safety conducts in NSW and in Bangladesh accordingly. This discussion will demonstrate that the statutes of both jurisdictions include offences with a traditional *mens rea* requirement and offences where the *mens rea* prerequisite has been relaxed. In NSW, these offences form a sophisticated model for effectively criminalising the dangerous food safety conducts. The following section will look into the offences of the *FA 2003*.

\(^{1098}\) See the opinions of the judges of the case at,<http://wings.buffalo.edu/law/bclc/web/park.htm>.

\(^{1099}\) 24 Wis 60, 62 (1869).

\(^{1100}\) Frank, above n 1089, 535.

\(^{1101}\) 105 Wis 2d 261 (1982).

\(^{1102}\) Ibid 263.


\(^{1104}\) To see the list, see ibid 84–8.
7.3. Food Safety Offences in NSW

The *FA 2003* is the key legislation for regulating food safety in NSW. Part 2 of the *FA 2003* deals with ‘offences relating to food’. Division 1 includes ‘serious offences relating to food’; division 2 articulates ‘other offences relating to food’. Division 3 provides for the defences. The following discussion of the *FA 2003* offences will be selective, focusing on those offences that are most relevant to the current food safety problems of Bangladesh.\(^{1105}\)

This section will summarise the criminalisation of dangerous food safety conducts under the *FA 2003* from three basic points of views. Section 7.3.1 will analyse the Three-Tier *mens rea* and penalty model which the *FA 2003* has adopted. Section 7.3.2 will discuss the *actus reus* of the offences and whether the definitions are broad enough to encompass all the possible offences under the law. Section 7.3.3 will talk about the defences available under the *FA 2003* considering whether their scope is adequate to ensure that a wrongdoer (food manufacturer) does not escape the criminal liability imposed by the law.

7.3.1. Food Safety Offences and Their Penalties in the *Food Act 2003*(NSW)

The *FA 2003* contains food safety offences embracing a Three-Tier model of *mens rea*, and penalties are prescribed commensurate with the degree of culpability of the offender.\(^{1106}\) Amongst these three categories of offences, the highest penalty is set for a Tier 1 offence, followed by an offence of Tier 2 which attracts a penalty higher than that of a Tier 3 offence. Thus the penalties are gradually decreased based on the fault elements of an offence that are

\(^{1105}\) Moreover, the ongoing section will discuss the provisions that are relevant and necessary to the food safety affairs within the scope of the dissertation. For example, Division 2A of Part 2 of the *FA 2003* comprises the ‘beef labelling’ which is not covered by scope of the dissertation and thus will not be discussed in this thesis.

correspondingly downgraded from Tier 1 to Tier 3. The following figure represents the Three-Tier *mens rea* model.

![Three-Tier Mens Rea Model in the Food Act 2003 (NSW)](image)

**Figure 7.1: Three-Tier Mens Rea Model in the Food Act 2003 (NSW)**

**Tier 1 offences**

Tier 1 offences apply to the conduct affecting food safety with subjective fault elements. These offences require the prosecution to prove specific *mens rea* of the accused as stipulated in the relevant sections of the legislation. Proscribing the conduct constituting Tier 1 offences, the *FA 2003* states in s13(1) 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.’ Section 14(1) further asserts that ‘[a] person must not sell food that the person knows is unsafe.’ Section 13(1) expressly requires proof of the accused’s (manufacturer in the present study) ‘knowledge’ of rendering the food unsafe as *mens rea*, where the food was intended to be sold. Under s 14(1) the prosecution must prove, as the mental element of the offence, that the accused knew that the sold food was unsafe. The knowledge of the accused has to be proved
subjectively. Giving emphasis to this higher degree of fault element, the legislation itself has categorised these offences as ‘serious’ ones.\textsuperscript{1107} The prosecution bears the onus of proving that the defendant’s handling of food had the potential to render the food unsafe, or that the defendant sold (\textit{actus reus}) the unsafe food with the requisite knowledge in each instance. Once both \textit{actus reus} and \textit{mens rea} are proved, an individual defendant can be punished with a maximum fine of 1000 penalty units or imprisonment for 2 years, or both, while a maximum fine of 5000 penalty units applies to a corporation.\textsuperscript{1108}

**Tier 2 Offences**

Tier 2 incorporates the mid-range offences that require the commission of \textit{actus reus} with a fault element of an objective standard. These offences are defined in s 13(2) and s 14(2) of the \textit{FA 2003}. Section 13(2) provides 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,’ whilst s 14(2) stipulates that ‘[a] person must not sell food that the person ought reasonably to know is unsafe.’

Clearly, s 13(2) is differentiated from s 13(1) only by reference to the mental elements of these two offences, as their physical components are exactly the same. Unlike s 13(1), s 13(2) does not impose any burden on the prosecution to prove any subjective \textit{mens rea}, instead it is sufficient if the knowledge can be proved objectively by applying a reasonable person test (objective test): that a reasonable person would have had the knowledge that the handling of food in question would or was likely to render the substance unsafe. However, the prosecution must also prove the food was intended to be sold. That is, there is no need to prove that defendant actually knew that his/her/its handling of food intended to be sold was at

\textsuperscript{1107} As mentioned in the heading of Div 1 – Pt 2 of the \textit{FA 2003}.

\textsuperscript{1108} \textit{FA 2003} ss 13(1), 14(1).
least likely to render the food unsafe, rather it would suffice to prove that a reasonable person
would have appreciate this risk. Notably, no actual consequence of the offence is required to
be proved. The same distinction exists between ss 14(1) and 14(2) with respect to fault
elements though the conduct is again exactly the same in both subsections.

The Chief Industrial Magistrate’s Court of NSW applied ss 13(2) and 14(2) of the FA 2003 in
NSW Food Authority v Terry Allan Harding (Harding case) in 2008.1109 The Court convicted
defendant Harding of contravention of these two subsections. He was charged with handling
and selling unsafe oysters that he harvested from the Hastings River. He harvested them at a
time when all the harvest zones on the river were closed due to rainfall.1110 While other
oystermen were not harvesting oysters in the river as they were aware of the unsafe condition
of the oysters and of the closure of the river, the defendant did harvest them and sold them to
the Sydney Fish Market. Fortunately, officers from the Food Authority seized the batch of
oysters before they reached consumers. Harding claimed that he did not know that river was
closed at that time. He denied any knowledge of the closure, and the conditions that rendered
the harvested oysters unsafe. The Court found that his actual knowledge was not necessary,
because he failed to act as a reasonable person as he could have easily known about the
closure of the river by phoning the authority or by sending an SMS.1111 He committed the
actus reus at the time when others refrained from harvesting oysters. Therefore, the Court
ignored his denial and relied on the objective test in punishing him with a record penalty of
$42 000, as he ought to have known that the oysters were unsafe.1112 It is worth mentioning

1111 NSW Food Authority v Terry Allan Harding (case number 20274893/06) 5–6 (‘Harding Case’).
1112 ‘Record Fine for Unsafe Oysters’, above n 1110.
the defence of having a mistaken but reasonable belief as to the facts constitute the offence. Therefore, Harding could not raise this defence.

The maximum penalties for the Tier 2 offences are 750 penalty units for individuals and 3750 penalty units for corporations. These penalties are lower than those for Tier 1 offences, and this distinction is a reflection of the difference in the required fault elements of these two tiers. Nonetheless, the Tier 2 offences are not trivial as the legislators have deliberately prescribed significant maximum penalties that can be imposed on serious offenders.

**Tier 3 Offences**

Tier 3 offences are completely reliant on physical elements, requiring no *mens rea* whatsoever. So, proving the *actus reus* of the defendant beyond reasonable doubt alone is sufficient for a conviction. These offences are mentioned in ss 16(2), 17(2) and 21 of the *FA2003*. Section 16(2) simply prohibits a person from selling ‘food that is unsafe’, while s 17(2) lays down a similar restriction by asserting that ‘[a] person must not sell food that is unsuitable.’ Each of these two subsections deals with a single offence, that is, selling of ‘unsafe’ or of ‘unsuitable’ food respectively. So, the difference between these two offences relates to the quality of the food sold to anyone in any place within NSW. However, s 21 involves multiple offences, referring to contraventions of the *Australia New Zealand Food Standards Code* (ANZFSC) instead of the *FA 2003*, as it reads:

(2) A person must not sell any food that does not comply with a requirement of the Food Standards Code that relates to the food. (3) A person must not sell or advertise for sale any food that is packaged or labelled in a manner that contravenes a provision of the Food Standards Code that relates to the food.

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1113 *FA 2003* ss ss 13(2), 14(2).
1114 *Harding Case*, 7.
Standards Code. (4) A person must not sell or advertise for sale any food in a manner that contravenes a provision of the Food Standards Code.

All three offences proscribe sale or advertising for sale of foodstuffs in contravention of the ANZFSC. Hence, s 21 aims to ensure the standard of food to be sold by requiring the sellers or advertisers to strictly abide by the ANZFSC. First, s 21(2) prohibits selling of any food by any person if the product does not conform to the relevant standards enshrined in the ANZFSC. Secondly, s 21(3) imposes restrictions on both selling of, and advertising for sale of, any foodstuff that flouts the packaging or labelling requirements set forth in the ANZFSC. Thirdly, s 21(4) contains a general prohibition intending to prevent selling of, or advertising for sale of, any food in violation of any provision of the ANZFSC. Plainly, it would be an offence to sell or advertise for sale of any foodstuff in NSW that does not comply with the standards prescribed in the ANZFSC with respect to the contents, packaging and labelling or any other aspects of food mentioned therein.

Noticeably, none of the offences is explicit about the fault element. However, it may not readily mean that no mens rea is required. The High Court of Australia in the He Kaw Teh case interpreted a statutory provision which was silent about the fault element. The Court held that the statutory silence about the mens rea requirement does not necessarily negate the need for this crucial element of an offence. If the legislation is silent where there is no exclusion, either expressly or by necessary implication, of mens rea in the section creating the offence, there is still a common law presumption that mens rea is required. However, the presumption is rebuttable. It can be displaced if it is successfully rebutted. Such a rebuttal would actually mean that the legislators intended to displace the fault element of the offence. The High Court set out the ways in which the presumption of (subjective) mens rea can be

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1116 The case involved importation of a large amount of heroin. See above n 1074.
1117 Customs Act 1901 (Cth) s 233B. It was concerned with the importation of prohibited narcotics.
rebutted. It stipulated three matters to be taken into account in determining whether the presumption has been displaced by the relevant section of the statute, and whether the Parliament intended the provision creating the offence should have no mental element.\textsuperscript{1118} The factors are: the language of the section creating the offence, the subject matter of the statute, and the efficacy of the law.

First, regard must be had to the words of the statute creating the offence,\textsuperscript{1119} as the statutory expressions might suggest the intention of the Parliament. Sections 16(2), 17(2) and 21 of the FA 2003 lack any clear indication of intention of the lawmakers regarding a blameworthy state of mind, and there is no mention of even ‘reasonable excuse’ either. Such a lack may provide an indication that the Parliament intended to displace the presumption. Further, the words used in creating the offences in all three sections,\textsuperscript{1120} give emphasis to the conduct part by inserting the words ‘must not’ preceding the prohibited conduct in the absence of any indication for mental element. Admittedly, the same prominence has been given to the Tier 1 and Tier 2 offences; but unlike Tier 3, they overtly mention the requisite \textit{mens rea}. Therefore, the same words are especially important for Tier 3 to highlight the physical elements.

Second, the subject matter of the statute is to be taken into account.\textsuperscript{1121} It refers to the nature of the offence, that is, whether or not the offence is truly criminal. Generally, the more serious the offence, the more likely is that a \textit{mens rea} element was intended. The offences of Tier 3 are not truly criminal for three reasons.

(i) Of course, the offences under Tier 3 deal with a social evil, but not as grave as the importation of prohibited narcotics, (a large quantity of heroin) as it was found in \textit{He Kaw}

\textsuperscript{1118} See \textit{He Kaw Teh Case} (1985) 60 ALR 449, 453–54.
\textsuperscript{1119} Ibid 453.
\textsuperscript{1120} Sections 16(2), 17(2) and 21(2)–(4) of the \textit{FA 2003}.
\textsuperscript{1121} \textit{He Kaw Teh Case} (1985) 60 ALR 449, 453.
Teh, tending to substantiate the argument that the legislators naturally wanted to rigorously suppress the conduct.\textsuperscript{1122} The High Court in \textit{He Kaw Teh} stated that if the prohibited acts ‘are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty’, then it is likely that the presumption of subjective fault element will be displaced.\textsuperscript{1123} The offences under Tier 3 are of a regulatory nature, and food safety offences are treated as public interest offences.\textsuperscript{1124} It is judicially recognised that the statutory offences created to protect public interest are generally deemed to have displaced fault elements.\textsuperscript{1125}

(ii) The offences are concerned with not only ‘unsafe’, but ‘unsuitable’ food products, whereas Tier 1 and Tier 2 deal exclusively with unsafe food. The adjective ‘unsuitable’ signifies a state arguably less dangerous than ‘unsafe’ when it comes to foodstuff as it attracts lower penalty compared to the penalties for the similar offence concerning ‘unsafe’ food (to be discussed below). This somehow dilutes the seriousness of the offences in question. On the other hand, the offences under s 21 involve breach of the ANZFSC rather than the food legislation. These offences are generally regarded as less serious ‘on the spot offences’ under the \textit{FA 2003}.\textsuperscript{1126} In practice, if an infringement of the ANZFSC is found, the regulator as an enforcement measure directly issues a penalty notice requiring payment of a penalty by an offender. Criminal prosecutions for committing a crime belonging to Tier 3 are unlikely to be initiated as the penalty notices issued by regulators are not typically dealt with by courts unless the accused person wishes to bring the issue to a court for a final decision.\textsuperscript{1127}

\textsuperscript{1122} See ibid.
\textsuperscript{1123} Ibid, quoting from \textit{Sherras v De Rutzen} (1895) 1 QB 918, 922.
\textsuperscript{1125} See Gibbs CJ in \textit{He Kaw Teh Case} quoting from \textit{Sherra v De Rutzen} [1895] 1 QB 918.
\textsuperscript{1127} \textit{FA 2003} s 120(2).
(iii) The less serious nature of the Tier 3 offences is also reflected in their penalties. As discussed previously, all the Tier 3 offences prohibit sale, or advertisement for sale of, foodstuffs in breach of the ANZFSC. Advertising for sale of food is an offence which is absent in Tier 1 and Tier 2. Seemingly, it has been regarded as less serious by the Parliament as it is not included in the legislation. The other conduct being selling of unsafe foods has been proscribed in the preceding two tiers. However, the penalties for Tier 3 offences are lower than those for Tier 1 and Tier 2. The maximum Tier 3 penalties are 500 penalty units for individuals under ss 16(2) and 21, whereas it is 400 penalty units for offences against s 17(2) which deals with unsuitable foods. Similar to the other tiers, the penalties of corporations are higher than individuals in Tier 3, but yet lower than the corporate penalties in the other two tiers. Corporate penalties are 2500 units for offences against s 16(2) and 21, whilst it is 2000 units under s 17(2). Evidently, the maximum penalties for the Tier 3 offences are lower than even that of the Tier 2 offences which require objectively proved \textit{mens rea}.

Therefore, it can be inferred, based on the above arguments, that the subject matter of the Tier 3 offences are not truly criminal and their subject matter does not uphold the common law presumption of a \textit{mens rea} requirement.

Third, the efficacy or utility of the law should be given due consideration having regard to the impact of the law, that is, whether the imposition of strict or absolute liability would be a good deterrent. Also, it is to be considered, if a strict liability or absolute liability provision ‘will assist in the enforcement of the regulations’ and ‘will promote the observance of the regulations’, then the presumption is likely to be displaced.\footnote{1128 As quoted in \textit{He Kow Teh [7] Lim Chin Aik v The Queen} at 174.} A strict liability offence in NSW does not require any \textit{mens rea} element as such, but it allows the defence of honest and
reasonable mistake of fact. But s 27 of the FA 2003 has displaced that defence and thereby has negated the possibility of their being offences of strict liability.\footnote{Section 27 of the FA 2003 states that the defence of “mistake of reasonable belief” to the offences against pt 2, div 2 of the Act is not available.}

Arguably, if \textit{mens rea} is attached to the offences of Tier 3, society may experience less legal efficiency with respect to their enforcement by regulators due to the inherent complexity of proving the fault element that may affect the prevention of harm in a quick and cost effective manner. This may have a negative impact on public confidence in the law and in the legal system as well. A threat of prompt action by regulators would reasonably work as a deterrent. On the other hand, the offences carry low penalties. Therefore, it is unlikely to unjustly penalise anyone in an excessive manner for committing a Tier 3 offence, in other words, it may not be unreasonably harsh on offenders.

Based on the above discussion it seems unlikely that the Parliament intended to attach any subjective \textit{mens rea} as an element to the offences of Tier 3. Clearly, the lawmakers did not intend to add a fault element of objective standard either, because the Tier 2 offences expressly require such an element with a higher penalty. In such a situation, the presumption of \textit{mens rea} can be successfully displaced. Therefore, it can be finally inferred that the offences of Tier 3 are of absolute liability.

The above discussion presents that the Three-Tier \textit{mens rea} model is closely connected with the penalties of offences under the respective Tiers. For example, a Tier 1 type offence which requires subjective \textit{mens rea} does not impose negligible penalties, rather it imposes the highest penalties; or a Tier 3 type offence which negates the \textit{mens rea} does not impose harsh penalties upon the accused. The following figure (Figure 7.2) will show the Three-Tier
penalty model in the *Food Act 2003* which is identical to Three-Tier *mens rea* model shown in Figure 7.1.

**Figure 7.2: Three-Tier Penalty Model in the *Food Act 2003* (NSW)**

Lastly, the Three-Tier *mens rea* and penalty model is noteworthy in the sense that it reflects its relevance to the responsive regulation theory (see chapters 3 and 8 of the thesis) which also suggests escalating to higher punishments from lower penalties. Tier 3 offences are the easiest to prove as they do not leave much room for the offenders to use a defence.\(^{1130}\) Hence when a food manufacturer is caught contravening the *FA 2003* offences, a regulator can promptly impose the Tier 3 penalties. But Tier 2 offences are comparatively harder to prove as they require proving objective *mens rea* in the court. Tier 1 offences remain at the apex of

\(^{1130}\) The only defence a food manufacturer may claim is the ‘due diligence’ which has been discussed in section 7.3.3 of this chapter.
the pyramid and prosecution may find these offences hardest to establish since they involve subjective forms of *mens rea*. It appears that the Three-Tier system of *mens rea* and penalties has made the *FA 2003* a check and balance type regulation where both regulators and the regulatees are offered space. Courts cannot impose serious penalties if the regulators (as the prosecution) fail to establish the fault elements of the food manufacturers for Tier 1 and Tier 2 category offences. On the other hand, a food manufacturer will find it difficult escape criminal liability for Tier 3 offences because the regulator can impose a fine without the necessity of proving *mens rea* of the part of the manufacturers.

### 7.3.2. Broadened Actus Reus in the Food Act 2003 (NSW)

The *FA 2003* provides broad *actus reus* elements for the offences. In s 14(1)(2) of the *FA 2003*, as mentioned above, it is observed that the *actus reus* has been broadened by using the word ‘sale’, which encompasses every kind of sale in the food industry as the statute is not limited by any further explanation. Typically a manufacturer sells foods to the suppliers who subsequently sell them to retailers who finally sell them to consumers. The entire food industry is engaged in the selling of food for business purposes. Further ‘unsafe food’ has been extensively defined in s 8(1) of the Act which mentions the following:

> For the purposes of this Act, 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) 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.

The reasonable purpose of food or its use is consumption. Once a person becomes ill from consuming a food, such a food is considered ‘unsafe’ under this definition; no matter who

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1131 Middledorp, above n 267, 89, 90.
1132 However, food will not be considered as unsafe for its ingredient values: see *FA 2003* s 8(2).
produced it and how it was manufactured. Therefore, this definition of unsafe food encompasses all possible ways that a food can be unsafe. The definition seems leave no gap and an offender may hardly have any opportunity to escape from the actus reus.

Sections 16 and 17 of the FA 2003 deal with two significant offences in regard to food safety namely, the ‘handling and sale of unsafe food’ (s 16) and the ‘handling and sale of unsuitable food’ (s 17), both of which use tight means for criminalising the respective offences. Section 16(1) states that, ‘a person must not handle food intended for sale in a manner that will render, or is likely to render, the food unsafe’. Section 17(1) uses identical language in defining the offence of ‘handling and sale of unsuitable food’.

The statute defines terms with a view to including all the acts or omissions that are covered in the actus reus of the food safety offences in both sections. For instance, firstly, both ss 16(1) and 17(1) include the handler of the food, while ss 16(2) and 17(2) take in the seller of the food under the statute. That means, all the persons involved with the manufacturing, processing, supplying, and retailing — either as the directors or the employees of the industry — are included within the ambit of possible defendants in regard to the actus reus. The coverage of the actus reus of the offences is wide. Secondly, the phrase ‘handling of food’ used in s 16 of the FA 2003 is defined in s 4(1) of the Act as consisting of ‘... making, manufacturing, producing, collecting, extracting, processing, storing, transporting, delivering, preparing, treating, preserving, packing, cooking, thawing, serving or displaying of food.’ Again, s 8 defines the phrase ‘unsafe food’ and s 9 provides a definition of unsuitable

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1133 FA 2003 s 16(1). See the definition of ‘handling of food’ in s 4(1) of the FA 2003.
1134 Ibid s 17. Section 17 mentions, ‘(1) A person must not handle food intended for sale in a manner that will render, or is likely to render, the food unsuitable. (2) A person must not sell food that is unsuitable’, which asserts the similarity of languages in both sections except the name of the offence.
1135 See the provision of s 16(2) in section 7.3.1 of this chapter.
1136 See the provision of s 17(2) in section 7.3.1 of this chapter.
1137 See above section 7.3.1 of the chapter.
food. These effectively cover all kinds of food adulteration or contamination in NSW. Both definitions are broad. For example, s 9(1)(d) states that a food is unsuitable if it contains a substance foreign to the nature of the food. The present research finds this definition quite broad because foods are commonly adulterated or contaminated with a foreign ingredient other than the natural ingredients. For instance, the ANZFSC provides that honey should be made of ‘natural sweet substance produced by honey bees from the nectar of blossoms ...’. If a manufacturer produces honey by using only sugar syrup instead of natural honey produced by bees, it is correctly assumed to be adulterated as sugar is a foreign agent to this food. This example regarding a small part of the definition of ‘unsuitable food’ suggests that a manufacture will find it difficult to deny the actus reus of the offence.

In fact, the FA 2003 has wisely used both the concepts of ‘unsafe’ and ‘unsuitable’ food to criminalise dangerous food safety practices. Middledorp notes that the difference between ‘unsafe’ and ‘unsuitable’ is ‘a fine one’. On the one hand, unsafe food can cause injury, that is, result in actual harm to the consumer, due to the person being affected by various foodborne illnesses. On the other hand, consumption of unsuitable food may not make a consumer sick; it may taste unpleasant or be ‘repugnant’ to the consumer, but not actually cause harm (illness). The example Middledorp provides is salient. If properly processed and packaged ultra-high-temperature (UHT) milk is consumed after its expiry date, it may taste sour and thus be treated as ‘unsuitable’ (but it is not ‘unsafe’ to consume); however, if the same milk is not appropriately processed or packaged, it is ‘unsafe’ as it could contain or have become contaminated by microbiological pathogens and cause harm to the

1139 Middledorp, above n 267, 89, 91.
1140 Ibid.
consumer. The *FA 2003* has therefore cleverly included the handling of both unsafe and unsuitable food in the statute which practically covers all undesirable conduct towards foods which can cause problems to a consumer.

Section 21 of the *FA 2003* includes the offences related to compliance with the ANZFSC in NSW. Section 21(1) says, ‘a person must comply with any requirement imposed on the person by a provision of the ANZFSC in relation to the conduct of a food business or to food intended for sale or food for sale.’ The subsequent sub-sections of s 21 have been clarified above. Considering the entirety of s 21 of the *FA 2003*, the current research finds the *actus reus* of the offences quite broad: a defendant violates the Act if he or she does not comply with any requirement of the ANZFSC.

The decision of the *New South Wales Food Authority (Authorised Officer Brett Campbell) v Van Thuong Nguyen* (*Bankstown Case*) is relevant in this regard. On 5 January 2011, the NSW Department of Health notified the NSW Food Authority (NSWFA) that a salmonella outbreak had occurred which resulted in 83 people becoming ill (20 of them hospitalised) in Western Sydney. The NSWFA authorised officers discovered that a local food manufacturer, the ‘Bankstown Bakehouse’, had been handling and selling unsafe food, thereby violating s 16 of the *FA 2003*. Moreover, the bakery was alleged to have also violated the ANZFSC under s 21 of the *FA 2003*. Considering the seriousness of the incident, it resulted in a criminal prosecution for contravention of the *FA 2003*. Examining the *actus reus*,

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1141 Ibid.
1143 See the details of Department of Health (NSW) in section 5.2.6 of chapter 5 of the thesis.
the court found that due to the inappropriate temperature used in manufacturing unit, and inadequate unclean handling of the foods, salmonella had spread in all foods and contaminated other foods available in its entire bakery. The defendant (the company’s former director) was held guilty. He was fined $12000 (plus costs).

7.3.3. Due Diligence Defence is Limited for Food Manufacturers

In a recent discussion of Australian food safety regulations, Ludlow indicates that the defence of due diligence\textsuperscript{1144} in a food safety offence can restrain a successful prosecution as it provides a defence.\textsuperscript{1145} However, she suggests that there may indeed be a higher standard demanded by the \textit{Food Act} as the Act demands the defendant demonstrate that ‘\textit{all} due diligence’ not simply ‘reasonable’ due diligence as well as ‘\textit{all} reasonable precautions’ having been taken.\textsuperscript{1146}

The \textit{FA 2003} in s 26 provides a limited defence of due diligence to an alleged offender for the violation of food safety laws, rather than the unlimited defence as provided in the enactments of Bangladesh (as discussed in section 7.4 of this chapter). Section 26(1) provides that, ‘in any proceedings for an offence under this Part, it is a defence if it is proved that the person took all reasonable precautions and exercised all due diligence to prevent the commission of the offence by the person or by another person under the person’s control.’ In s 26(2), the Act specifies this defence, providing the particular details to establish s 26(1). A food manufacturer can prove that he or she has taken all reasonable safety measures and exercised due diligence to prevent the committed offence by showing:

\textsuperscript{1144} See the details of ‘due diligence’ in section 7.5.3 of this chapter.

\textsuperscript{1145} Ludlow, above n 267, 189.

\textsuperscript{1146} Ibid. While discussing the Victorian Food Act, the author cites s 26 of \textit{FA 2003} as the equivalent provision. The ‘higher standard’ to which she refers is the \textit{FA 2003} standing relative to that demanded by the Common Law.
(a) that the commission of the offence was due to:
   (i) an act or default of another person, or
   (ii) reliance on information supplied by another person, and
(b) that:
   (i) the person carried out all such checks of the food concerned as were reasonable in all the circumstances, or
   (ii) it was reasonable in all the circumstances to rely on checks carried out by the person who supplied the food concerned to the person, and
(c) that the person did not import the food into this State from another country, and
(d) in the case of an offence involving the sale of food, that:
   (i) the person sold the food in the same condition as when the person purchased it, or
   (ii) the person sold the food in a different condition to that in which the person purchased it, but that the difference did not result in any contravention of this Act or the regulations [emphasis added].

However, the word ‘another person’ mentioned in s 26(2) does not include the employees, agents or directors of the defendant food manufacturers. Therefore, the due diligence defence is not unrestricted under the FA 2003; it does not include the ‘employees, agents or directors’ of the defendant manufacturer (corporate or individual) as the ‘other person’ able to be deemed responsible for the offence. The manufacturer cannot avoid prosecution by shifting blame to an employee, director or agent. The ‘other person’, it seems, must be an unrelated party. Section 26 indicates that, merely proving the taking of ‘all reasonable precautions’ and compliance with all rules and regulations by the food manufacturers or its employees, directors or agents may not satisfy the provision of the evidence of due diligence defence in NSW; s 26(2) must be satisfied.

Finally the discussion in section 7.3 of the chapter demonstrates that the FA 2003 has introduced a significant mens rea and penalty model for criminalising the dangerous food safety conducts. The law also provides widened actus rea of the offences and limited defences for the food manufacturers. Therefore it can be argued that the FA 2003 has effectively criminalised the food safety conducts in NSW.

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1147 FA 2003 s 26(2).
1148 Ibid s 26(3).
7.4. Food Safety Offences in Bangladesh

The following discussion will analyse the main offences sections of the major criminal statutes related to food safety in Bangladesh for investigating the mens rea structures of the offences, the breadth of the actus reus and the broadness of the defences with a view to assessing the limitations of the offences for making the adulterated food manufacturers criminally responsible.

It is not practically feasible to encompass all the food safety related laws and their provisions in this thesis in order to analyse the criminalisation of dangerous food safety conducts. Besides, it would be a repetitive discussion due to the nature of the basic contents. Thus, specific sections of the most important statutes in view of the food safety issues in Bangladesh along with their selected offences will be discussed in this section to illustrate the entire criminal liability regime.

7.4.1. Penal Code 1860

Section 272 of the PC 1860 states: ‘whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished ...’. Further, s 273 says, ‘whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished...’.

Relying on the He Kaw Teh principle discussed in section 7.3 of this chapter, it can be argued that s 272 does not include any specific mens rea as such for the conduct part of the offence

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1149 See the scope of the thesis in section 2.11 of chapter 2 of the thesis.
(adulterates) in order to commit this offence; however, the prosecution require to prove as the
ulterior intent\(^{1150}\) or knowledge that the accused intended to sell the foodstuff or knew that it
was likely that the adulterated article would be sold. Section 273 explicitly requires the
subjective mens rea element for constituting the offence. Thus it should fit the Tier 1 type
offence as described in section 7.3 of this chapter. But it is worth noting that, practically s
273 does not fit the Tier 1 type offence because of the mild sanctions able to be imposed.\(^ {1151}\)

Section 272 of the \textit{PC 1860} uses the word ‘adulterates’ to encompass the \textit{actus reus} of the
offence which in fact includes a broad range of \textit{actus reus} of the offence meaning the food
can be adulterated by any means with anything. As long as the section does not limit the
definition of adulteration in the statute, a manufacturer is liable for whatever way he or she
adulterates the food. Further, selling or offering for selling a food that has been made
poisonous or that has become poisonous is included as the \textit{actus reus} of the offence under s
273. Since the legislation does not limit the word ‘selling’, it encompasses every kind of food
selling (for example, a manufacturer sells food to a supplier/retailer). If that sold food is
noxious in any possible way (that the legislature could have foreseen), the seller will be liable
under this section. Therefore similar to s 272 of the \textit{PC 1860}, this section also includes a
broad \textit{actus reus}.

The \textit{PC 1860} allows the general defence of ‘mistake of fact’.\(^ {1152}\) So s 272, although it is silent
in regard to the fault element of the offence, nevertheless does not fulfil the requirement of

\(^{1150}\) ‘Ulterior intent’ indicates the motive of the \textit{actus reus}: see Walter Harrison Hitchler, ‘Motive as an Essential
Element of Crime’ (1930–1931) 35 \textit{Dickerson Law Review} 105, 108. For more details on the offences
concerning ‘ulterior intent’, see Jeremy Horder, ‘Crimes of Ulterior Intent’ in A P Simester and A T H Smith
(eds), \textit{Harm and Culpability} (Oxford University Press on Demand, 1996) 153–68.
\(^{1151}\) Section 273 of the \textit{PC 1860} imposes a maximum term of six months imprisonment or up to a maximum fine
of BDT1000. See the details of the adequacy of penalties in section 7.7 of the chapter.
\(^{1152}\) See \textit{PC 1860} ss 76, 79.
the Tier 3 offences defined in section 7.3.1 of this chapter. It is noted that the Tier 3 offences in the *FA 2003* does not allow any defence of mistake of fact.

Hence, based on the above discussion it can be said that the mens rea requirements of the PC 1860 is not structurally organised. This is because it gives mild punishment (mentioned in section 7.7 of this chapter) for an offence which requires a subjective fault element to be established. It seems that the law has failed to distinguish and categorise the offences considering their mens rea requirements and level of penalties.

### 7.4.2. *Pure Food Ordinance 1959*

Chapter II (ss 6–27) of the *PFO 1959* proscribes the manufacture and sale of various adulterated, contaminated, chemically treated, and overall unsafe food. The current discussion will involve an analysis of selected sections of the *PFO 1959*.

Section 6 of the *PFO 1959* outlaws the ‘manufacturing’ of unsafe food by omitting the mens rea element and includes that ‘no person shall, directly or indirectly and whether by himself [or herself] or by any other person acting on his [or her] behalf ... manufacture or sell any article of food which is adulterated...’. Using the words such as ‘*manufacture or sell* any article of food which is adulterated [emphasis added]’ in this offence section represents the actus reus of this offence which is not broad enough since it fails to encompass many other ways of adulterating foods in the food chain in Bangladesh. For example, using Dichloro Diphenyl Trichloroethane (DDT) powder in the *sutki* (dried fish) is a frequent source of adulteration in Bangladesh that is neither done by ‘manufacturing’ nor by ‘selling’. DDT is used in the *sutki* while ‘processing’ such fish, and while food processing is within the scope of the thesis, it is not within the scope of the definition of ‘manufacturing’ or ‘selling’ under the thesis.

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1153 *PFO 1959* s 6(1)(a).
the *PFO 1959*. Therefore, this section does not include the criminal liability of a ‘processor’ who applies DDT in *sutki* in Bangladesh. Nor does it include the criminal liability of a processor who uses formalin; however, the latter are caught by s 6A (see below).

Section 6 of the *PFO 1959* rejects the defence of ‘lack of knowledge’ and ‘due diligence’ of the manufacturer.\(^{1154}\)

Section 6A\(^{1155}\) of the *PFO 1959* proscribes the manufacturing as well as processing of foods using dangerous and poisonous chemicals. This provision is similar to s 6 (discussed above) because s 6A also negates the *mens rea* of the offence and it has narrow *actus reus*.

The provisions of s 6A particularises the name a number of chemicals, such as ‘calcium carbide, formalin, ...intoxicat[ing] food colour or flavouring matter’ and mentions that a person will be liable in the event that he or she uses these aforementioned chemicals in the food, or sells any food wherein these chemicals are used. That means, a person who adulterates any food using a chemical *other than* those listed in s 6A will not be liable for his or her act. For example, *moodi* (puffed rice), a popular food is adulterated and manufactured by using *sodium hydrosulfide* for making it whiter and bigger in size,\(^{1156}\) which can cause various kidney diseases.\(^{1157}\) The name of this chemical, however, is not included in this offence.

Akin to ss 6 and 6A, several other provisions of this legislation intentionally omit the *mens rea* of the offence. These include ss 7,\(^{1158}\) 16,\(^{1159}\) 24\(^{1160}\) and so forth. Unfortunately, although

\(^{1154}\) *Ibid* s 6(4).

\(^{1155}\) Section 6A of the *PFO 1959* has been added in 2002 by amending the law.

\(^{1156}\) See Khan, above n 113; ‘Two Puffed Rice Factories’, above n 117; ‘Subject: Adulterated Food: Some of Our Food Habit’, above n 117.

\(^{1157}\) Al-Rnall, above n 118, v.

\(^{1158}\) *PFO 1959* s 7 defiend the offence named ‘prohibition of manufacture or sale of food not of proper standard of purity’.
these offences may appear to fit the Tier 3 category of offences (as mentioned in section 7.3.1 of this chapter), they actually do not. This is because the offences under the *PFO 1959* include imprisonment as a criminal penalty.\textsuperscript{1161}

A Tier 3 offence does not include any imprisonment because it will not allow the offence to be summarily and easily implemented by the regulators. Imposition of such a punishment (that is, one that includes imprisonment) may also risk the loss of the cooperation of the regulatees in regard to overall food regulatory arrangements as well as fail to assure justice to regulatees.

Certain mistaken beliefs are treated as a defence under s 20(1) of the *PFO 1959* for offences contained in ss 6–18 of the *PFO 1959*. For example, the Ordinance asserts that in any criminal proceedings for the sale of adulterated or unsafe food, a seller has available the defence that he or she had no reason to presume that the food was not of such a nature or ingredients, or of the quality that it was then in the same situation as when he or she bought it.\textsuperscript{1162}

Finally, this law seems opposite to *PC 1860* and does not have a broad *actus reus*. Further, it approves unnecessary defences\textsuperscript{1163} for the food manufacturers. For this reason, it will not be an overstatement to assert that the *PFO 1959* has failed to effectively impose criminal liability upon the food manufacturers in Bangladesh.

\textsuperscript{1159} *PFO 1959* s 16 defined the offence named ‘prohibition of keeping adulterants in places where food is manufactured or sold’.

\textsuperscript{1160} *PFO 1959* s 24 defined the offence named ‘provisions relating to premises and part of premises used for manufacture and sale of food’.

\textsuperscript{1161} See *PFO 1959* s 42. See also section 7.7 of the chapter.

\textsuperscript{1162} *PFO 1959* s 20(1)(b).

\textsuperscript{1163} See the rational of the defences in section 7.5.3 of this chapter.
Chapter 7: Criminal Liability of Food Manufacturers in Bangladesh

7.4.3. Special Powers Act 1974

Section 25C of the SPA 1974 governs food adulteration and provides criminal penalties for the offenders, that is, ‘whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink…’.\footnote{SPA 1974 s 25C (1)(a).}

As to the law itself, the phrasing and expressions of the enactment are identical to those of s 272 of the PC 1860.\footnote{See the issue of multiplicity of laws in section 4.3.1 of chapter 4.} Therefore, the \textit{actus reus} and \textit{mens rea} related concerns are the same as for the PC 1860 (as discussed above in section 7.4.1 of this chapter). It is necessary to mention that, despite the exclusion of fault element, s 25C does not fit the category of Tier 3 offences since the penalties provided under this section are extremely serious (death penalty or life imprisonment).\footnote{See section 7.7 of the chapter.}

In 1987, the Government of Bangladesh (GoB) amended the SPA 1974 by inserting s 25E. This section adds the defence of ‘due diligence’ for corporate food adulterators which weakens their criminal liability. Section 25E states:

Where an offence under section … 25C is committed by a firm, company or other body corporate, every partner, director, manager, secretary or other officer or agent thereof shall, if actively concerned in the conduct of the business of such firm, company or body corporate, be deemed to have committed the offence unless he [or she] proves that the offence was committed \textit{without his knowledge} or that he \textit{exercised all due diligence} to prevent the commission of the offence. [Emphasis added].

Therefore, although s 25C of the SPA 1974 is able to apply a severe penalty upon those associated with the manufacture of adulterated food by firms, companies or corporations by imposing the death penalty on such persons should they be found guilty of the offence, this threat appears to have simply become worthless as it appears to have never been applied,
perhaps a reflection of the available defences. The section apportions great responsibility to company officers as well as the other body corporate but this law also appears to fall short of imposing effective criminal liability upon the food manufacturers and perhaps this is why no case reference is found to date where such a manufacturer or associated person (as defined above) has faced death penalty under the SPA 1974 since the promulgation of this enactment in 1974.

7.4.4. Bangladesh Standard Testing Institute Ordinance 1985

The BSTIO 1985 deals with offences relating to the Bangladesh food standards. Section 19 of the BSTIO 1985 outlaws the improper use of Bangladesh standard mark (BSM),\textsuperscript{1167} and provides that [food] manufacturers (s 19 refers the word as ‘person’) are not allowed to use the BSM unless they legally obtain a licence to use it under s 20\textsuperscript{1168} of the BSTIO 1985.\textsuperscript{1169} Even though the licence to use the BSM is granted by the BSTI, manufacturers are not permitted to use it for business unless the particular food is made conforming to standard prescribed by the BSTI.\textsuperscript{1170} It is noted that s 19 does not necessitate any mens rea for the offence and the actus reus of the offence is also broad. But again this offence does not fulfil the requirement of a Tier 3 offence as the penalties include imprisonment.\textsuperscript{1171} It seems that, like the other statutes, the BSTIO1985 has also failed to structurally organise the offences considering their mens rea and penalties.

However, in addition to the disorganised mens rea and penalties for the offences, this law perhaps has failed to be enforced due to several regulatory and administrative problems of the BSTI mentioned in different sections of chapter 5 and chapter 8 of the thesis.

\textsuperscript{1167} See the details of Bangladesh Standard in section 5.3.7 of chapter 5 of the thesis.
\textsuperscript{1168} BSTIO 1985 s 20 deals with the granting of licence and its procedure.
\textsuperscript{1169} See generally BSTIO 1985 s 19(1).
\textsuperscript{1170} See generally ibid s 19(2).
\textsuperscript{1171} See section 7.7 of the chapter.
7.4.5. Consumer Rights Protection Act 2009

The CRPA 2009 is the latest law that partly deals with food safety as a section of the consumer protection issues in Bangladesh. Considering the above mentioned laws, this law does not introduce anything new in terms of criminalising poor conduct related to food safety. In practice, the CRPA 2009 indirectly restates the provisions of the PFO 1959 in several cases, with slight alterations to the mens rea requirements and expressions used in other laws and to the penalties to be imposed on breaches of the law. It further contributes to the confusing array of pieces of legislation for implementation.

Section 41 of the CRPA 2009 provides that a person will be punished if he or she intentionally sells or offers to sell any adulterated goods (for example, food). This section criminalises merely ‘selling’ as an offence which includes manufacturing and processing under s 2(16) of the statute. However, many manufacturers stock various adulterating ingredients (adulterants) and date expired foods, yet these actions are not contained within the actus reus under this section. This indicates the narrowness of the actus reus of the offence. The selling should be intentional, which points to the requirement of the subjective mens rea for constituting the offence. Therefore, this offence fits the Tier 1 category offence mentioned in section 7.3.1 of this chapter.

1172 For instance, see CRPA 2009 ch 4.
1173 Ibid s 41. Note: CRPA includes as ‘consumers’ those parties in the ‘food chain’ who buy, and includes wholesalers (who buy from a manufacturer), and retailers or traders who may buy from manufacturer or wholesaler who have ‘offered for sale’ or ‘sold’ adulterated or unsafe food. However this thesis concentrates on end user consumers.
Any food with an admixture of any substance that is dangerously harmful to human health and mixture of such substance with food,1175 or the commission of any act which is a threat to the life or safety of consumers that is prohibited under any law,1176 has been declared as punishable1177 ‘acts against consumer rights’1178 in the CRPA 2009. These offences do not provide any prerequisite for mens rea. But all these offences impose a higher penalty with imprisonment as part of the available sanctions.1179 And this situation does not allow this offence to fit either the Tier 1 or Tier 3 category. Further, the problems remain in actus reus as none of these sections encompass all possible ways of committing the respective offences.

Section 78 of the CRPA 2009 states some provisions associated with the exclusion from liability and grants the defence of ‘lack of knowledge’ to the defendants. Section 78(1) of the law provides that a seller cannot be penalised for the contravention of any provision under this law where he or she is not knowingly involved in committing the offence. Releasing the prosecution from establishing the mens rea (as mentioned in regard to ss 42, 52) on the one hand and offering the defence of ‘lack of knowledge’ to the defendant on other hand is contradictory. Practically, a manufacturer should not be given a defence based on fault elements when the offence section itself denies the prerequisite of proving subjective or objective mens rea.

Secondly, the liability issue of the adulterated food manufacturers is risked when s 78(2) of the CRPA 2009 has released the retailers from every sort of criminal liability due to the nonexistence of an intentional relation/involvement between the manufacturer and the retailer in the action that is contrary to the consumer protection legislation. This subsection offers a

1175 CRPA 2009 ss 2(20)(c), 42.
1176 Ibid ss 2(20)(j), 52.
1177 These are punishable offence as laid in the CRPA 2009 ss 41, 42 and 52 accordingly.
1178 CRPA 2009 s 2(20).
1179 The punishment includes up to a BDT 200 000 criminal penalty and/or 3 years of imprisonment.
defence that a retailer is not criminally responsible for storing or selling adulterated and contaminated food if the particular retailer buys these adulterated foods from a manufacturer with whom he or she does not have any intentional relation/involvement with the act against consumer protection. This provision sends a dangerous signal considering the current food safety situation in Bangladesh because this privilege can effectively act to abet the corporate offenders in their manufacture of adulterated foods and their supply of such goods to the retailers. When a retailer has open to him or her the defence of an absence of an involvement in with the producer in the act that is contrary to the relevant consumer legislation, then he or she (retailer) will hardly be concerned to check the purity or safety of the food prior to selling it in the supermarket to the consumers. This may help to maximise the profits of the manufacturers and abet the continuing practice of the food adulteration.

In addition to the above, the CRPA 2009 cannot be implemented properly due to regulatory problems associated with it\textsuperscript{1180} as well as problems with its administrative enforcement.\textsuperscript{1181}

7.5. Issues Concerned regarding the Food Safety Offences in Bangladesh

Unsafe and dangerous conducts related to food manufacturing have been criminalised in at least five different statutes in Bangladesh. Every single statute includes numerous sections to outlaw food adulteration, food contamination and overall food safety problems. The analysis of the food safety offences of Bangladesh helps the writer to reach the following important findings.

Firstly, the food safety statutory laws of Bangladesh do not embrace the Three-Tier model of offences. Secondly, a greater part of the offences do not encompass a wide range of \textit{actus

\textsuperscript{1180} The regulatory framework for food safety in Bangladesh and its drawbacks has been discussed in detail in chapter 5 of this thesis.

\textsuperscript{1181} The administrative enforcement of food safety regulation and its problems will be discussed details in chapter 8 of this thesis.
reus. Thirdly, a number of laws approve the defences of due diligence and mistaken belief for the food manufacturers. These defences should not be unrestricted. These findings are discussed below.

7.5.1. Three-Tier Model of Offences is Not Applied

Some statutes have endorsed the offences with mens rea in Bangladesh, for example, s 273 of the PC 1860, s 41 of the CRPA 2009. However, although these offences appear to be characterised as the offences with subjective mens rea but they cannot be purely said to be considered Tier 1 offences. This is because these offences always do not impose higher or even adequate\(^{1182}\) penalties which may indicate appropriate sanctions for the culprit who adulterates food where a subjective mens rea has been demonstrated.

Tier 2 type offences are not witnessed in the statutes that have been discussed in section 7.4 of this chapter. Many of the provisions of above mentioned statutes, for example, s 6 of the PFO 1959, s 19 of the BSTIO 1985 resemble Tier 3 offences as they have omitted the prerequisite of a mens rea element. But these offences cannot be truly categorised as Tier 3 offences since they involve the possible sanction of imprisonment. It is true that these types of offences liberate the consumers because the prosecution does not have to prove the mens rea (which is a difficult task for the prosecution),\(^{1183}\) but the imposition of a severe penalty without the necessity of demonstrating mens rea may cause an undesired injustice to the food manufacturers.

Finally, the Tree-Tier model of offences allows responsive regulation to be applied in a smooth way as it lets the regulators escalate to higher penalties from lower penalties

\(^{1182}\) See section 7.7 of this chapter.

\(^{1183}\) Gordon, ‘Subjective and Objective Mens Rea’, above n 1184, 365; see generally Perkins, above n 1084, 906.
gradually. The Three-Tier model also ensures that food manufacturers are not penalised with a harsh sanctions for offences lacking any prerequisite mens rea (as this would create possible injustice). Hence, Bangladesh should follow the model of the FA 2003 where harsh penalties are only applicable for offences where mens rea is required to be proved. Overall, based on the above discussion, the current thesis recommends that the Three-Tier model of offences as applied in the FA 2003 is a convenient option to adopt in the food safety criminal liability regime of Bangladesh.

7.5.2. Narrow Actus Reus

The actus reus of a food safety offence should be much broader so that it can take in all possible ways by which a manufacturer can adulterate or make food unsafe. But a significant number of food safety offences in Bangladesh do not ensure a broad actus reus.

To address this issue, Bangladesh can follow the equivalent examples of the FA 2003, discussed in section 7.3 of this chapter. In order to encompass a broader actus rea, the respective laws should be carefully updated on a regular basis to cope with the contemporary forms of committing the offences. The example of s 6A ofPFO 1959 can be given here. The law should be updated to include sodium hydrosulfide as a prohibited chemical in this section. Scientific literature in the area needs to be regularly canvassed to ensure that Bangladesh’s list of chemicals or substances that are listed as harmful and their use prohibited is regularly updated.

7.5.3. Unrestricted Defences

The discussion in section 7.4 exposes that the major pieces of food safety legislation in Bangladesh offer the defence of due diligence and mistaken belief to the food manufacturers.
Chapter 7: Criminal Liability of Food Manufacturers in Bangladesh

The ongoing section of this chapter will analyse rational of these defences in a food safety case considering the views portrayed in different legal research literature.

**Whether ‘Due Diligence’ Defence Should Be Allowed Unrestrictedly**

Offences relating to consumer protection allow ‘due diligence’ as a common defence.1184 ‘Due diligence’ is ‘the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems’.1185 It is used to distinguish between the persons who have used all reasonable efforts to avoid the offence and those who have not.1186 ‘Due diligence’ refers to a minimum standard of behaviour which is applied to defend oneself against the violation of regulatory or supervisory provisions so as to ensure that the particular process was properly carried out.1187

However, a number of legal studies refuse to accept the defence of due diligence in product liability offences.1188 Several US cases1189 suggest that if a corporation prohibits any criminal conduct by making express policies or instructions (which conforms to the due diligence element), it will nevertheless be criminally responsible for the acts or omissions of its agents.

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1186 Cartwright, above n 1184, 11.
1187 Universal Telecasters (Qld) Ltd v Guthrie (1978) 18 ALR 531; Solaiman, Investor Protection, above n 151, 213.
1188 For example, Metzger, above n 631, 53; Samuel R Miller and Lawrence C Levine, ‘Recent Developments in Corporate Criminal Liability’ (1984) 24(1) Santa Clara Law Review 41, 43.
and employees.\textsuperscript{1190} In \textit{United States v Hilton Hotels Corp},\textsuperscript{1191} an agent of the defendant corporation violated the company’s guidelines, which set up the policy not to engage in particular offensive activities. The defendant was held criminally liable, ignoring the due diligence defence.\textsuperscript{1192}

In Bangladesh the \textit{SPA 1974} retains the due diligence defence. As understood from the s 25E of the legislation, everyone — including the food manufacturer, either as individual or as corporate body, its directors, managers, officers, employees, and agents — is exempted from the criminal liability when it can be demonstrated that they/it exercised ‘due diligence’. But in NSW (as discussed in section 7.3.3 of the chapter), the due diligence defence is restricted and it is not granted to the employees, agents or directors of the accused food manufacturers. Food safety offences are public welfare and public health related concerns, which results in the due diligence defence being regarded as inappropriate. The current study argues that considering the continuing level of unscrupulous adulteration of foodstuffs by manufacturers in Bangladesh, it is implausible to permit the defence of due diligence unrestrictedly, especially for food manufacturers. In that case Bangladesh may follow the example of the \textit{FA 2003}.

\textbf{Whether ‘Mistaken Belief’ Defence Should Be Accepted in All Cases}

In Bangladesh, the \textit{PFO 1959} provides the defence of mistaken belief in regard to food safety offences. Neither any provision in the law nor any case references were found on how to apply this defence in \textit{PFO 1959}. Further, the statute does not mention whether this kind of mistaken belief should be ‘reasonable’ or not. By contrast, the discussion in section 7.3.1 notes that the \textit{FA 2003} s 27 does not allow the defence of ‘mistaken but reasonable belief’ for

\textsuperscript{1190} Miller and Levine, above n 1188, 43; Metzger, above n 631, 53.
\textsuperscript{1191} 467 F 2d 1000 (9th Cir, 1972), cert denied, 409 US 1125 (1973).
\textsuperscript{1192} Miller and Levine, above n 1188, 43–4. See also 711 F 2d 570, 572 (4th Cir, 1983).
the offences mentioned in div 2 of pt 2 of the Act. Moreover, in NSW the defence of ‘honest and reasonable mistake of fact’ is hard to establish in regard to an offence committed. If the accused attempts so utilise this defence, there are few requirements by which to judge its validity.¹¹⁹³ First, the accused should raise an issue of a mistake of fact not ignorance. For instance, if a fish processor argues that he or she was not aware of the fact that using formalin can cause harm to human body and thus he or she used it in fish processing to keep it fresh, it represents the lack of awareness or ignorance of the defendant, not a mistake of fact. He or she should have investigated the effects of formalin and ‘turned his or her mind to the relevant facts.’¹¹⁹⁴ Secondly, that mistake should be such as to render the behaviour of the accused legally innocent, that is, the defendant believed in a state of facts which, had they existed, his or her conduct would not have constituted an offence.¹¹⁹⁵ Thirdly, the mistake must be ‘honest and reasonable’.¹¹⁹⁶ Lastly, the mistake must be fact based, not law-based.¹¹⁹⁷ It is commonly presumed that everyone knows the law and ignorance of law is not an excuse unless otherwise provided by the statute.¹¹⁹⁸ In a case where the defendant satisfies an ‘evidential burden’ (for example, he or she points to evidence which recommends a reasonable likelihood that the issue exists or does not exist) required to imply the defence, the prosecution must establish ‘beyond reasonable doubt’ that the defendant did not have ‘a reasonable belief’ in the facts asserted.¹¹⁹⁹ That means, the onus is on the defendant to raise

¹¹⁹⁵ Proudman v Dayman (1941) 67 CLR 536, 540 (Dixon J).
¹¹⁹⁶ See Proudman v Dayman (1941) 67 CLR 536. See also He Kaw Teh Case (1985) 60 ALR 449, 455. The judge referred the case R v Tolson (1889) 23 QBD 168, particularly at 181 (Cave J) from whence the ‘honest and reasonable belief’ has come.
¹¹⁹⁷ See the He Kaw Teh Case (1985) 60 ALR 449, 884.
¹¹⁹⁸ Spears, Quilter and Harfield, above n 1059, 29. In fact, ‘where the mistake is categorised as one of law, liability is essentially absolute’: Brown et al, Criminal Laws, above n 283, 393.
¹¹⁹⁹ He Kaw Teh Case (1985) 60 ALR 449, 475.
adequate evidence on behalf of his or her ‘honest and reasonable mistake of fact’, and in that case the onus shifts to prosecution to disprove the defence either by establishing that the mistake of fact was not ‘reasonable’; or it was not ‘honest’ and this must be established beyond reasonable doubt.

Based on the above discussion, the current study advocates that, in Bangladesh the defence of mistaken belief should be ‘honest and reasonable’. Further allowing this defence for comparatively less serious offences may cause injustice to the consumers. It may defer or lengthen the period of the implementation of the laws and ultimately result in ineffectiveness. The current study argues that considering the severity of the food adulteration situation in Bangladesh, the defence of mistaken belief only should be accepted for the offences where mens rea is required and where serious sanctions are given. Especially when the regulators implement the laws at an ‘in the field’ level for less serious offences, the defence of the mistaken belief should not be allowed. In such cases Bangladesh can follow the equivalent example of the FA 2003. This will assist the food manufacturers to be more aware of the need to produce safe foods in order to avoid penalties.

7.6. Persons Liable for Manufacturing Unsafe Foods

A criminal offence is associated with different persons, the natural or the artificial/juristic person. In food safety cases different individuals, corporate bodies, and state authorities (such as those of various levels of Government) are involved. A consumer harmed by an unsafe food product can make liable all persons involved to the production of that food. This includes the manufacturer, either individually or as a body corporate. The following discussion will detail these persons who are criminally liable for the manufacture of unsafe foods in Bangladesh.
7.6.1. Individuals

A food manufacturer, as corporation (or company or body corporate), cannot work without its individual employees, officers and agents, all of whom are human beings.1200 In practice, it is barely practicable to punish the corporation without punishing the individual members of that corporation (that is, directors, executives, staff, employees and so on) while applying the criminal sanctions upon the food manufacturers.1201 A corporation may suppose that it will be capable of ‘shrugging off’ the liability by paying off the penalties (fines) unless the individuals within the corporation are penalised personally; and thus it is expected that corporations will comply with laws when the corporate officers are punished.1202 Francis thinks that if the individuals are punished for involvement in food adulteration, the manufacturer as a corporate body will try to take care of the whole group.1203 Mueller advocates imposing criminal liability on these individuals, particularly corporate management, because he viewed ‘management as its [the corporation’s] brain, capable of exercising the requisite criminal intent, so that corporate criminal liability follows management guilt’ and believed that the corporation had the responsibility for the actions or omissions of its employees or agents who acted in the course of their employment.1204 Individual liability is strongly promoted by a number of legal scholars on the basis that the shareholders ultimately suffer from the loss of the business, and they have can employ their authority by appointing a new administration or by overseeing the activities of high ranked company officers.1205 It is in such a company’s interest not only to insure their officers against such risks (if possible)
but to ensure low premiums or less risk by ensuring the most ethical courses of action are adopted throughout the business’s operations.

Individual criminal liability is furthermore a concern when a single person owns the factory and manufactures unsafe foods. Usually this may occur when the individual is knowingly involved in the production of particular unsafe foodstuffs that can cause harm to consumers. In Bangladesh, many individuals (as manufacturers) own small food manufacturing plants where they are engaged in producing unsafe foodstuffs.1206

**Individual Criminal Liability in the Statutory Laws of Bangladesh**

Individual liability for manufacturing of unsafe food products is not clearly articulated in the statutes of Bangladesh. For example, the *PC 1860* (s 272) uses the word ‘whoever’ to identify the person who contravenes the law. The *SPA 1974* (s 25C) also uses the same word ‘whoever’. However, in particular s 25E of the *SPA 1974* states in regard to the liability of the food manufacturers (for unsafe or adulterated foods and so forth) refers to a corporation, company or a firm or any other corporate body being liable for producing unsafe foods under s 25C of the *SPA 1974* and in these cases every partner, director, manager, secretary or other officer or agent thereof is personally liable for the offence. This provision is praiseworthy.

Similarly to the *PC 1860*, while stating the relevant penalties s 44 of the *PFO 1959* asserts, ‘*whoever* contravenes any provision of this Ordinance mentioned … [emphasis added]’. The word ‘whoever’ is not clarified/defined in any of these statutes; nor was any judicial reference found with an explanation of these terms in reference to food safety issues in Bangladesh. Several examples can be given similar to the above where the laws include such

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kinds of ambiguous and vague terms to identify the regulatees that can be subject to criminal liability in Bangladesh.\textsuperscript{1207} The only law which specifically identifies the individual liability for consumer rights issues in Bangladesh is the \textit{CRPA 2009}. This law mentions the criminal liability of different ‘persons’ in regard to manufacturing of unsafe foods. The \textit{CRPA 2009} later clarifies the word ‘persons’ and provides that the word ‘persons’ will include any ‘individual, company, association, partnership business, any other registered association or their representatives’.\textsuperscript{1208}

In the case of NSW, individual liability has been clearly articulated in the enactment where necessary. Sections that deal with food safety offences in the \textit{FA 2003} provide the liabilities for individuals when mentioning the particular penalty units (for example, see ss 13–21). In particular, s 123(1) of the \textit{FA 2003} states the individual liability of the employees and agents for food safety. This section declares that an employee or an agent may be liable for unsafe foods under this law and occupying such positions cannot be submitted as a defence. Hence, in these clear cases, an individual involved with the manufacturing of unsafe foods does not have any opportunity to ignore their criminal liabilities.

Based on the above discussion, it can be argued that an appropriate enactment necessitates providing appropriate sanctions both for a corporation and its employees.\textsuperscript{1209} Therefore, Bangladesh can update the above mentioned pieces of legislation following the examples of liabilities for the individuals articulated in the equivalent legislation in NSW (as has been discussed in this section).

\textsuperscript{1207} See generally Solaiman, \textit{Investor Protection}, above n 151, 195–201.
\textsuperscript{1208} \textit{CRPA 2009} s 2(17).
\textsuperscript{1209} Metzger, above n 631, 87.
Chapter 7: Criminal Liability of Food Manufacturers in Bangladesh

7.6.2. Body Corporate

The prerequisite mental elements for imposing criminal responsibility upon the manufacturers have been relaxed in criminal product liability and the *mens rea* element is not a necessity for all food safety offences.\(^{1210}\) Today the relaxation of *mens rea* allows the manufacturers as a corporate body to be criminally liable,\(^{1211}\) unless the specific criminal statute clearly particularises and means the human being.\(^{1212}\)

A food manufacturer, as a corporation, is liable for the act or omission of the individuals involved with it under the ‘vicarious corporate criminal liability’ (VCCL) principle. In such instances, the behaviours or activities of the ‘corporation’s individual employee or agent … supplies the *actus reus* of the crime.’ In *Inland Freight Lines v United States*,\(^ {1213}\) the court held the corporation criminally liable although no intention was evident among the corporate agents. A Harvard study mentions that ‘corporations have been convicted of crimes requiring knowledge on the basis of the “collective knowledge” of the employees as a group, even though no single employee possessed sufficient information to know that the crime was being committed.’\(^ {1214}\) In practice, a corporation cannot possess the mind and thus it cannot have any *mens rea*. Therefore, if an offence requires the subjective or objective fault elements (for example Tier 1 and Tier 2 type offences mentioned in section 7.3.1 of this chapter), the court may consider the *mens rea* of an individual employee or agent or the director of a corporation.

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\(^{1210}\) See Henry W Edgerton, ‘Corporate Criminal Responsibility’ (1927) 36(6) *Yale Law Journal* 827, 828. See the decisions of the *Peaks, Gunston & Tee Ltd v Ward* [1902] 2 KB 1; *Commonwealth v Graustein & Co* 209 Mass 38, 95 NE 97 (1911). For more details, see section 7.2.1 of the chapter.

\(^{1211}\) Edgerton, above n 1210, 827–8.

\(^{1212}\) Ibid 842.

\(^{1213}\) 191 F 2d 313, 315 (10\(^{th}\) Cir, 1951).

\(^{1214}\) ‘Corporate Crime: Regulating Corporate Behavior’, above n 1205, 1248. See also the decisions of the *United States v TIM E - DC Inc*, 381 F Supp 730, 739 (WD Va 1974). For more details, see Angelo Capuano, ‘Catching the Leprechaun: Company Liability and the Case for a Benefit Test in Organic Attribution’ (2010) 24(2) *Australian Journal of Corporate Law* 177, 179, 201.
to specify the guilty mind of the corporation.\textsuperscript{1215} Such individuals’ liability is widely known as the VCCL.\textsuperscript{1216} Contemporary regulations relax the \textit{mens rea} requirements with a view to allowing the corporations to be liable for the activities of their employees or managers.\textsuperscript{1217} Therefore, when the statute provides criminal liability by relaxing the \textit{mens rea}, a corporation cannot deny its VCCL for the activities of the employees.\textsuperscript{1218}

The VCCL has some conditions. A food manufacturer is liable for its employees’ activities under the VCCL for producing unsafe food products only if the particular employee acts within the scope of their authority.\textsuperscript{1219} Brown states that a corporation is liable for the criminal act or omission of its employees in cases where the employees work within the scope of their employment and if their intention involves gaining benefit for the corporation.\textsuperscript{1220} In \textit{United States v Gold} case,\textsuperscript{1221} the court held that, ‘to be acting within his employment, the agent first must have intended that his act would have produced some benefit to the corporation or some benefit to himself [or herself] and the corporation second’.\textsuperscript{1222} Therefore, when an individual as an agent of the manufacturer does any act or omits any act within the scope of their employment and for the benefit of the company, that particular individual will be legally responsible for corporate criminal liability — this principle is called as ‘\textit{respondeat superior}’,\textsuperscript{1223} which is founded upon the principle

\textsuperscript{1215} Hall, above n 1056, 551.
\textsuperscript{1216} Brown, above n 1070, 280.
\textsuperscript{1218} \textit{United States v Hilton Hotels Corp} 467 F 2d 1000, 1006–7 (9\textsuperscript{th} Cir, 1972).
\textsuperscript{1219} See \textit{United States v McDonald & Wilson Waste Oil}, 933 F 2d 35, 42. See also \textit{United States v Bi-Co Pavers Inc}, (5\textsuperscript{th} Cir, 1984) 741 E2d730, 737.
\textsuperscript{1220} Brown, above n 1070, 279.
\textsuperscript{1221} \textit{(11\textsuperscript{th} Cir, 1984) 743 F2d 800.}
\textsuperscript{1222} \textit{United States v Gold} 743 F 2d 800, 822–3 (11\textsuperscript{th} Cir, 1984). See Hall, above n 1056, 550–1.
\textsuperscript{1223} ‘Corporate Crime: Regulating Corporate Behavior’, above n 1205, 1247.
of VCCL. It does not matter in regard to VCCL whether the particular individual employee or agent is working as a director or an ordinary servant in the company. A court need not even require seeing the corporation’s intention to benefit.

Corporate Criminal Liability in the Statutory Laws of Bangladesh

Various laws of Bangladesh provide manufacturer liability as body corporate. The following section will discuss these enactments in regard to the criminal liabilities of food manufacturers as a corporate entity.

Apart from s 25E of the SPA 1974 articulated in the above discussion, s 27(1) of the CRPA 2009 also contains specific provisions on criminal liability for corporations (manufacturers). Both of the provisions of the statutes are positively advocated.

But as mentioned previously, some statutes of Bangladesh use the ambiguous and vague terms like, ‘whoever’ to indicate liability for all violators of the laws. The statutes appear not aimed specifically at food manufacturers. More than a few academic writers in the area suggest that the use of words like ‘whoever’ in the criminal statutes usually does not succeed in achieving the goal of the offences concerned in the statute.

By contrast, in NSW the FA 2003 mentions the liability of a body corporate while stating the liability of the individual at the same time. In particular, s 122 of the FA 2003 articulates the criminal liability of the corporations when it states that every director or every person related

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1225 See, eg, United States v Basic Constr Co, 711 F 2d570, 573 (4th Cir, 1983); United States v Koppers Co, 652 F 2d 290, 298 (2d Cir, 1981).

1226 See, eg, United States v Empire Packing Co, 174 F 2d 16, 20 (7th Cir, 1949); United States v Carter, 311 F 2d 934, 942 (6th Cir, 1963); Old Monastery Co v United States, 147 F 2d 905, 908 (4th Cir). See ‘Corporate Crime: Regulating Corporate Behavior’, above n 1205, 1250; Metzger, above n 631, 52.

1227 Christopher D Stone, Where the Law Ends: The Social Control of Corporate Behavior (Harper and Row, 1975) 25; Metzger, above n 631, 49.
with the management of the corporation is liable for any offence committed by the corporation. Several sections of the *FA 2003* refer to s 122 after inserting the offence provisions. For instance, s 14 of the *FA 2003* notes that ‘an 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’.

Section 122 of the *FA 2003* in fact expresses that it is no matter whether a corporation is proceeded against under this law or not, persons will be prosecuted and nothing can affect the criminal liability of the corporations.

Corporate bodies like the large food manufacturers are sometimes powerful and they invest huge amounts to hire renowned lawyers to win the cases against them by using thin loopholes in the statutes. Thus it is imperative to include the food manufacturers or anyone involved in the offence with clear language in the statutes. But, until it is done, the courts of Bangladesh can construe the ambiguous words like ‘any person’ or ‘whoever’ by including the food manufacturers. As an example, in *United States v Union Supply Co* the court suggests that if a law intends to deal with the corporation then word ‘any person’ can include the ‘corporations’.

Finally food manufacturers, either as an individual or as a corporate body, are liable for the production of contaminated and adulterated food products. In Bangladesh, although some of the statutes mention the corporate liability, many of them fail to indicate the responsibility clearly. Rather these statutes use the vague words or phrases that lack the necessary clarity; these need to be corrected. For this purpose, this study recommends that Bangladesh can

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1228 See the similar notes in *FA 2003* ss 16, 17, 18.
1229 See generally Metzger, above n 631, 49.
update its laws in light of the equivalent example of the *FA 2003*, which asserts the corporate liability and individual liability separately.

7.6.3. Government

The government is responsible to ensure safe food for all consumers. Public officials perform this task on behalf of the government. So the public officials concerned as well as the GoB itself are responsible if they fail to perform their official duties to guarantee safe food for the consumers. Mashaw believes that ‘a failure to injure — that is, to coerce compliance with a predetermined rule of conduct — is a dereliction of official duty’.1231

It warrants mentioning that the government and its officials in Bangladesh are excluded from liability with a sole exception: the *SPA 1974*, which deals with the liability of the government for the manufacturing of unsafe foods. Section 34 states that the Government or any related person can be held legally responsible if they do not act in good faith under this law.

In NSW, s 134(2) of the *FA 2003* refers to the minister, enforcement agency, crown representative, or any authorised officer as a ‘protected person’ under the law. These protected persons generally do not have any ‘civil liability’ for compensation in cases where a ‘claim is made in connection with the handling, sale or consumption of food’ and the ‘claim is based on alleged negligence or other breach of duty (including statutory duty) arising

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1231 Jerry L Mashaw, ‘Civil Liability of Government Officers: Property Rights and Official Accountability’ (1978) 42 *Law and Contemporary Problems* 8, 8. ‘Injury’ or harms to businesses and individuals by regulatory authorities in the prosecution of their duty can include seizure or confiscation of goods or publication of damaging information (negative publicity): at 11. He recognises the immense harm that can be wrought by a enforcement failure (that is, the failure to injure or harm by imposing available regulatory sanctions, undertaking necessary inspections, or for example, continuing to license a wrongdoer. In the context of food safety, this could be continuing to license an adulterating manufacturer without that party demonstrating its amended processes, or licensing the production of a product that clearly includes a material widely recognised as harmful to the consumer. Unlimited immunity for officials at various levels is ill-advised as being immune leaves them more vulnerable to dereliction of duty. See also 14–15; 18 et seq.
because of the exercise of, or the failure to exercise, any function under this Act’. Importantly, the FA 2003 does not bring up anything about the exclusion of criminal liability, which suggests that the Government officials may subject to criminal liability in relation to food safety.

Given the realities in Bangladesh discussed in section 2.4 and section 2.5 of chapter 2 of the thesis, it is supposed that the Government and especially its officials should incur liability for the rampant production of unsafe foodstuffs. It is undesirable that the legal responsibility of the government under SPA 1974 is excused by the ‘good faith’ immunity, and no further statute includes any provision providing the criminal liability of the government officials for the uncontrolled production of unsafe foods in Bangladesh. But in NSW, the persons such as the Crown, Ministers, or other government officials bear criminal liability which makes them always take care in the performance of their duties.

Based on the above discussion, it can be argued that Bangladesh should incorporate specific provisions regarding criminal liability for the government and government officials, especially for the high officials in like manner to the equivalent provisions in NSW. It may encourage the bureaucrats to perform official duties cautiously and consider the food safety issues properly, in terms of ensuring the effectiveness of the legislation.

7.7. Adequacy of Penalties for Manufacturing Unsafe Food

The inadequacy of penalties in the food safety liabilities regime of Bangladesh is a significant shortcoming that needs immediate attention. Given the perspective of the widespread food adulteration throughout the country, most of the statutes do not impose satisfactory penalties upon food manufacturers found guilty of an offence. There can therefore, it is argued, be little

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1232 See FA 2003 s 135(2)(a)(b).
deterrent effect. Furthermore, the penalties in the criminal liability regime in Bangladesh do not follow the structure of the Three-Tier model (as demonstrated in section 7.3.1 of this chapter) and are replete with anomalies as well as in practice an apparent reluctance to impose the available sanctions. It is completely unstructured. For example, the penalty for the Tier 1 type offences (which requires subjective mens rea) imposes very lower fines and mild punishments. On the other hand, a penalty for Tier 3 type offence (which purposefully cancels the fault element) imposes rigorous punishments. The following discussion will discuss the rational and adequacy of the penalties in the food safety criminal liability regime in Bangladesh.

The penalty set in s 272 of the PC 1860 for the adulteration of food or drink is a maximum term of six months imprisonment or up to a maximum fine of Bangladesh taka (BDT)1000 (equivalent to AUD12\(^{1233}\)) or both. Section 273 of the PC 1860 prescribes the same penalties for selling, or offering or exposing for sale any food or drink that has become noxious or unfit for consumption knowingly or having reason to know that it is thus. Though s 273 could be a Tier 1 type offence considering the mens rea requirement, it cannot be so due to its extremely low punishments afforded under the section. In fact, given the gravity of the both offences and the amount of the fines, it is alleged that this punishment is absurd in the 21\(^{st}\) century and scarcely a deterrent in situations where the potential profit far exceeds any possible fine payable.

The PFO 1959 is one of the laws most frequently used to combat the production of unsafe food in Bangladesh; but unfortunately this law does not provide adequate sanctions either. The PFO 1959 was amended in 2005 and the penalties applying increased substantially but the monetary penalties are still inadequate. The maximum penalty for a first offence in regard

\(^{1233}\) 1 AUD is equal to 85 BDT approximately (6 January 2013).
to the manufacture of adulterated or stale (s 6) food which is not of a fit nature, substance or quality has been raised to BDT50 000 (equivalent to AUD588) or imprisonment for a term of up to one year, or both. The maximum penalties for subsequent offences of the same nature are a fine of BDT200 000 (equivalent to AUD2353) or three years imprisonment with forfeiture of manufacturing machinery or premises (factory or shop). Both monetary sanction and terms of imprisonment and confiscation may be imposed.\textsuperscript{1234} As argued previously, since this offence does not require any \textit{mens rea}, it should not involve any imprisonment. The maximum penalty for these types of offences in the \textit{PFO 1959} (for example, s 6A) could be increased to a far heavier monetary fine, however.

Unlike the above mentioned negligible penalties, the \textit{SPA 1974} provides severe sanctions, such as life imprisonment and the death penalty for food adulteration.\textsuperscript{1235} But offences which do not require proving any subjective fault element within the frame of Tier 3 should not have available harsh penalties such as the death penalty.\textsuperscript{1236}

The \textit{BSTIO 1985} mentions in s 30 that a person will be subject to two years imprisonment or a fine from a minimum of BDT7000 (equivalent to AUD83) to a maximum of BDT50 000 (equivalent to AUD590) for the contravention of the provisions of s 19. In addition, a court may direct that the offender forfeit their property where necessary. The monetary penalties as laid out in \textit{BSTIO 1985} are negligible, and they need to be increased in accordance with a modern perspective of the seriousness of the crimes involved. The traders and manufacturers are almost without exception very wealthy and they would hardly care about a penalty of

\textsuperscript{1235} \textit{SPA 1974} s 25C(1).
\textsuperscript{1236} However, it is notable that manufacturers who produce unsafe food that causes the death of numerous people and who demonstrate the necessary \textit{mens rea} should carry the liability and be subject to prosecution for involuntary manslaughter or reckless homicide. Metzger, above n 631, 74; see also LaFave and Scott, above n 1080, 208.
Chapter 7: Criminal Liability of Food Manufacturers in Bangladesh

BDT50,000. It could be more useful if they faced a far heavier fine. Imprisonment should not be allowed as a penalty for this offence as the fault elements are omitted in the offence section.

The penalties of the CRPA 2009 are comparatively higher than those of other statutes and more practical than those applying to breaches of the other food safety laws of Bangladesh. A person faces maximum 3 years imprisonment and/or BDT200,000 (equivalent to AUD2353) for the contravention of s 41 of the CRPA 2009. As mentioned in section 7.4.5 of this chapter, offences similar to those of s 41 actually fit the category of Tier 1 type offences. Because this offence requires a subjective *mens rea* to be proved as well as imposing a severe penalty, at least from the perspective of the duration of imprisonment. However, the monetary fine for the violation of offences identical to s 41 also needs to be more substantial.

In practical terms, the reason that the current study is arguing for a higher penalty is that the main object of the criminal fine in the food manufacturing industry is to discourage manufacturers from making a profit by producing adulterated foods.1237 Some manufacturers may regard the fine as a business cost and make huge profits by strongly adulterating food, in which case the fine is not acting as a deterrent.1238 Several scholarships on corporate liability suggest that the reason that food manufacturers adulterate foods is in order to gain greater profit.1239 An important and effective way to reduce this may be for the legislation to include penalties that would seriously threaten their profit, namely by the imposition of harsh financial penalties in regard to offending behaviours and so to encourage them to stop

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1237 See generally Fisse, above n 629, 377.
1239 For example, see generally Charles H McCaghy, Deviant Behavior: Crime, Conflict, and Interest Groups (Macmillan Publishing, 1976) 218; Fisse, above n 629, 377; Robinson and Kane, above n 1023, 142; Metzger, above n 631, 14.
continuing such undesirable behaviours. Coffee regarded criminal fines lacking any apparent deterrent effect as essentially a tax on corporate crime and says, ‘... the criminal justice system is simply placing a tax on corporate crime, which, although it is more than a nuisance tax, is also less than a deterrent. The rational, if amoral, corporation may continue to do business as usual.’ Therefore, a monetary fine, unless the maximum is massive and rigorously applied, appears to be worthless in regard to affecting the behaviour of an executive or of a corporation. Similarly, Brown et al also suggested that financial penalties that are imposed upon the persons within a corporation by the court are sometimes treated as a tax by the industries rather than as a deterrent. Therefore, again, a monetary fine — unless it is extraordinarily high and rigorously applied— appears to be worthless as regards a penalty for and a deterrent to an executive of a corporation.

To redress the deficiency in regard to the inadequacy of penalties for food safety offences in Bangladesh, the equivalent example of NSW is relevant here. The FA 2003 prescribes different penalties for the manufacture of unsafe foods. Part 2, div 1–2 of this Act prescribes dissimilar penalties for Tier 1, Tier 2 and Tier 3 offences as has been shown in section 7.3.1 (in Figure 7.2) of the chapter. But whatever the penalties provided for any of the offences, be it Tier 1 or Tier 3 offence, all of them are up-to-date and adequate considering the current real

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1240 Stone, above n 1227, 29; Spurgeon and Fagan, above n 1238, 426–7.
1242 See generally Clinard and Yeager, above n 1202, 287.
1244 See generally Clinard and Yeager, above n 1202, 287.
value of the fine. For example, an individual will be fined up to 750 penalty units\(^\text{1245}\) (which is AUD82 500 equivalent to BDT7 012 500), while a corporation can be fined up to 3750 penalty units (which is AUD412500, or BDT35 062 500) for handling food in an unsafe manner,\(^\text{1246}\) which is a Tier 1 offence. On the other hand, an individual will be given a maximum of 500 penalty units and a corporation will be given maximum 2500 penalty units for the failure to comply with the relevant sections of the Food Standards Code under s 21 of the \textit{FA 2003}, which is a Tier 3 offence.\(^\text{1247}\)

It is obvious from above discussion on the \textit{FA 2003} that this statute prescribes different penalties for individuals and corporations. Sometimes the penalties for corporations are four or five times those applying to the individual offender. The liability of a corporation may not be same as that of individuals. A corporation can affect many people whereas an individual can affect only a few. A corporation can contaminate or adulterate food in its control and harm many consumers within a short span of time whereas it is difficult for an individual to reach the same number of people in a similar time, nor has the individual the opportunity to do so. The ability to pay a fine may not same for an individual as it is for corporations, however. It is therefore appreciated that the penalties for corporations have been clearly distinguished from those applying to individuals. The framers of the legislation appear to have given consideration to the respective circumstances of individuals and corporations, in terms of access to resources, both in terms of a corporation’s greater ability to source knowledge and expertise and its ability to absorb fines, as compared to that of individuals liable in the same area of offence. In Bangladesh, as has been demonstrated earlier, there is

\(^{1245}\) According to \textit{CSPA 1999} s 17 the value of a penalty unit is AUD 110.

\(^{1246}\) \textit{FA 2003} s 13.

\(^{1247}\) Ibid s21.
little or no distinction and liability and penalties are in most cases same for all, both for individuals and for corporations.

As realised from the above discussion, the penalty regime of the food safety related statutes in Bangladesh is unstructured and the sanctions are inadequate in terms of their monetary value. Therefore, it can be suggested that Bangladesh follow the Three-Tier model of offences of the FA 2003 to upgrade and increase the penalties for the different offences articulated in laws considering the mens rea requirement of the offences. But until these enactments have been updated by the government, the courts can play a role in defending the consumer’s interest and can interpret the laws in so far as it is currently possible to impose adequate penalties on offending persons and corporations. Finally, Bangladesh also needs to upgrade its liability regime considering the separate penalties for the individual and body corporate.

7.8. Summary and Conclusions

This chapter has discussed the offences, its elements and especially the traditional requirements of mens rea for establishing the offences. Discussion of numerous examples of scholarship has demonstrated that although the traditional way of criminalising food safety conducts required fault elements, today this is not always necessary. Several legal scholars have shown that food safety cases have had the necessity to prove fault elements relaxed. However, as an example of contemporary legislation, the FA 2003 has adopted a significant Three-Tier model of offences (considering their mens rea and penalties) which encompasses offences with subjective mens rea (Tier 1), offences with objective mens rea (Tier 2) and offences without mens rea (Tier 3). Considering the prerequisite fault elements, the highest

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penalties are available for the Tier 1 offences, less harsh penalties are available for Tier 2 
offences and the lowest penalties are available for Tier 3 offences. This Three-Tier model 
allows responsive regulation to work properly as it escalates from lower penalties to higher 
penalties considering involvement of the fault element of the offences. On the other hand, the 
statutes of Bangladesh do not embrace any organised structure of offences based on their 
mens rea and penalties. It is unstructured because it imposes negligible penalties for the 
offences with subjective mens rea, and severe penalties for offences without mens rea. The 
present research has shown that none can be advocated positively. In addition, this study did 
not find any offences that satisfied the criteria for Tier 2 offences in any of the relevant 
statutes of Bangladesh. Since it is argued that the Three-Tier model may be useful in 
implementing the responsive regulation theory (which is the basic theory that this study has 
chosen to apply to the food safety regulation of Bangladesh), this research has recommended 
that Bangladesh adopt the Three-Tier model of the FA 2003 which will help the smooth 
working and application of the responsive regulation in the area of food safety.

The actus reus of the offences in Bangladesh is not wide enough to encompass all the 
potential ways of committing a particular offence. This issue needs to be concentrated on. 
Further, there are few unrestricted defences offered named ‘due diligence’, ‘mistaken belief’, 
all of which should be restrictedly applied.

The language of the statutes should be amended with a view to making the individuals and 
corporate bodies separately responsible. The word ‘whoever’ or similar phrases either need to 
be clarified in the statutes, or the enactments should use the specific words where every 
single person involved with food safety offences can be specifically included under the 
criminal liability regime. The GoB may be exempted from the civil liability; but the 
personnel working as part of the government should not be exempted from criminal liability
for the failure of their duty to protect consumers from the production of unsafe foods. Finally, the penalty regime needs to be restructured and adulterated food manufacturers should be penalised with adequate fines in such a way that it destroys any hope of profit by adulterating food. All these recommendations are proposed for stopping the ongoing uncontrolled food safety problems in Bangladesh with a view to attaching stronger criminal liability to the adulterated food manufacturers. The application of these recommendations is hoped to ensure that consumers get justice and are assured of safe food.
Chapter 8: Enforcement Framework of Food Safety Regulations in Bangladesh

8.1. Introduction

Enforcement is the last step of achieving the objectives of laws. It denotes the ultimate success or failure of the entire regulatory mechanism. The laws can be updated and thereby made relevant, liabilities can be standard and contemporary, but the whole regulatory system may perhaps be worthless if the enforcement framework is not effective.

The present chapter will examine the enforcement framework of food safety regulations (EFFSR) of Bangladesh in light of their counterparts of NSW where appropriate and necessary. The EFFSR of Bangladesh is divided into two parts, namely, ‘administrative enforcement’\(^{1249}\) (also called ‘regulatory enforcement’) and ‘judicial enforcement’.\(^{1250}\) The regulatory bodies that are concerned with the administrative enforcement of the food safety laws in Bangladesh, along with their compositions, functions and powers, have been discussed in chapter 5 of this thesis. Hence, while discussing the administrative implementation of the major food safety laws in Bangladesh, those administrative bodies will be referred to in the current chapter without restating the details of their regulatory structures.

For the purpose of this thesis it is important to note that the criminal sanctions described in chapter 7, which impose criminal liability upon food manufacturers, are in practice upheld by the mobile court (MC)\(^{1251}\). The MC does not maintain any detailed judicial proceedings; and

\(^{1249}\) For the purpose of this thesis, the term ‘administrative enforcement’ is defined as enforcement by any regulatory authority (or administrative authority) which is conducted without following any detailed judicial process.

\(^{1250}\) The judicial enforcement will mean in this thesis where the detailed judicial proceedings are maintained to decide a food safety case by a competent court.

\(^{1251}\) See the details of mobile court in section 8.4 of this chapter.
penalties are imposed on the spot. This is why imposition of these criminal penalties (commonly used as ‘fine’1252) is treated as the ‘administrative enforcement’ in this study.

This chapter argues that the food safety regulatory bodies mentioned in section 5.3 of chapter 5 fall short to form an effective and organised administrative enforcement regime of the food safety regulations in Bangladesh. The direct enforcement of the criminal penalty without following any prior administrative enforcement steps (for example, persuasion, improvement notice, civil penalty and so on), implementation problems at the grassroots level, inadequacy of enforcement staffs, difficulties with the MC mechanism, restraints with filing complaints and the ignorance of establishing the food courts significantly contribute in the failure of the EFFSR of Bangladesh. Addressing these issues is substantial for the identification of weaknesses of the exiting framework with a view to offering the necessary recommendations in light of their NSW equivalents.

The current research has chosen the responsive regulation theory (RRT) as the basic philosophy for applying in the food safety enforcement framework (FSEF) of Bangladesh. The present FSEF of NSW is grounded on the RRT.1253 Therefore, the administrative and judicial enforcement framework of the FSEF of NSW will be stated to show a model EFFSR for Bangladesh. However, all the regulations operating in the FSEF of NSW will not be discussed in this chapter. Considering the length of the thesis, this chapter will mainly explain the Food Act 2003 (NSW) (FA 2003) in order to represent the enforcement of the food safety regulations in NSW. The total discussion of the chapter will be conducted with the object of adopting the RRT in the EFFSR in Bangladesh and to solve other concerning issues.

1252 See also section 7.4 and section 7.7 of the chapter 7 of the thesis.
1253 Mascini and Van Wijk, above n 253, 27–8; Wood et al, above n 285. See also section 3.8 of chapter 3 of the thesis.
For achieving the objectives of the chapter, the overall discussion will be conducted in two parts. Part I will discuss the administrative enforcement framework of the food safety laws (AEFFSL), whereas Part II will discuss the judicial enforcement framework of the food safety laws (JEFFSL) in Bangladesh. In both parts, the EFFSR of NSW will be discussed at the first phase to demonstrate a model enforcement framework where the RRT is adopted and practised. After that, the shortcomings of the EFFSR of Bangladesh will be identified in order to employ the RRT in accordance with the equivalent framework of NSW.

The discussion commences with an introduction in section 8.1 of the chapter. Part I will start from section 8.2, where the total discussion will be focused on how the AEFFSL in Bangladesh can accept the RRT. To achieve this goal, and as the first phase in the process, the AEFFSL in NSW will be represented as model for Bangladesh. This section will mainly depict how NSW has embraced the RRT in its enforcement regime. Then the AEFFSL of Bangladesh will be examined to identify whether the existing framework complies with RRT or not. Necessary recommendations will be offered at end of the section. Apart from the adoption of RRT in the AEFFSL of Bangladesh, some other important issues will be analysed that warrant a degree of attention. Section 8.3 of the chapter will explain the problems associated with enforcement by the Sanitary Inspector (SIs); section 8.4 will outline the difficulties with the MC enforcement; and section 8.5 will talk about the inadequacy of enforcement personnel. While discussing these concerns, the equivalent examples and provisions of NSW will be brought to fill up the shortcomings where appropriate and necessary.

Part II of the chapter will begin with section 8.6 with an aim to identify the issues relevant to how the JEFFSL in Bangladesh can adopt the RRT. To attain this purpose, the counterpart
framework functional in NSW will primarily be portrayed. Then the existing JEFFSL of Bangladesh will be described, followed by the answer to the question of whether it complies with the RRT or not. Recommendations will be offered in the final stage of the section. Some other significant issues in respect of the JEFFSL in Bangladesh will be discussed subsequently. Section 8.7 will focus on the food court issue; section 8.8 will elucidate the restraints on filing complaints; and section 8.9 will detail the time limitation on filing complaints. Finally section 8.10 will present a summary of the whole chapter along with conclusions.
Part I: Administrative Enforcement of Food Safety Laws

This part will address four major issues in relation to the AEFFSL of Bangladesh. The first issue is to unveil how Bangladesh can accommodate the RRT in its FSEF. Apart from this key issue, this part will also explain some other noteworthy issues, such as, problems with SIs and MC enforcement, and shortage of enforcement personnel.

8.2. How Can the Administrative Enforcement Regime of Food Safety Laws in Bangladesh Adopt Responsive Regulation?

The AEFFSL in Bangladesh does not have any authorised enforcement guidelines. The laws are enforced in a disorganised way. The following discussions will uncover the issues concerned with the way to adopt the RRT in the FSEF of Bangladesh. For this purpose, the FSEF of NSW will be discussed first to represent a model that embraces RRT.

8.2.1. Administrative Enforcement of the Food Act 2003 (NSW)

The AEFFSL in NSW is enforced by the NSW Food Authority (NSWFA) authorised officers as well as by the local councils. The entire administrative enforcement mechanism is based on the RRT. The following sections will discuss step by step the AEFFSL in NSW with a view to it representing a model of enforcement management for Bangladesh.

Coordinated Enforcement by Food Regulation Partnership

The NSWFA together with the local councils (LCs) operate the AEFFSL in NSW in the food regulation partnership (FRP). The NSWFA describes the FRP as a landmark in the

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1254 See section 5.2.3 of chapter 5 of the thesis.
1255 For more details, see section 5.2 of chapter 5 of the thesis.
1256 See section 5.2.4 of chapter 5 of the thesis.
FSEF of NSW and recognises that the FRP is ‘one of the most significant pieces of regulation in food industry for last 100 years’. The coordination between the NSWFA and the LCs while enforcing the food safety regulations is noteworthy as both of them work closely in the field in order to enforce the FA 2003. The NSWFA looks after the safety and integrity of the food supply by monitoring food industries so that they do comply with the regulations. Each local council (LC) has a definite role as the food safety enforcement agency. LCs perform regular inspections and respond to food related emergencies. The FRP helps to improve the capabilities of the NSWFA as an enforcement body since this partnership ensures that all existing enforcement mechanisms are directly concentrating on food safety outcomes. A recent example of coordinated intervention and cooperation of LCs and the NSWFA occurred in the wake of a 2011 salmonella outbreak in Western Sydney has ensured massively improved food-handling practice via the introduction of a requirement for a Food Safety Supervisor on site and improved training which has resulted in far better compliance in the area. To ensure an efficient enforcement mechanism, LC officers are authorised under the FA 2003 to supervise all types of food businesses, but they are primarily responsible for retail and service food businesses. More specifically, LCs undertake the surveillance of the retail and food service industry and the NSWFA officers directly administer and

1258 Ibid.
1259 The NSWFA worked with LCs to raise the level of food safety awareness of the issues at hot bread shops and the '[t]he initial results have been really encouraging with 93 per cent of businesses surveyed demonstrating adequate cleaning and sanitising at the end of the project compared to just 55 per cent at the beginning… The percentage of businesses that had a trained Food Safety Supervisor in place also went from only 31 per cent to 100 per cent compliance by the end of the project.' The Authority announced that it would be 'looking to repeat similar projects in other local government areas in the near future in a bid to ensure there are no more repeats of such a large scale foodborne illness outbreak.' On the FPR, generally see NSWFA, ‘Annual Report 2009–10’, above n 601, 10.
1262 Pathway to Partnership, above n 1260, 10.
enforce food safety laws across the entire food manufacturing industry (which is the main concern of the current study).\textsuperscript{1263}

The LCs have to report to the NSWFA regularly in relation to the activities they perform time to time.\textsuperscript{1264} As per the report of the NSWFA, LCs help monitor and regulate more than 36000 food businesses across NSW.\textsuperscript{1265} Some 25645 primary\textsuperscript{1266} food inspections were conducted between 1 January 2009 and 30 June 2009. Of these, 69 per cent of inspections were satisfactory.\textsuperscript{1267} Between 1 July 2008 and 30 June 2009, 8040 warning letters and 1621 improvement notices issued, 63 prohibitions orders served, 86 seizures were made, 1713 penalty notices issued, and 48 prosecutions were filed.\textsuperscript{1268} This statistics shows that, the number of prosecutions (judicial enforcement) are significantly lower than the number of improvement notices and penalty notices, which proves that the basic philosophy of RRT works on the initial stages of the regulatory enforcement pyramid of sanctions(REPS) as described in chapter 3 of this thesis.


\textsuperscript{1264} NSWFA, ‘Summary Report of NSW Enforcement Agencies’, above n 635, 4. Note: It is significant to note that all the details of the local councils and NSWFA regarding the enforcement of the food safety laws in NSW will not be mentioned in this section. Rather the details and necessary information about the administrative enforcement of NSW food safety laws will be brought to discussion while analysing and addressing the gaps of the equivalent enforcement regime of Bangladesh. Therefore, the ongoing section will simply address on how the administrative enforcement authority enforces the laws upon the food manufacturers.


\textsuperscript{1266} Primary inspection means any planned, programmed or routine inspection. It does not include reinspections for any identified unsatisfactory inspections.

\textsuperscript{1267} ‘Satisfactory inspection’ is where no re-inspection was warranted to close out any breaches identified, and where no significant enforcement action like issue of improvement notice, penalty notice, prohibition order, prosecution was taken: see, eg, NSWFA, ‘Summary Report of NSW Enforcement Agencies’, above n 635, 5.

\textsuperscript{1268} Ibid 13. NSW Minister for Primary Industries mentioned in a recent media release, ‘Between 1 July 2011 and 30 June 2012 there were fewer tough enforcement actions, such as penalties, seizures and prosecutions, for serious non-compliance compared with the previous four years ….. The results of this enforcement hierarchy also highlighted that intervention and business support are effective means of encouraging compliance’: New South Wales Food Authority, ‘Increased Compliance by Food Outlets’ (Media Release, 26 January 2013) <http://www.foodauthority.nsw.gov.au/news/media-releases/mr-26-Jan-13-increased-compliance-by-food-outlets/#.Ue4_ekCnBCB>. 

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Chapter 8: Enforcement Framework of Food Safety Regulations in Bangladesh

Application of Responsive Regulation in the Food Safety Enforcement Framework of NSW

The present part of this dissertation will discuss the AEFFSL of NSW in greater detail to demonstrate a model enforcement mechanism so that the issues in regard to integrating the RRT in the FSEF of Bangladesh can be properly identified.

The AEFFSL of NSW is governed by the Australia & New Zealand Food Regulation Enforcement Guideline (ANZFREG),1269 which is enforced jointly by local government and the NSW Food Authority (NSWFA). As mentioned, both local government and NSWFA work together as agreed in the FRP1270 in order to ensure food safety.1271

The ANZFREG is built entirely upon the original philosophy of the RRT as mentioned on the website of the NSWFA. It is there stated that the ANZFREG supports the following:

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\text{Graduated application of enforcement measures against food businesses, commencing with milder measures, such as verbal warnings, but then progressing to more severe measures (eg prosecution) should the milder measures not address the issue of concern. While advocating a graduated approach to the application of enforcement provisions, it is important to note that this policy does not prevent the Authority [NSWFA] from applying more severe provisions in the first instance (eg prohibition order), should serious legislative breaches be encountered (eg serious hygiene breach with the potential to be an imminent threat to food safety).}^{1272}
\]

The ANZFREG described its ‘enforcement toolbox’1273 step by step. It starts with the warning letter, then a statutory improvement notice, a prohibition letter, downgrading the status of the foods, seizures of equipment and the like. After that, the issuing of a penalty

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1270 See the details of FRP in section 5.2.4 of chapter 5 of this thesis.


1272 Ibid 2, 6.

1273 See ANZFREG, above n 1269, 13–23.
(civil) notice is suggested, that may then be followed by prosecution in the local court, which can impose a criminal penalty. Then the enforcement toolbox suggests the publication of the name of the offenders on the NSWFA’s website — a ‘name and shame’ approach. Finally it recommends the suspension or cancellation of the licence of the particular food manufacturer.\textsuperscript{1274} The enforcement toolbox is further detailed below.

**Persuasion and Verbal Warnings**

It is a general duty of the authorised officers to provide routine advice, persuasion, training and verbal warnings to the food manufacturers. Verbal warnings do not accompany formal notification and thus are informal in nature. For this reason, verbal warnings are generally used for ‘issues of a minor technical nature’.\textsuperscript{1275}

**Corrective Action Requests**

The implementing authority can issue corrective action requests (CARs) which are useful as preliminary steps in the REPS and generally are a request for the business owner and/or operator to employ an action in regard to the eradication of a matter of noncompliance detected during an audit of a business licensed by the Authority.\textsuperscript{1276}

**Written Warnings**

When an improvement notice (see below) seems inappropriate at the first instance, the enforcement authorities can issue a written warning. Generally a warning letter includes the details of the offence, its nature, time-frame for and nature of proposed remedial action, maximum penalty and so on. A warning letter generally expires within three months of its

\textsuperscript{1274} NSWFA, *Compliance and Enforcement Policy*, above n 1271, 11.

\textsuperscript{1275} Ibid.

\textsuperscript{1276} Ibid 12.
issue date and a follow-up action required if the respective manufacturer does not perform the requested action. Failure to comply with a warning letter in general results in a more serious administrative enforcement measure, such as penalty notice.

**Improvement Notice**

Where advice and persuasion does not work, the authority may consider an improvement notice for any particular food business in place of a warning letter at first instance. Improvement notices are generally issued if the enforcement authority finds any food business contravening any provision of the food regulations, for instance, the FA 2003 or the *Food Standard Code*[^1277] (Standard 3.2.2 and 3.2.3).[^1278] Part 5 of the FA 2003 describes the situations where an improvement notice may be issued. An improvement notice generally includes the contravened provision and an explanation of how and why it is believed to have been contravened. It also includes a brief report on what is to be done by the respective manufacturer for ensuring legislative compliance.[^1279] The time-frame for the manufacturer to comply with the improvement notice is also included in the notice. For less serious matters, the time-frame is generally more than 24 hours, while serious issues should be dealt with within 24 hours.[^1280] Complete non-compliance or part non-compliance of an improvement notice within the prescribed timeframe may result in the issuing of a **penalty notice**.

**Prohibition Order**

A prohibition order is considered the next administrative enforcement step if the improvement notices or warning letters do not achieve the desired result. Section 60 of the

[^1277]: See the details of Australia New Zealand Food Standard Code in section 5.2.2 of chapter 5 of the thesis.
[^1278]: See FA 2003 s 57.
[^1279]: NSWFA, *Compliance and Enforcement Policy*, above n 1271, 12.
[^1280]: Ibid 13. See also FA 2003 s 58.
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FA 2003 provides details about prohibition orders. In general, a prohibition letter addresses such matters as a legislative non-compliance where it is necessary to prevent any immediate danger to public health.\(^{1281}\) A prohibition order may apply to the entire manufacturing premises or to any particular part of it and it is treated as ongoing until or unless a clearance certificate is issued. Non-compliance with a prohibition order may result serious consequences, such as prosecution and, if successful, the imposition of a criminal penalty.

Seizure

In NSW, an authorised officer has the power to seize allegedly unsafe food.\(^{1282}\) When the authorised officer has reason to believe that any particular food manufacturer is not complying with the food safety regulations applied in NSW, he or she can seize the suspect food, vehicle, equipment or any other material.\(^{1283}\) If necessary, an authorised officer may destroy the seized foods or materials, while keeping a record of the materials and of the action taken. Sometimes a penalty notice is also served on the person from whom the items have been seized to deter them from further committing the contravention of the same provision.\(^{1284}\) However, generally the seized items are returned or the manufacturer or compensated for, if it the investigation discovers that the particular food manufacturer has not contravened the regulations.

Civil Penalty

In the event that the prior steps prove ineffective, the enforcement authority may impose a penalty notice on any food manufacturer. Sections 120, 133A, and 133D of FA 2003 and the

\(^{1281}\) FA 2003 s 60.
\(^{1282}\) Ibid pt 4.
\(^{1283}\) Ibid s 38.
\(^{1284}\) NSWFA, Compliance and Enforcement Policy, above n 1271, 13.
sch 2 s 16 of FR 2010 detail penalty notices. Penalty notices usually address the accused person who has committed the offence and the respective person has to pay the amount by the due date unless he or she wishes to have the issue decided in a competent court. The recipient of a penalty notice is given 21 days either to pay the penalty notice or to bring the issue to the court.\textsuperscript{1285} If a penalty notice is referred to the court, the enforcement authorities need to collect and submit the appropriate evidence of the alleged offence against the food manufacturer. Some food businesses are extremely large and some food businesses make huge profits by non-compliances with the food regulations. In these cases penalty notices are hardly effective as punishment. In such instances the enforcement authorities may consider using alternative enforcement tools, such as prosecution or the imposition of specific licence conditions upon a business, or anything seems appropriate and necessary.\textsuperscript{1286}

It is suggested that, while applying the sanction of a penalty notice, the enforcement authorities have the discretion to take into account the Attorney General’s ‘Caution Guidelines’ issued under s 19A(3) of the Fines Act 1996. However, the authorised officer is not obliged to issue a ‘caution’. In practice, the enforcement guideline allows an enforcement officer to use discretion before issuing a caution notice instead of penalty notice. This is in fact the philosophy of RRT — to persuade the regulatees as far as possible to adopt compliance with the regulations before the use of the application of sanctions.\textsuperscript{1287} It is said that the ANZFREG ‘advocates the use of a graduated approach to enforcement and allows for not only cautions to be given but the use of less severe enforcement tools if warranted’.\textsuperscript{1288}

The caution notice should be considered an inappropriate measure of enforcement if it is found


\textsuperscript{1286} Ibid.

\textsuperscript{1287} Ibid, Compliance and Enforcement Policy, above n 1271, 14.

\textsuperscript{1288} Ibid 15.
that manufacturer’s behaviour did not risk to public safety, or the particular person is suffering from mental illness, or did not commit the offence knowingly, or is now required to comply with the regulations or if the authorised officer founds it otherwise reasonable.\textsuperscript{7289} It is worth mentioning that an accused food manufacturer can apply for an internal review of the penalty notice or may wish to resolve this issue in a competent court as stated previously.

Under the \textit{Fines Act 1996}, every enforcement agency has the power to review the penalty notices internally and the respective agency sets out the basic requirements for this kind of review. Application for an internal review can be made within the time-frame of the due penalty reminder notice.\textsuperscript{7290} Section 24E(2) of the \textit{Fines Act 1996} states that reviewing agency— for example, the NSWFA — has to withdraw the penalty notice if the following grounds are found:\textsuperscript{7291}

(a) the penalty notice was issued contrary to law,
(b) the issue of the penalty notice involved a mistake of identity,
(c) the penalty notice should not have been issued, having regard to the exceptional circumstances relating to the offence,
(d) the person to whom the penalty notice was issued is unable, because the person has an intellectual disability, a mental illness, a cognitive impairment or is homeless: (i) to understand that the person’s conduct constituted an offence, or (ii) to control such conduct.

The NSWFA authorised officers are required to conduct regular monitoring activities within their jurisdiction; and, while carrying out their duties, they have the authority to call upon the assistance of NSW Police or any scientific expert or anyone else deemed essential for the particular case.\textsuperscript{7292} The court has the power to intervene in regard to any kind of penalty notice and an aggrieved manufacturer may wish to challenge any administrative enforcement

\textsuperscript{7290} \textit{Fines Act 1996} (NSW) s 24A (3).
\textsuperscript{7291} NSWFA, \textit{Compliance and Enforcement Policy}, above n 1271, 15.
order or notice issued by enforcement authorities in an authorised court. In such instances, the court makes the ultimate decision.\textsuperscript{1293}

The next steps are criminal penalties (such as huge monetary fines for corporations, and imprisonment in the case of individuals) and corporate capital punishments (such as licence suspension or revocation/cancellation), all of which are treated as the judicial enforcement. Thus, these enforcement steps are discussed in Part II of this chapter. Finally, based on the above discussion it can be noted that the AEFFSL of NSW is organised and up to date and is constructed based on the RRT.

8.2.2. Administrative Enforcement Framework of the Food Safety Laws of Bangladesh

Chapter 3 of this thesis discusses various positive aspects of the application of RRT. The RRT is a persuasion based systematic strategy of enforcement which can bring out the best compliance of the food manufacturers by removing excess, needless inspections and employing more resources to persuasion and advice.\textsuperscript{1294} Hence, the embracing of RRT in the FSRR of Bangladesh is an important issue that is worthy of investigation. The following section will thus attempt to examine the current AEFFSL in Bangladesh with a view to identifying the shortcomings in regard to implementing the RRT in the enforcement mechanism.

The main food safety statutes in Bangladesh are applied by the administrative enforcement mechanisms. Sections 272 and 273 of the Penal Code 1860 (PC 1860) as well as the Pure Food Ordinance 1959 (PFO 1959), the Bangladesh Standard Testing Institute Ordinance 1985 (BSTIO 1985) and the Consumer Rights Protection Act 2009 (CRPA 2009) — all are

\textsuperscript{1293} \textit{FA 2003} s 120[2].
\textsuperscript{1294} Hampton, above n 253,5.
administratively enforced through the MC. However, the *Special Powers Act 1974* (SPA 1974) is not enforceable administratively but judicially. Following discussion will explain the administrative enforcement mechanism of the major food safety laws in Bangladesh with the purpose of studying whether or not the required regulatory steps of RRT are observed. In the final stage of the current section, the gaps that exist in regard to adopting the RRT in the food safety enforcement regime of Bangladesh will be identified to enable a solution to be offered in light of their equivalents in NSW.

However, prior to starting the discussion, the following Table will tabulate the names of the laws, relevant regulatory body, field level enforcement authorities and the MC applicability.

<table>
<thead>
<tr>
<th>Name of the Laws</th>
<th>Regulatory Bodies</th>
<th>Enforcement Person in Field Level</th>
<th>Mobile Court Applicability</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Penal Code 1860</em></td>
<td>MOHFW MOLGRD</td>
<td>Sanitary Inspector</td>
<td>Yes</td>
</tr>
<tr>
<td>ss 272, 273</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Pure Food Ordinance 1959</em></td>
<td>MOHFW MOLGRD</td>
<td>Sanitary Inspector</td>
<td>Yes</td>
</tr>
<tr>
<td><em>Bangladesh Standard Testing Institute Ordinance 1985</em></td>
<td>MOI</td>
<td>BSTI Inspectors</td>
<td>Yes</td>
</tr>
<tr>
<td><em>Consumer Rights Protection Act 2009</em></td>
<td>MOC</td>
<td>DNCRP</td>
<td>Yes</td>
</tr>
</tbody>
</table>

**Table 8.1: The Food Safety Laws and Their Administrative Enforcement**

*Penal Code 1860 and Pure Food Ordinance 1959*

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1295 See part II of this chapter for the enforcement of SPA 1974.
1296 MOHFW is the abbreviated form of ‘Ministry of Health and Family Welfare’. See the details of MOHFW, in section 5.3.3 of chapter 5 of the thesis.
1297 MOLGRD is the abbreviated form of ‘Ministry of Local Government, Rural Development and Cooperatives’. See the details of MOLGRD, in section 5.3.4 of chapter 5 of the thesis.
1298 MOI is the abbreviated form of ‘Ministry of Industry’. See the details of MOI, in section 5.3.7 of chapter 5 of the thesis.
1299 MOC is the abbreviated form of ‘Ministry of Commerce’. See the details of MOC, in section 5.3.9 of chapter 5 of the thesis.
1300 DNCRP is the abbreviated form of ‘Directorate of National Consumer Rights Protection’. See further below in the discussion on the Consumer Rights Protection Act 2009.
1301 Note: The SPA 1974 is not administratively enforceable by the Mobile Courts. Hence, the name of this law is not mentioned here.
Chapter 8: Enforcement Framework of Food Safety Regulations in Bangladesh

The SIs, either the Upazila Sanitary Inspectors (USI) or District Sanitary Inspectors (DSI) (for their respective upazila or district),\textsuperscript{1302} are employed within the Directorate General of Health Services (DGHS)\textsuperscript{1303} under the Ministry of Health and Family Welfare (MOHFW) and enforce ss 272 and 273 of the \textit{PC 1860},\textsuperscript{1304} and the \textit{PFO 1959}\.\textsuperscript{1305} Every Upazila (sub-district) has one USI who works under the supervision of DSI,\textsuperscript{1306} both of which are appointed under s 34 of the \textit{PFO 1959}\.\textsuperscript{1307}

Similarly, the MOLGRD\textsuperscript{1308} through their respective SIs implement the \textit{PC 1860} and the \textit{PFO 1959}. But in both cases (either under the MOHFW or MOLGRD), the SIs do not have any inspection manual or enforcement guidelines\textsuperscript{1309} for the proper administrative enforcement of the food safety regulations\textsuperscript{1310}.

The SIs both under the MOHFW and MOLGRD cannot enforce the regulations themselves; rather they need the help of executive magistrates for implementing the penalties\textsuperscript{1311}. In practice, the executive magistrates enforce the regulations through MCs,\textsuperscript{1312} and SIs simply accompany the MC.

\textsuperscript{1302} FSPT, \textit{Food Inspection and Enforcement in Bangladesh}, above n 549, 2. For more details on Sanitary Inspectors, see section 5.3 of chapter 5 of the thesis.
\textsuperscript{1303} For example, see section 5.3.3 of chapter 5 of the thesis.
\textsuperscript{1304} FSPT, \textit{Food Inspection and Enforcement in Bangladesh}, above n 549, 2.
\textsuperscript{1305} Ibid. The sanitary inspectors under the DGHS also implements some other laws, for example, \textit{IDDPA 1989} and \textit{BMSO 1984}, but these enactments have been considered outdated, of limited jurisdiction and unnecessary enactments, and this is why they will not be elaborated upon further in this thesis: see the scope of the thesis in section 2.11 of chapter 2; see also section 4.3.3 of chapter 4 of the thesis.
\textsuperscript{1306} FSPT, \textit{Food Inspection and Enforcement in Bangladesh}, above n 549, 2; See generally Rahman and Ismail, above n 495, 3. See also Rouf, above n 652, 91; Saqib, above n 687, 301.
\textsuperscript{1307} See Saqib, above n 687, 301.
\textsuperscript{1308} The MOLGRD is responsible to ‘ensure food safety and quality to protect public health in city corporations and municipalities’: see FSPT, \textit{Food Inspection and Enforcement in Bangladesh}, above n 549, 13.
\textsuperscript{1309} Importance of having clear enforcement guidelines has been emphasised in section 3.4 of chapter 3 of this thesis.
\textsuperscript{1310} FSPT, \textit{Food Inspection and Enforcement in Bangladesh}, above n 549, 2.
\textsuperscript{1311} See section 5.3.12 of chapter 5 of the thesis.
\textsuperscript{1312} See the details of mobile court in section 8.4 of this chapter.
The current study observes that the administrative enforcement procedure of the food safety regulations by the SIs does not follow all required steps of REPS to comply with the RRT. The reason perhaps is that, in the absence of enforcement guidelines, the administrative enforcement authorities implement the laws without any proper direction in a disorganised or inconsistent way. The present research finds no evidence of the application of persuasive measures, improvement notices or any civil penalty before the direct imposition of the criminal penalty while enforcing the PC 1860, the PFO 1959, and the Bangladesh Pure Food Rules 1967 (BPFR 1967). However, the report of the FAO food safety project in Bangladesh indicated that the MC sometimes considers certain instruments of the RRT before criminally penalising the adulterated food manufacturers. The report states:

> Immediate enforcement actions on violation of laws and regulations related to food safety, quality and environmental sanitation may result in immediate correction, warning letters, fines and temporary closure of the business. Food items may also be seized and destroyed when necessary.\(^{1313}\)

The writer of the present thesis finds some examples of oral warning notices\(^ {1314}\) and temporary shut downs\(^ {1315}\) in the performance of administrative enforcement of the food safety regulations. However, no written guidelines are found that can provide evidence of the basis

\(^{1313}\) FSPT, *Food Inspection and Enforcement in Bangladesh*, above n 549, 12.
of issuing these warning letters or instituting temporary closure before penalising the manufacturers.

**Bangladesh Standards and Testing Institution Ordinance 1985**

The Bangladesh Standard Testing Institute (BSTI)\(^{1316}\) is an important regulatory body for the administrative enforcement of the *Bangladesh Standards and Testing Institution Ordinance 1985 (BSTIO 1985)* which administers the inspection, testing and certification of the standards of food products. Section 20 of the *BSTIO 1985* states that every manufactured food product must comply with the BSTI standard and use the Bangladesh Standards Mark (BSM).\(^{1317}\) Any food manufacturer, that intends to use the BSM, needs apply to the BSTI for obtaining the licence. Once a company obtains a licence, BSTI inspectors appointed under s 25 of the *BSTIO 1985* conduct unannounced inspections and randomly take samples from the manufacturer’s premises or from the open market. These samples are tested in the BSTI laboratory. In the event that the laboratory testing identifies any noncompliance with the BSM, the DG of the BSTI may order the shutdown of the particular food manufacturing unit.\(^{1318}\)

It is noteworthy that closing down a manufacturing plant, either temporarily or permanently, is a serious decision which BSTI is able to do without any prior improvement notice, civil penalty, prohibition order or the imposition of any criminal penalty. The current study is concerned that the imposition of severe punishments like closure of a production plant without any prior warning may create a grievance among manufacturers and may discourage their compliance with regulations to the detriment of people’s health and safety.

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\(^{1316}\) See section 5.3.7 of chapter 5 of this thesis.

\(^{1317}\) For more see section 5.3.7 of chapter 5 of the thesis.

\(^{1318}\) *BSTIO 1985* s 33C.
In addition to this, section 7.3 of chapter 7 of this thesis has discussed some conducts related to food standards that *BSTIO 1985* has criminalised. BSTI inspectors enforce these offences administratively through the MC at the field level. But similar to the SIs under the MOHFW and MOLGRD, the BSTI officers do not have any official guidelines for their inspections. Whether the BSTI inspection officers take part in the MC or they perform an independent inspection, they do not have any guidelines; they do not even have any official requirements regarding the administrative enforcement of the *BSTIO 1985*.  

**Consumer Rights Protection Act 2009**

Chapter 3 of the *Consumer Rights Protection Act 2009 (CRPA 2009)* makes various provisions in regard to the administrative enforcement of the Act. Section 18 of the *CRPA 2009* establishes the Directorate of National Consumer Rights Protection (DNCRP), headed by a Director General (DG), to administer the functions of this law.  

Section 21 of the *CRPA 2009* outlines the functions of the DG and mainly covers the administrative enforcement of the legislation. The head office of the DNCRP is Dhaka, the capital city of Bangladesh. But, if need exists, under the current legislation other branches of the DNCRP may be established in other districts of Bangladesh for effective administrative enforcement of the law. The DG performs the monitoring activities to identify noncompliance with the food safety provisions under the authority of s 21 of the Act. The DG possesses the power as an Officer-in-Charge of a police station when investigating a possible offence stated in the Act. The DG or any officer on his or her behalf can issue a warrant...
against the offender, or arrest the culprit for noncompliance with the CRPA 2009. Identical to the BSTIO 1985 detailed above, s 27 of the CRPA 2009 asserts that the DG or an authorised person under the DNCRP can temporarily shut down the food manufacturing unit where the adulterated or unsafe food is made. The DNCRP is also empowered to seize any adulterated foods.

Section 70 of the CRPA 2009 provides that the DNCRP or any authorised officer on its behalf may, if necessary, impose a penalty, cancel a licence or temporarily/permanently suspend the business activities of the particular food manufacturer. The DNCRP can implement such administrative enforcements in the event that it wants to avoid prosecution with the possible sanction of imprisonment or any other the steps for criminal proceedings against the accused food manufacturer. However, among all these implementation mechanisms, criminal penalties are used inconsistently but frequently as an administrative enforcement device of the CRPA 2009. In terms of RRT, the apex sanctions are being applied where other measures would be preferable, and worse they are being applied inconsistently, and their unpredictability (in terms of severity and their ‘match’ for the offence) will further risk antagonising manufacturers rather than inducing compliance.

As per the authority of s 80 of the CRPA 2009, the Government of Bangladesh (GoB), Ministry of Commerce, has promulgated the Consumer Rights Protection (Meeting and

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Footnotes:

1324 Ibid s 24.
1325 Ibid s 25.
1326 Ibid s 36.
1327 Ibid s 70(1).
1329 For details on ‘Ministry of Commerce’ see section 5.3.9 of chapter 5 of the thesis.
Unfortunately, the guidelines do not include any detailed provisions in regard to the step by step administrative enforcement of the CRPA 2009. In addition, the DNCRP does not have adequate manpower to implement the CRPA 2009. Similar to the enforcement of the PC 1860, PFO 1959 and BSTIO 1985, the CRPA 2009 also cannot be enforced by its own officials; rather executive magistrates through the MC implement this law. Given the numerous consumer rights problems in Bangladesh, it appears that the DNCRP hardly has the time to conduct a drive against the unsafe food manufacturers.

8.2.3. Does Administrative Enforcement Framework of Food Safety Laws in Bangladesh Comply with Responsive Regulation?

The preceding discussion suggests that the food safety regulations in Bangladesh are enforced in an unorganised way in the absence of any proper enforcement guidelines. The AEFFSL in Bangladesh has no well-designed inspection strategies with a clear method of detecting noncompliance with the regulations. An appropriate regulatory enforcement mechanism should have clearly outlined enforcement policies so that all instances of non-compliance can be easily identified so that prompt action can be taken by the proper authority. The following discussion will determine the shortcomings of the AEFFSL in order to adopt RRT.

Absence of Persuasion, Improvement Notice

Usually the enforcement officials impose a criminal penalty upon the food manufacturers. Occasionally they issue warning letters, or immediate correction notices for the

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1331 For details on the inadequacy of the manpower issue see, section 8.5 of this chapter.
1332 See generally Baldwin and Black, above n 277, 61.
noncompliance of regulations — but not always. No evidence of attempts to persuade the manufacturers to comply with the relevant laws was found. The RRT suggests the investment of a significant portion of resources for persuading the food manufacturers to comply with the regulations because in most cases compliances are possible in the persuasion stages.\footnote{See section 3.3 of chapter 3 of the thesis.} Therefore, with its absence of the employment of a persuasive strategy for compliance before imposing criminal penalties, the AEFFSL falls short of having the first step of RRT. In addition to the non-application of the persuasive strategy, the AEFFSL of Bangladesh also does not give any formal improvement notice or prohibition order before the direct imposition of a criminal penalty.

**Absence of Civil Penalty**

The existing AEFFSL of Bangladesh does not embrace the requirements of civil penalty\footnote{See the definition of civil penalty in section 3.1 of chapter 3 of the thesis.} to comply with the RRT. This is because monetary penalties imposed by the MC\footnote{See section 8.4 of chapter 8 of the thesis for the details of Mobile courts.} upon the food manufacturers (mentioned in section 7.7 of chapter 7 of this thesis) are clearly criminal in nature. This may in fact mystify readers because, in all the cases, these monetary penalties are popularly known as a ‘fine’ in the media.\footnote{For example, see ‘Mobile Court Fine [sic] Ice Cream Factory’ *The Daily Star* (online), 4 October 2012 <http://www.thedailystar.net/newDesign/news-details.php?nid=252412>; ‘Mobile Courts Fine 4 Vermicelli Factories’, above n 97; UNB, Jhalakathi, ‘Snippets: Mobile Court Fines Food Shops’ *The Daily Star* (online), 23 August 2011 <http://www.thedailystar.net/newDesign/news-details.php?nid=199853>.} The current research notes that these fines should not be characterised as a civil penalty for the purpose of RRT. Two reasons are given for this. Firstly, the fines imposed by the MC magistrates are accompanied by imprisonment as an alternative or additional sanction.\footnote{For example, see ‘Mobile Court Jailed and Fined 2 Traders for Selling Adulterated Food Items’, *Highbeam Business* (online), 25 August 2010 <http://business.highbeam.com/409102/article-1P3-2119997981/mobile-court-jailed-and-fined-2-traders-selling-adulterated>; ‘One Jailed for Food Adulteration’, *Daily Sun* (online), 12 September 2011 <http://www.daily-sun.com/details_yes_12-09-2011_One-jailed-for-food-}. Secondly, while imposing these fines the
executive magistrates use the Code of Criminal Procedure 1898 (CrPC 1898) for penalising the offenders.\textsuperscript{1338} In practice, civil penalties should be imposed by the regulatory authorities and should not include any sentence of imprisonment.\textsuperscript{1339}

Civil penalties are designed to avoid serious and huge criminal liabilities.\textsuperscript{1340} The RRT as applied in the AEFFSL of NSW utilises persuasion, warnings and civil penalties instead of the imposing direct criminal penalty at the lower range of offences. It is hardly practicable to expect that the repeated application of a criminal penalty will decrease the rate of offences. The current situation in regard to food safety in Bangladesh and of the level of occurrences of food safety offences in demonstrate that deterrence expected to be created by the imposition of direct criminal penalties has failed.\textsuperscript{1341} Ayres and Braithwaite, the originators of the RRT, also do not support the use of criminal sanctions in the initial stages of enforcement; they argue that punishment is expensive and, when it is applied at corporate level, it removes the individual’s sense of responsibility as well as undermining the good will of the persons involved (and potentially of others).\textsuperscript{1342} Civil penalties are advocated as highly effective in the corporate sector since they help to enhance the probability of imposing sanctions on corporate offenders by using the ‘lower standard of proof and procedural protections
available in a civil action as opposed to the higher standard applicable in a criminal prosecution’.\textsuperscript{1343}

It is observed that in NSW the inspection strategies for administrative enforcement are organised. The authorised officers of the NSWFA in conjunction with the local government authorities both work under the FRP to enforce the laws in a strategic way. Their area of inspection is selected and they do it thoroughly and regularly.\textsuperscript{1344} The AEFFSL in NSW is constructed based on the philosophy of RRT, as is demonstrated above in this chapter and as previously discussed in chapter 3 of this thesis.

To address the issue in the current section of this chapter, it is suggested that Bangladesh should include the persuasive measures, warning letters, improvement notices, prohibition orders and civil penalties before the direct imposition of the criminal penalties with a view to incorporating the RRT in the current food safety liability regime. For this purpose, Bangladesh can introduce enforcement guidelines based on the REPS as suggested in section 3.7.5 of chapter 3 of the thesis.

8.3. Problems with Enforcement by the Sanitary Inspectors\textsuperscript{1345}

The SIs are mainly concerned with the enforcement of the food safety regulations throughout Bangladesh. But there are several problems with the enforcement by SIs.


\textsuperscript{1344} For more details, see 8.2.1 of this chapter.

\textsuperscript{1345} For a detailed discussion on the ‘enforcement problems’ regarding the food safety regulation in Bangladesh, see Ali, ‘Food Safety and Public Health’, above n 260, 40.
Firstly, as mentioned above, the SIs do not have any specific inspection strategy, which is necessary for the proper administrative enforcement of the food safety regulations. Activities related to food safety are a small part of the workload of SIs. The SIs are overburdened with other activities related to health and sanitary issues in the rural, city corporation and in municipal areas, and thus they hardly get enough time to monitor food safety. The terms of reference for SIs have 18 components, of which only three relate to food safety. They are: to visit all food establishments in their local jurisdiction; to collect samples of suspicious or adulterated food for laboratory testing and to monitor these premises; and to detect food adulteration, hygiene and sanitary conditions in food premises. In practice, SIs inspect food producers where food is manually manufactured, such as bakeries and confectioners; but they rarely monitor the large food manufacturers. SIs collects information through newspapers, electronic media and from consumer victims. They barely visit the remote areas where adequate public transport is unavailable. Therefore, food manufacturers situated in these areas go largely uninspected. Every SI is required to send minimum five food samples to the Public Health Laboratory (PHL) (mentioned in section 5.3.3 of chapter 5) for laboratory analysis. But SIs barely can do it due to the absence of administrative enforcement guidelines in regard to their activities.

Secondly, the qualifications of the SIs as detailed in s 4 of the BPFR 1967 provides that an SI requires having a minimum secondary school certificate (year 10 in Australia). They study a three years undergraduate diploma course on ‘Sanitary Inspectorships Training’ offered under

1346 FSPT, Food Inspection and Enforcement in Bangladesh, above n 549, 2.
1349 Ibid.
the MOHFW. SIs are class III workers and are employed at the same level as the Health Assistants who have three years of work experience. In addition to this, SIs have limited knowledge about food safety laws and regulations. It is stressed that due to their minimum educational background and low experience, they are hardly qualified to enforce enforcement steps under the RRT. However, the following discussion will find a potential solution to this issue in light of the equivalent NSW AEFFSL.

In NSW, the NSWFA authorised officer (the one who mainly enforces food safety laws in regard to the food manufacturers) are responsible for looking after food safety related activities. The powers of NSWFA authorised officers are stated in s 37 of the FA 2003, which describes all the activities of an authorised officer as including food and food safety related activities.

An authorised officer who is empowered to enforce the food safety regulations is well qualified, with tertiary qualifications in health and food safety related disciplines. Before they qualify as an authorised office, they must experience a rigorous training program. In addition, they then frequently attend various ‘specialist courses and briefings to make sure their skills and knowledge are at the forefront of food industry best practice.’

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1350 FSPT, Food Inspection and Enforcement in Bangladesh, above n 549, 2.
1351 Ibid.
1353 For details, see section 5.2.3 of chapter 5 and section 5.2.4 of the current chapter.
1354 For a ordinary version of the powers of the authorised persons, see NSWFA, Powers of Authorised Officers, above n 1292.
1356 Ibid.
To address the aforementioned issue in Bangladesh, it can be argued that it is necessary for clear guidelines concerning the roles and responsibilities of SIs to be outlined. The SIs need to be relieved of all other activities and given the authority to enforce solely the food safety laws. Furthermore, to build an effective AEFFSL, the SIs need to be sufficiently qualified to enforce the regulations and their knowledge should be improved by giving them proper training on regulations thereby building their individual and institutional capacity.

8.4. Difficulties with the Mobile Court Enforcement System

The GoB passed the *Mobile Court Act 2009 (MCA 2009)* to ensure effective and skilful implementation of the prevention of offences. The schedule annexed to the *MCA 2009* notes that any offence committed under the *PC 1860* (ss 272 and 273), *PFO 1959*, *BSTIO 1985*, or *CRPA 2009* is deemed as an offence under the *MCA 2009*. The MC consists of an executive magistrate from the Upazila/District/City Corporation, an SI (either under the MOHFW/MOLGRD), a BSTI inspector and the police. The MC is headed by the executive magistrates. Section 6(2) of the *MCA 2009* mentions that if a particular offence committed by any offender is so serious that the fine imposable under the *MCA 2009* would not be sufficient, the magistrate may decide to initiate further legal proceedings against that person. An executive magistrate may direct the Officer-in-Charge of the respective police station to file a First Information Report (FIR) against a particular offender, if the particular

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1359 *MCA 2009* preamble [author’s trans].
1360 Ibid s 6(2) [author’s trans]. See the Schedule of the Act where the names of the laws are mentioned for jurisdiction. Note: To see the details of the offences under the mentioned laws, see section 4.3.1 of chapter 4 and section 7.4 of chapter 7 of the thesis.
1361 FSPT, *Food Inspection and Enforcement in Bangladesh*, above n 549, 11–12.
offence is to be tried by any court or tribunal higher than the session court.\footnote{MCA 2009 s 6(5) [author’s trans].} As per s 8 of the \textit{MCA 2009}, the MC cannot enforce a penalty of imprisonment for greater than two years.

The MC is not administered properly due to the lack of an adequate number of magistrates.\footnote{See the Staff Correspondent, ‘Food Adulteration Rings Alarm Bell: Star-Rdrs Roundtable Told Most Food Items Adulterated, Pose Lethal Risks to Public Health’, \textit{The Daily Star} (online), 11 August 2011 <http://archive.thedailystar.net/newDesign/news-details.php?nid=198096>; Daily Star, \textit{Roundtable on Hazards of Food Contamination in National Life: Way Forward} (10 August 2011) online,(published on 21 August 2011) <http://www.thedailystar.net/suppliments/2011/roundtable_on_hazards/roundtable.pdf>.} It is unexpected but none of the following — an SI under the MOHFW/MOLGRD, a BSTI inspector under the MOC or the officer under the DNCRP — can directly enforce the respective laws and fine the food adulterers. They have to hire an executive magistrate (under the Ministry of Public Administration\footnote{See section 5.3.12 of chapter 5 of the thesis.}) to be with them to conduct the MC and enforce the \textit{PC 1860}, \textit{PFO 1959}, \textit{BSTIO 1985} and \textit{CRPA 2009}.\footnote{FAO, ‘Report on a Workshop on Food Inspection Arrangements in Bangladesh’, above n 506, 3. For example, see ‘5 Restaurants Fined’, \textit{Daily Sun} (online), 15 March 2012 <http://www.daily-sun.com/?view=details&type=daily_sun_news&pub_no=85&cat_id=1&menu_id=8&news_type_id=1&news_id=16527&archive=yes&arch_date=15-03-2012>; Shudipta Sharma, ‘Food Adulteration Goes on as DCC, BSTI Pass the Buck’, \textit{Daily Sun} (online), 12 April 2011 <http://www.daily-sun.com/details_yes_12-04-2011_Food-adulteration-goes-on-as-DCC,-BSTI-pass-the-buck_-_187_1_2_1_9.html>.} Under s 5 of the \textit{MCA2009} only an executive magistrate can fine the food manufacturers. Therefore, it is understood that the SIs, BSTI inspectors, or the DNCRP officials are appointed to identify the food safety problems but they are not entitled to impose any fine for a contravention of the regulations. This is waste of human resources as it is impracticable to appoint as many executive magistrates as is needed for the entirety of Bangladesh solely to look after food safety related matters.\footnote{See further below about this problem in section 8.5 of this chapter.} Hence, the current study considers this a substantial difficulty for the operation of the current AEFFSL. The concept of the MC and the hiring of the executive magistrate for the anti-adulteration drive is not a viable option to administratively enforce the food safety regulations. This is because the executive magistrates
are extremely busy with plenty of other activities, such as dealing with the ‘law and order’ situation, working as the protocol officer of high governmental officials and so on. It is evident from several newspaper reports that many of the food adulteration drives cannot be run only due to the scarcity of executive magistrates.\footnote{Shudipta Sharma, ‘Manpower Crisis Hampers BSTI Activities: Over One-Third Posts Lying Vacant’, \textit{Daily Sun} (online), 20 March 2011 <http://www.daily-sun.com/details_yes_28-03-2011_Manpower-crisis-hampers-BSTI-activities_171_1_10_1_4.html>; Sadia Afrin, ‘Mobile Courts Continue Drive against Food Adulteration’, \textit{New Age} (online), 2 August 2012 <http://newagebd.com/detail.php?date=2012-08-02&nid=19293#.UTVgTxwibb8>.

\footnote{NSWFA, \textit{Powers of Authorised Officers}, above n 1292.}

\footnote{NSWFA, \textit{Penalty Notice Publication Protocol}, above n 1285.}

A further problem in regard to the MC is that, in the case of a criminal penalty (commonly known as ‘fine’) under s 9 of the \textit{MCA 2009}, the offender has to pay the fine ‘on the spot’; otherwise he or she will have to face imprisonment. It cannot, however, be reasonable to bind the accused to do so. The accused may not have the money in his or her pocket at that time or he or she may wish to have this issue heard in court instead of simply paying the fine. Considering the importance of the issue, the following discussion will attempt to find a potential solution to this concern in light of the equivalent NSW AEFFSL.

In NSW, the enforcement authorities, either the NSWFA authorised officers or local government officers can implement the \textit{FA 2003} directly by commencing any ‘compliance action, such as improvement notices, prohibition orders, penalty notices and prosecutions’\footnote{NSWFA, \textit{Powers of Authorised Officers}, above n 1292.} without the help of executive magistrates. However, they can have the assistance of police if necessary, which similarly happens in Bangladesh. There is no such concept similar to MC enforcement in the AEFFSL of NSW. Further, normally the recipient of a penalty notice is given 21 days either to pay the penalty or to bring this issue in the court in NSW.\footnote{NSWFA, \textit{Penalty Notice Publication Protocol}, above n 1285.}
Following the example of NSW, the current study recommends abolishing the MC for the enforcement of food safety laws. The SIs should be entitled (educated enough) to implement the regulations directly without any help from the executive magistrates. For that purpose, the SIs should be trained in the various food safety related matters with specialised training from home and abroad. Also, in regard to the fine, it would be better if the offender is given a reasonable time (for example, one month) to pay.

8.5. Inadequacy of Administrative Enforcement Personnel

The number of SIs for maintaining food safety is not adequate in rural areas. There are 600 SIs employed for the administrative enforcement of the regulations under the MOHFW, including the USI, DSI and some SIs who work in different institutes and ports. There are 4451 Union Parishads in Bangladesh, which places are treated as rural areas. Therefore, it is argued that the number of SIs is inadequate considering the current food safety situations in Bangladesh. Similarly, the number of SIs under the MOLGRD who are responsible for the enforcement of food safety laws in 6 city corporations and 308 municipalities (Paurashavas) in Bangladesh are also not sufficient. For example, in Dhaka, the capital city and the most populated area in Bangladesh, there are only ‘two posts for food and sanitation officers, four posts for health inspectors and four posts for sample suppliers in its

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1371 FSPT, Food Inspection and Enforcement in Bangladesh, above n 549, 2.
1373 See Rahman and Ismail, above n 495, 4.
1374 FSPT, Food Inspection and Enforcement in Bangladesh, above n 549, 3.
In fact, not only Dhaka City but the other urban areas like the city corporations and municipalities in Bangladesh are heavily populated in Bangladesh (unlike the rural areas). It is alleged that many of the posts of SIs under the MOLGRD (especially in the municipalities) are vacant and the SIs under the MOHFW have to perform this additional job in addition to their regular work. Thus, it is widely recognised that the number of the SIs in the city corporations and municipalities are seriously inadequate for the enforcement of the food safety laws.

The BSTI has only five branches (in Chittagong, Sylhet, Khulna, Rajshahi, and in Barishal) besides the head office situated in Dhaka. This means that only a few BSTI inspectors are located in divisional towns. The BSTI inspectors cannot access many small food manufacturers situated in remote areas to check standards. But products from these manufacturers are available in the market, and is supposedly having a dangerous effect on public health. For example, on 18 May 2012, a mother and her son died in a remote area of Naogaon District by drinking fruit juice manufactured by a local manufacturer (named as the Standard Foods Company) which lacked an expiry date but which bore the BSM of BSTI. Similarly, there are various products on the market with or without the BSM of BSTI or with unauthorised standard marks — which is punishable under the BSTIO 1985.
but BSTI cannot implement the legislation due to the lack of enforcement personnel.\footnote{See Mohammed Hossain, ‘Food Safety and Quality Control in Bangladesh’, \textit{The Financial Express} (online), 10 September 2008 <http://www.thefinancialexpress-bd.com/2008/09/10/45060.html>; ADB and MOI, TA Loan 2150-BAN, above n 715, [8].} It should be noted that currently BSTI has only 48 inspectors to cover the entire country,\footnote{Fahud Khan, ‘2/3 of Foods Not Certified, \textit{Priyo: Internet Life} (online), 11 August 2011 <http://news.priyo.com/law-and-order/2011/08/11/23-foods-not-certified-34326.html>.} a country where nearly 150 million people live. This number of inspectors is inadequate, given not only the population but also taking into account the ongoing problem of food adulteration in Bangladesh.

The DNCRP, from its very beginning, has been (and remains) dysfunctional due to the shortage of adequate enforcement personnel. The Government recently appointed a total of 27 assistant directors but this number is still insufficient in view of the number of proposed offices of the DNCRP in every district and the number of potential violations.\footnote{See the notice of the appointments of 22 Assistant Directors, in the webpage of DNCRP at <http://www.dncrp.gov.bd/latest-news.php?news_id=61> and 5 other appointments at <http://www.dncrp.gov.bd/latest-news.php?news_id=62> (last accessed 18 March 2013). See also Durjoy Roy, ‘Directorate Limps with Low Manpower’, \textit{Daily Sun} (online), 30 January 2011 <http://www.dailysun.com/?view=details&archive=yes&archive_date=30-01-2011&type=daily_sun_news&pub_no=113&cat_id=1&menu_id=2&news_type_id=1&index=1>. This newspaper report claims the appointment of 235 employees in the DNCRP but no evidences are found.} Up until 2010, there had only been 71 monitoring drives in just 120 markets in Bangladesh by the DNCRP.\footnote{Roy, ‘Directorate Limps with Low Manpower’, above n 1386.} Moreover, ss 10 and 13 of the \textit{CRPA 2009} provide that committees are to be formed at district, upazila and union level for the administrative enforcement of the \textit{CRPA 2009}, but the fulfilment of these provisions is still a far cry from the position outlined in the Act, with few having yet been established. Now the equivalents provisions of NSW AEFFSSL will be discussed below in order to find a potential solution of this issue.

In NSW, the number of the enforcement officials is adequate as the NSWFA has taken on board the help of LCs under the FRP to meet the demand. No evidence or literature is found
regarding the inadequacy of the number or training of enforcement personnel in the AEFFSL of NSW to date.

Finally, the food safety problem is a major public health concern in Bangladesh, and the extent of the current food safety problem along with its seriousness is also well-known. Therefore, there should be no opportunity to procrastinate about this issue. The GoB should appoint a satisfactory number of qualified SIs and also other enforcement officials in the above mentioned administrative bodies.

Part II: Judicial Enforcement of Food Safety Laws

This part will discuss major concerns regarding the judicial enforcement of food safety laws in Bangladesh. The first issue to be analysed is how Bangladesh can accommodate the RRT in the judicial enforcement framework of the food safety laws (JEFFSL). Except this key issue, there are some significant issues that are necessary to attend to. These are the provision for establishing the food courts, restraints on filing complaints, and the time limitation on filing complaints. While discussing these issues, the equivalent NSW provisions will be referred to in order to fill the loopholes where appropriate and necessary.

8.6. How Can the Judicial Enforcement Framework of Food Safety Laws in Bangladesh Adopt Responsive Regulation?

Responsive regulation attempts to increase compliance with the laws from the beginning of the enforcement pyramid. In practice, administrative enforcement mostly secures compliance with regulations at the initial stages of the REPS. This is because the manufacturers in most cases comply with the laws before they face the harsh criminal penalties imposed by the courts. For example, the Australian Competition and Consumer Council (ACCC) states that ‘in most cases, existing civil penalties are enough to deter contraventions…’. Therefore judicial enforcements are left relatively a narrower place compared to administrative enforcement under the RRT.

The following sections of this part will examine the JEFFSL of NSW followed by an examination of the comparable framework of Bangladesh in order to reveal the shortcomings of the latter (with regard to the former one) that may be remedied by adopting the RRT.

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1389 For details, see section 3.3 of chapter 3 of the thesis.
8.6.1. Judicial Enforcement of the *Food Act 2003* (NSW)

Part 10 (ss 118–32) of the *FA 2003* deals with the judicial enforcement of the food safety laws in NSW which comprise the procedural and evidentiary provisions of the Act. But it is the ANZFREG where all the enforcement steps are described in detail. The judicial enforcement starts where the administrative enforcement is challenged or where the particular case is no longer suitable for administrative enforcement. The following sub-sections will discuss the competent courts and the procedure of prosecutions, criminal penalties, options and the register of penalties along with the last step of judicial enforcement with the corporate capital punishments.

**Filing of Cases**

Any judicial proceeding under the *FA 2003* should be filed either in the local court or in the Supreme Court of NSW in its summary jurisdiction.\(^{1391}\) Local courts cannot impose fine of more than AUD10 000.\(^{1392}\) Therefore, the Supreme Court of NSW tries a prosecution that deals with the fine more than AUD10 000. In the administrative enforcement procedure, an authorised officer serves a penalty notice for any kind of contravention of provisions under the *FA 2003*.\(^{1393}\) But this penalty notice or dispute becomes a concern for the court when the accused person does not want to pay the fine issued by the authorised officer and wants his or her case to be heard in the court.\(^{1394}\) If the accused pays the amount mentioned in the penalty notice, he or she cannot be subject to further action for the same offence.\(^{1395}\) Besides, payment of a penalty notice is not counted as an admission in regard to the alleged

\(^{1391}\) *FA 2003* s 118 (1).
\(^{1392}\) Ibid s 118 (2).
\(^{1393}\) Ibid s 120 (1).
\(^{1394}\) Ibid s 120 (2).
\(^{1395}\) Ibid s 120 (4).
liability.\textsuperscript{1396} It is significant to note that the enforcement mechanism under the RRT generally leaves an option for the administrative enforcements to be challenged in the court, which makes the final decision. But some sanctions, such as, criminal penalties, and suspension/cancellation of licences are implemented by judicial enforcement. A prosecution in court or judicial enforcement is reserved for the more serious violations of food safety laws or where the improvement notice, caution notice and civil penalties have proved insufficient or failed to ensure compliance by the food manufacturers.\textsuperscript{1397} Some offences are committed deliberately ignoring the regulations and some conduct creates serious consequences; and some offences are committed repeatedly even though the manufacturer has faced previous prosecutions. These cases are generally sent to the Supreme Court for hearing.\textsuperscript{1398} In a prosecution, the report about the economic profits gained by an accused manufacturer is submitted to the court. In addition, the evidence related to the likelihood of the harm and risk to public health is also submitted.

**Evidence**

All supportive evidence of prior enforcement action needs to be available for the court’s attention. The evidence of previous enforcement actions may include seized foodstuffs or other materials, photographs or audio or video records, related photographs, interviews and so on.\textsuperscript{1399} The court may consider the certificate of an approved analyst prepared in accordance with s 74 of the \textit{FA 2003}.\textsuperscript{1400} However, if there is any dispute about the analysis

\textsuperscript{1396} Ibid s 120(5). Note: For the purposes of s 120 of the \textit{FA 2003}, in addition to the regular \textit{authorised officer} of the NSWFA, a police officer can also be treated as an \textit{authorised officer} for administrative enforcement of the law; see \textit{FA 2003} s 120(9).


\textsuperscript{1398} Ibid.

\textsuperscript{1399} NSWFA, \textit{Compliance and Enforcement Policy}, above n 1271, 16.

\textsuperscript{1400} \textit{FA 2003} s 128.
conducted under s 128, the court may direct further specific analysis or anything agreed to by the parties.\textsuperscript{1401} To ensure a fair trial, the accused person gets access to the evidence on request; but this is after the completion of the investigation and before the commencement of the prosecution.

Prior to the commencement of the proceedings, the offender has the opportunity to place his or her records before the court.\textsuperscript{1402} The ANZFREG suggests that before commencing proceedings, the defendant can negotiate with the prosecution for charges which may result in the withdrawal of the case, or the defendant may plead guilty for some or for all of the alleged offences.\textsuperscript{1403} Usually negotiations as to the charges are initiated by the offender, but prosecution hardly responds where the offender wants to claim himself or herself innocent.\textsuperscript{1404}

**Penalties and Sanctions**

Subsequent to the civil penalty applied during the administrative enforcement of the food safety laws in NSW there are few steps. These are, criminal penalty, register of penalties (naming and shaming) and the corporate criminal punishments, all of which are gradually sanctioned escalating in accordance with the REPS as mentioned in the ANZFREG. The following discussion will address these three enforcement steps.

**Criminal Penalty**

In the event that all the preceding steps of the administrative enforcement measures mentioned in section 8.2.1 of this chapter fail to result in the compliance of the food

\textsuperscript{1401} FA 2003 s 129.  
\textsuperscript{1402} NSWFA, Compliance and Enforcement Policy, above n 1271, 16.  
\textsuperscript{1403} Ibid 17.  
\textsuperscript{1404} Ibid.
manufacturers, the next step is prosecution with a view to imposing a criminal penalty upon the accused. Criminal penalties are normally huge financial fines which threaten to disable the entire company. These may also be accompanied by imprisonment.

**Register of Penalties**

The FA 2003 provides a useful process for greater effectiveness of the regulations by registering the name of the offenders on the website of the NSWFA.\(^\text{1405}\) Sections 133, 133A of the FA 2003 mention that the NSWFA may keep a register of information about offences and penalty notices. The register contains some information,\(^\text{1406}\) for example, name, address, business type, place of the convicted food manufacturers. Section 133B states that ‘any register kept under this Part is to be made available for public inspection on an internet website of the Food Authority’— this is an approach generally known as ‘name and shame’.\(^\text{1407}\) Details of food businesses which have received penalty notices,\(^\text{1408}\) or have been successfully prosecuted,\(^\text{1409}\) are available on the website and such information is accessible to the public. Penalty notices are published when they are paid or if the matter is not resolved after 70 days from the issue of the penalty notice.\(^\text{1410}\) However, the NSWFA does not ‘name and shame’ until the respective time of appeal by the food business expires. A food manufacturer has the right to apply for an internal review of the matter and may wish to apply

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\(^{1405}\) See the webpage link, NSWFA, *Register of Penalty Notices*, above n 628.
\(^{1406}\) Information which can be published is available in ss133A–133F of the *FA 2003*.
\(^{1408}\) NSWFA, *Register of Penalty Notices*, above n 628.
\(^{1409}\) NSW Food Authority, *Register of Offences (Prosecutions)* (13 April 2012) <http://www.foodauthority.nsw.gov.au/news/offences/prosecutions/>. Section 133F of the *FA 2003* deals with ‘corrective action requests’ and mentions that ‘an interested person’ can apply to the NSWFA for the correction of an entry in the Register of Offences and Alleged Offences (s 133) in relation to their food business (It is worth noting that information on conviction is only added to the register after any final appeal is concluded (s 133(4)).
\(^{1410}\) NSWFA, *Penalty Notice Publication Protocol*, above n 1285; see also *FA 2003* s 133A(4).
for removing incorrect or inappropriate information to the NSW Administrative Decisions Tribunal when the NSWFA refuses to do so. A penalty notice, once entered onto the register, remains listed there for 12 months.

**Corporate Capital Punishment**

Corporate capital punishment is the last step of the enforcement pyramid under the RRT. It is the highest corporate punishment awarded by the court is suspending or cancelling the licence of those food businesses that need a licence to operate their business. After suspension or cancellation of the licence a particular manufacturer is not allowed to operate the business anymore. Corporate capital penalties not only affect the owners or directors of the respective food manufacturer but also employees, suppliers, customers and so on. For this reason, before a competent court decides to suspend or cancel the licence of a food manufacturer, a ‘show cause’ notice is given asking them to provide reasons as to why their licence should not be suspended or annulled. If the accused fail to reply to the show cause notice properly, the court may direct the final verdict giving the order of suspension or cancellation of their licence. In some cases, given the gravity and nature of the offences of the licensed food business, the court may impose additional licence conditions for running the business, should it be decided that it could continue in business. Whatever decision is given by the court, either the imposition of additional licence conditions or the suspension or cancellation of licence, there is an option for a formal review the decisions.

**Options of Enforcement**

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1411 *Productivity Commission Report on Food Safety*, above n 267, 137.
1413 See the list of the food businesses that needs a licence to operate food business in NSW at, NSW Food Authority, *Licensing* (26 May 2011) <http://www.foodauthority.nsw.gov.au/industry/food-standards-and-requirements/licensing/#.UTaRTVfWx3s>. Licenced businesses are regulated in NSW under the FR 2010. As these businesses are not covered under the scope of this dissertation, thus, they are not discussed in this chapter.
The NSWFA suggests that it is not always necessary or possible to enforce the Act using just this single tool of enforcement as described in this chapter. The situation may demand the implementation of multiple measures from the enforcement toolbox. For example, in any dangerous hygiene related issue, both penalty notice and prohibition order would be appropriate. In addition to this, where multiple breaches occur, the use of more significant enforcement tools could be needed. At the time of declaring judgments in a competent court, there are number of options available. The court may impose a criminal penalty, such as the huge fine or imprisonment on the offenders; or the court can consider some other punishment options depending on the gravity and nature of the offences. For example, if the offence is related to misleading food labelling, the court may issue an order for the corrective labelling. In some cases, the NSW Supreme Court has the power to give injunctive relief if the offender is found to be continually engaging in illegal activities.

Finally, in view of the above discussion it can be said that the JEFFSL in NSW is well-structured and it is built based on the RRT. Because the enforcement framework of the food safety regulations in NSW is planned and developed by the RRT, most of the food safety cases are supposed to be solved in the earlier stages of enforcement (administrative enforcement). Nevertheless if ultimately any case needs to be decided judicially, it is done in a smooth and systematised way as demonstrated in the above discussion.

8.6.2. Judicial Enforcement Framework of the Food Safety Laws of Bangladesh

The RRT offers a pyramidal enforcement based strategy where the judicial enforcement comes when the administrative enforcement fails or a regulatee challenges the penalty

1415 Ibid 9.
1416 See generally ibid 17.
1417 Ibid.
sanctioned by the regulatory enforcement authority. But the JEFFSL in Bangladesh does not comply with the philosophy of RRT. The judicial enforcement of the food safety laws in Bangladesh is simultaneously enforced with the administrative enforcement in the absence of any official enforcement guidelines. The following discussion will concentrate on the judicial enforcement of the major food safety laws in Bangladesh. Before commencing the discussion, the table below will tabulate the judicial enforcement of the main food safety laws in Bangladesh in regard to showing the name of the laws, who can file a case under the respective laws, and the competent courts to try the laws.

<table>
<thead>
<tr>
<th>Name of the Law</th>
<th>Who Can File Case</th>
<th>Competent Trial Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Penal Code 1860 ss 272, 273</td>
<td>Victim / Police</td>
<td>Any Judicial Magistrate&lt;sup&gt;1418&lt;/sup&gt;</td>
</tr>
<tr>
<td>Special Powers Act 1974</td>
<td>Victim / Police</td>
<td>Special Tribunal&lt;sup&gt;1419&lt;/sup&gt; (comprised of Sessions Judge, Additional Sessions Judge and Assistant Sessions)</td>
</tr>
<tr>
<td>Pure Food Ordinance 1959</td>
<td>Sanitary Inspectors/local authority or any person (with restrictions)</td>
<td>Food Court&lt;sup&gt;1421&lt;/sup&gt; (not established to date)/Magistrate of the first class&lt;sup&gt;1422&lt;/sup&gt;</td>
</tr>
<tr>
<td>Bangladesh Standard Testing Institute Ordinance 1985</td>
<td>BSTI Inspector</td>
<td>Metropolitan Magistrate or a Magistrate of the first class&lt;sup&gt;1423&lt;/sup&gt;</td>
</tr>
<tr>
<td>Consumer Rights Protection Act 2009</td>
<td>Anyone (with permission of DNCRP)</td>
<td>Metropolitan Magistrate or a Magistrate of the first class&lt;sup&gt;1424&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

Table 8.2: The Food Safety Laws and Their Judicial Enforcement

<sup>1418</sup> CrPC 1898 s 28, sch 2, col 8.  
<sup>1419</sup> SPA 1974 s 26(1).  
<sup>1420</sup> Ibid s 26(2).  
<sup>1421</sup> PFO 1959 s 41.  
<sup>1422</sup> Ibid s 41(2).  
<sup>1423</sup> BSTIO 1985 s 33(b).  
<sup>1424</sup> CRPA 2009 s 57(1).
Penal Code 1860 and Special Powers Act 1974

Sections 272 and 273 of the PC 1860 can be judicially enforced in the Judicial Magistrates Court.\textsuperscript{1425} And s 25C of the SPA 1974 is judicially enforced in the special tribunals,\textsuperscript{1426} which can be comprised of the Sessions Judge, or Additional Sessions Judge and Assistant Sessions Judges.\textsuperscript{1427} Both of the laws are enforced in accordance with the normal procedure outlined in the CrPC 1898,\textsuperscript{1428} where the victim or police officer can file a case in the criminal court at anytime for a violation of the respective criminal statutes. It is worth noting that, seeing the severity of the food adulteration in Bangladesh (discussed in section 2.4 and section 2.5 of chapter 2 of this thesis) and the administrative failure of the enforcement of the laws, the Supreme Court of Bangladesh has suggested greater application of the SPA 1974 and asked the police to file criminal cases under this statute against the persons responsible for food adulteration so that the adulterating manufacturers can be penalised with severe punishments.\textsuperscript{1429}

Pure Food Ordinance 1959

\textsuperscript{1425} CrPC 1898 s 28, sch 2, col 8. Note: The PC 1860 ss 272, 273 are usually enforced by the Mobile Courts, discussed in section 8.4 of the chapter. Because of its insignificant penalties mentioned in section 7.7 of chapter 7 of the thesis, victims hardly files a case under this law and thus the judicial enforcement of this provisions are rarely seen.

\textsuperscript{1426} SPA 1974 s 26(1).

\textsuperscript{1427} Ibid s 26(2).

\textsuperscript{1428} See the texts of the statute at <http://bdlaws.minlaw.gov.bd/pdf_part.php?id=75>.

The SIs under the MOHFW have the right to enter any manufacturing premises to check the food quality and food safety and identify the violation of the relevant regulations (for example, the *PFO 1959*), with a view to protecting the consumers from unsafe, adulterated, or contaminated food. The SIs collect random food samples or seize particular foodstuffs if required. Under s 39 of the *PFO 1959*, the SIs possess the power to dispose of the seized food item or its ingredients if necessary. But generally SIs send those food samples to the PHL for analysis. If laboratory analysis indicates that the samples show evidence of adulteration, a PHL public analyst reports it to the Civil Surgeon of the respective district for legal action against the owner of the food samples as indicated by s 44 of the *PFO 1959*. And the SI files the suit on behalf of the Civil Surgeon in the competent court against the manufacturer for the unsafe nature of the foods. Court decides the case based on the evidence produced by the complainant. A court while trying a complaint under the *PFO 1959* may again send the suspected food item to the PHL for testing. The PHL submits a report to the court and the court accepts this as evidence.

The SIs under the MOLGRD has almost identical duties to those of the equivalent SIs under the MOHFW mentioned above. They collect food samples from food outlets in various city corporations and municipalities and send them to the laboratory for analysis. The foods

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1430 *PFO 1959* s 35. Note: A three hours prior notice is required to enter in any food manufacturing premises.


1432 *PFO 1959* s 37.


1434 Rouf, above n 652, 91. However, the number of the public analysts and sanitary inspectors are insufficient, which has been stressed in the *Human Rights and Peace for Bangladesh v Bangladesh* (2009), Writ Petition No. 1190/2009, Supreme Court of Bangladesh (HCD) 5.

1435 FSPT, *Food Inspection and Enforcement in Bangladesh*, above n 549, 3.

1436 *PFO 1959* s 32.

1437 See laboratories under the MOLGRD in section 5.3.4 of chapter 5 of the thesis.
samples collected in the Dhaka City are sent to laboratories managed by the Dhaka City Corporation.\textsuperscript{1438} The public analysts check the safety of the food and send a report to the SIs. In the event that the report suggests that the food is unsafe, SIs file a case on behalf of the Mayor/Chief Health Officer/Chief Executive of the respective city corporation or municipality.\textsuperscript{1439}

\textit{Bangladesh Standard Testing Institute Ordinance 1985}

The BSTI inspectors collect food samples among the food products which are required to maintain the mandatory food standard specified by the BSTI. Inspectors send the collected food samples to the BSTI laboratories for the testing. If the test result reveals any noncompliance with the specific food standards, the inspector files a case with the competent court. The court summarily tries the case following the normal judicial proceedings.\textsuperscript{1440} A court does not recognise any case as valid unless it is filed by a BSTI inspector.\textsuperscript{1441}

\textit{Consumer Rights Protection Act 2009}

The judicial enforcement of the \textit{CRPA 2009} is comparatively unusual compared to the above mentioned food safety laws in Bangladesh. No person can directly sue an unsafe food manufacturer although they are entitled to claim damages in civil suits.\textsuperscript{1442} Section 76(1) of the \textit{CRPA 2009} provides that a consumer needs to notify any issue related to food adulteration or suspected instance of such adulteration to the DG of the DNCRP, or anyone authorised by DG. The DNCRP investigates the complaint administratively and makes an

\begin{footnotesize}
\textsuperscript{1438} FSPT, \textit{Food Inspection and Enforcement in Bangladesh}, above n 549, 4.
\textsuperscript{1439} Ibid.
\textsuperscript{1440} BSTIO 1985 s 33A(b).
\textsuperscript{1441} Ibid s 33(a).
\textsuperscript{1442} CRPA 2009 s 71(1).
\end{footnotesize}
attempt to impose sanctions upon the offenders.\textsuperscript{1443} But in that case, if the DG permits a consumer to proceed in the magistrate courts, only then can he or she file a case. However, the \textit{CRPA 2009} does not mention anything about the consequences if the DG fails to investigate the complaint lodged by an aggrieved consumer.\textsuperscript{1444} Instead, paradoxically indeed, a consumer may be punished if his or her allegation submitted to the DG is found to be untrue in the investigation.\textsuperscript{1445} It should be mentioned that given the practice of political interference and widespread corruption in the public sector in general, the role of the DG in dealing with such complaints can be vitiated by some ‘undue’ influence or subjective consideration. Referring to the weaknesses of the \textit{CRPA 2009}, Professor Mizanur Rahman, the incumbent Chairman of the National Human Rights Commission, expressed his disappointment when he said that ‘the \textit{CRPA 2009} does not provide consumers with any rights. It is meaningless to knowingly make such a law.’\textsuperscript{1446}

8.6.3. Does the Judicial Enforcement Framework of Food Safety Laws in Bangladesh Comply with Responsive Regulation?

The above discussion on the judicial enforcement of the major food safety laws in Bangladesh indicates that the respective enforcement officers (SIs/BSTI inspectors), or police or the victim may file a case for a judicial decision and the court directly execute sanctions upon the manufacturers by imposing a criminal penalty. The only difference as observed between the AEFFSL and JEFFSL in Bangladesh is that the MC cannot punish the food

\textsuperscript{1443} Ibid s 70.
\textsuperscript{1445} Consumer Rights Protection (Meetings and Proceedings) Rules 2010, rule 12(3).
\textsuperscript{1446} Rajib Ahmed, ‘Consumer Rights Law – Complainants Themselves Will be Troubled’, \textit{Kaler Kanthha} (Dhaka), 22 January 2010 [author’s trans].
manufacturers with more for than 2 years of imprisonment,\textsuperscript{1447} but a higher court than the MC can issue a penalty of more than two years imprisonment.

**Parallel Enforcement of Administrative and Judicial Sanctions**

The discussion of judicial and administrative enforcement of the food safety laws suggests that they both occur simultaneously in Bangladesh in the absence of any official enforcement guideline. However some other distinctive features warrant special mention as identified below.

**Insufficient Criminal Penalty**

It is discussed in section 7.7 of the chapter 7 of the thesis that the criminal penalties imposed under the food safety laws of Bangladesh are significantly lower than the penalties that might be expected had they been commensurate with the crime. These criminal penalties are hardly ever considered a sufficient deterrent to restrain a manufacturer from further producing unsafe food.

**No Naming and Shaming**

The enforcement framework of the food safety laws in Bangladesh does not have any provisions to publish the names of the convicted food adulterators or manufacturers of unsafe food either on a webpage or in any print or electronic media. For this reason, consumers seldom get the chance to be informed about who are the adulterated or unsafe food manufacturers. Owing to the sheer ignorance of the consumers, the manufacturers again start business, produce unsafe foods and profit from the practice.

**No Corporate Capital Punishment**

\textsuperscript{1447} MCA 2009 s 8(1) [author’s trans].
In judicial enforcement, the trial courts issue the verdicts against the food manufacturers and impose criminal penalties. An aggrieved food manufacturer can appeal to the higher courts against the decisions of the trial court. The appellate court finally decides the outcome. But the statutes do not offer any further enforcement steps or punishment levels after the criminal penalty that can be imposed by the judicial enforcement. In the absence of any corporate ‘capital punishment’, the convicted food manufacturers again go back to food business because the penalty is almost negligible in the liability regime.\textsuperscript{1448}

In NSW it is observed that judicial enforcement occurs subsequent to administrative enforcement. At the highest level of the REPS, the court imposes criminal penalties which are extremely difficult for a food manufacturer to bear.\textsuperscript{1449} When a court convicts a food manufacturer, the prerequisite information of that particular food producer is registered on a ‘name and shame’ Register of Offences. This lets consumers learn of the offence committed by the manufacturer. At the final stage of enforcement, the courts of NSW decide the licence suspension or cancellation of the food business. In fact, the credit for this well-structured enforcement framework in NSW goes to the adoption of the RRT which has created this pyramidal enforcement mechanism in accordance with the aforementioned enforcement steps.

In order to adopt the RRT in the JEFFSL of Bangladesh the following changes need to be made. Firstly, the administrative and judicial enforcement cannot be in parallel. Judicial enforcement should start only if administrative enforcement fails or the particular food manufacturer challenges any penalty and asks for a decision in the relevant court. Secondly, the JEFFSL of Bangladesh needs to adopt some further steps of judicial enforcement in a more graduated way. After imposing the criminal penalty by the court, the name of the

\textsuperscript{1448} See section 7.7 of chapter 7.
\textsuperscript{1449} For details, see section 7.7 of chapter 7 of the thesis.
respective food business (and the nature of their offence) should be publicised on the Bangladesh Food Safety Authority (BFSA) website. As all consumers are not educated in Bangladesh, besides publishing such information on the webpage, the name of the offender food manufacturer can be announced in the news of the television and radio, as can the nature of their offence. Newspaper publication is also encouraged. Thirdly, there should be the provisions of the corporate ‘capital punishment’, available, that is, the cancellation or revocation of the licence of the respective unsafe food manufacturer and furthermore a stipulation should be added that the same directors and owners will not be allowed to return in the food business. Finally, the criminal penalties should be also such that they form a deterrent as suggested in chapter 7.

**8.7. Provisions for Establishing Separate Food Court Ignored**

The food safety related laws are judicially enforced in various courts in Bangladesh. The discussion in regard to the JEFFSL shows that five food safety laws are enforced in five separate criminal courts. The present section will discuss the provision of the *PFO 1959* which implies the establishment of a separate food court in Bangladesh. The *PFO 1959* suggests that the judicial enforcement of the food safety regulations should be undertaken within the jurisdiction of the Pure Food Courts (PFC). Section 41 of the *PFO 1959* states that the government is required to form a PFC in every district and metropolitan area. Such courts shall have the power of summary trial under Chapter XXII of the *CrPC 1898*, and each PFC is to consist of a magistrate of the first class, while the decisions of such courts can be challenged by appeal to the Session Judge or Metropolitan Sessions Judge Court.

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1450 See section 5.4.1 and section 5.5 of chapter 5 of the thesis.
‘Justice delayed is justice denied’ is an old proverb which is true in relation to the judiciary of Bangladesh. A logjam of cases has been a serious and chronic problem in the administration of justice in the country.\footnote{See M Rafiqul Islam and S M Solaiman, ‘Public Confidence Crisis in the Judiciary and Judicial Accountability in Bangladesh’ (2003) 13 Journal of Judicial Administration 29, 29.} According to the chief justice of the day, as at 1 January 2012, about 2 132 046 cases had been pending in all courts and tribunals, including the Supreme Court of Bangladesh (which is made up of the High Court Division and the Appellate Division).\footnote{Staff Correspondent, ‘Judiciary Beset with 21 Lakh Pending Cases: CJ’, The Daily Star (online), 19 May 2012 <http://archive.thedailystar.net/newDesign/news-details.php?nid=234786>.} Currently there are more than 300 000 cases pending before the High Court Division alone, which has only 90 judges, whilst the Appellate Division of 10 judges is inundated with 17000 cases.\footnote{Ashutosh Sarkar, ‘HC to get 20 New Judges’, The Daily Star (online), 20 April 2013 <http://www.thedailystar.net/beta2/news/hc-to-get-20-new-judges/>.<ref>Human Rights and Peace for Bangladesh v Bangladesh (2009), Writ Petition No. 1190/2009, Supreme Court of Bangladesh (HCD) [23]. See also Bdnews24.com Bangladesh, ‘HC Asks Govt to Form Food Courts’, Bdnews24.com Bangladesh (online), 1 January 2009 <http://dev.bdnews24.com/details.php?id=134274&cid=2> (‘HC Asks Govt to Form Food Courts’); see also ‘Government Orders Countrywide Drive’, above n 683.} Inordinate delays in the disposal of cases cause a denial of justice and discourage the victims of breaches of law from filing a court case. Perhaps to avoid such a sore reality, the \textit{PFO 1959} provides that the judicial enforcement of the food safety regulations should be carried out by the PFCs. It is worth noting that, an NGO, amidst growing public concerns over the abundance of adulterated foods in markets, had lodged a public interest litigation with the Supreme Court of Bangladesh in June 2009. The petitioner sought and got directives of the Court on the GoB in order to ensure food safety in the country. The Court directed the GoB to establish a Food Court in each division and district cities across the country under s41 of the \textit{PFO 1959}.\footnote{Human Rights and Peace for Bangladesh v Bangladesh (2009), Writ Petition No. 1190/2009, Supreme Court of Bangladesh (HCD) [23]. See also Bdnews24.com Bangladesh, ‘HC Asks Govt to Form Food Courts’, Bdnews24.com Bangladesh (online), 1 January 2009 <http://dev.bdnews24.com/details.php?id=134274&cid=2> (‘HC Asks Govt to Form Food Courts’); see also ‘Government Orders Countrywide Drive’, above n 683.}

Finally, the forming of the PFCs is already due (which has been emphasised in the orders of the Supreme Court of Bangladesh). Similarly, the current study also recommends for the establishment of the PFCs without further delay.
8.8. Restraint on Filing Complaints

Filing of complaints under certain laws in Bangladesh has long been restricted and ordinary consumers do not have the right to initiate legal action against the wrongdoer. The discussion of the current chapter (especially in section 8.6.2) indicates that only the legally designated officials can prosecute a food manufacturer under the PFO 1959, the BSTIO 1985 and the CRPA 2009.

A court does not take cognisance of an offence unless it is filed by an SI or a public analyst or an authorised person under the PFO 1959. However, s 40 of the ordinance says that a local authority or an individual person can file a complaint if he or she receives a certificate from the public analyst (s 40(1)) or City Corporation Mayor or Paurashava Commissioner or any authorised office of the respective local government (s 40(2)), mentioning that the particular food item has been adulterated.

Similar to the PFO 1959, the BSTIO 1985 also laid the same provisions. Section 33(a) of the BSTIO 1985 mentions that any offence punishable under the BSTIO 1985 will not be considered by a competent court unless it is filed by the BSTI inspector or an authorised inspector by the GoB.

Consumers cannot file a case in the court directly under the CRPA 2009. In the context of Bangladesh, this study finds this restraint a disgrace for the individual consumers. In practice, this situation is hardly to be expected in regard to the CRPA 2009, which is supposed to protect the rights of the consumers. Provisions that restrict an aggrieved consumer’s right to

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1456 PFO 1959 s 41A.
1457 Note: the main reason for not allowing the individual consumer to sue an adulterant food manufacturer is perhaps that an individual does not have adequate knowledge on how to collect food sample and test in the laboratory for analysis. But it is argued that if the consumers are taught about how to proceed with a food sample for laboratory analysis and sue in the court, it would be a plausible idea.
file a complaint directly encumbers the individual’s access to justice.\(^{1458}\) Perhaps for this reason, the number of complaints that has been addressed to the DNCRP to sue in the court is not significant.\(^ {1459}\)

The current study suspects that the exclusive powers of the DG of DNCRP, SIs and BSTI inspectors to initiate prosecution against food manufacturers may have broadened corruption in Bangladesh. This is because food manufacturers may try to manage the authority concerned by offering bribes or any undue opportunities to ensure that they are not subject to civil suit or criminal prosecution in the court. In practice, this kind of situations may not be unusual in a country like Bangladesh where corruption has been a serious concern for last few decades, and continues to be so.

Finally, judicial constraints to prosecute unsafe food manufacturers are alleged to have encouraged the ignorance of food safety regulations in Bangladesh.\(^ {1460}\) The current research argues that the provision of obtaining permission from several authorities creates an unnecessary bureaucracy in the judicial enforcement of the JEFFSL of Bangladesh which needs to be eradicated. Therefore, a consumer should be allowed to file a case in the court directly without any restraint.

### 8.9. Time Limitation on Filing a Complaint

The consumers under the JEFFSL of Bangladesh face a restraint in regard to time limitation to file a case. When an affected consumer receives the certificate from the public analyst that


the particular food is adulterated as per s 40(1) of the PFO 1959, that victim consumer is allowed a maximum of 60 days to file the case against the food manufacturer. Similarly, s 61 of the CRPA 2009 provides that a magistrate will not take the case into cognisance unless the complaint is filed within 90 of the date of occurrence.

Both of these provisions of the PFO 1959 and CRPA 2009 are argued as shortcomings in the way of effective judicial enforcement of the food safety laws in Bangladesh.

In case of NSW, s 119 of the FA 2003 mentions the equivalent provisions regarding the time limitation to file the case and that this is that a victim must file their case within 2 years of the occurrence of the alleged offence.

Therefore, Bangladesh can follow the example of the FA 2003 and can extend the time limitation to up to 2 years for filing a case related to food safety offences.

8.10. Summary and Conclusions

This chapter has investigated the enforcement framework of the food safety regulations in Bangladesh to identify the drawbacks in order to adopt the RRT in its enforcement regime as well to solve some other significant problems. To examine and evaluate these goals, the equivalent NSW framework has been discussed. The examination has found that the FSEF of Bangladesh simultaneously applies the administrative and judicial enforcements both of which directly enforce the criminal penalties upon the regulatees. In practice, the entire framework does not comply with the RRT.

The existing AEFFSL of Bangladesh does not adequately focus on advice, training and persuasion although these regulatory enforcement tools are advocated for the enhancement of

\[1461\] PFO 1959 s 40(4).
compliance with regulations. The framework also does not embrace any civil penalty which is highly valued for its effectiveness in relation to food manufacturers. Therefore, the present research has argued that Bangladesh needs to develop a unified FSEF, which should be based on the RRT and as always is the case with this approach the administrative enforcement should start with persuasion, motivation, advice, or training. After that, it should apply sanctions, following the escalating and deescalating strategies mentioned in the REPS (in section 3.7.5 of chapter 3 of the thesis).

The FSEF needs an inspection manual or guidelines where all the necessary implementation procedures will be described, that is, details as to how all steps of administrative enforcement measures will be executed in the food safety regulatory regime. This study suggests that Bangladesh can borrow the inspection and enforcement strategies from NSW. The ‘NSW Food Authority Compliance and Enforcement Policy’ can be a role model for the development of a new enforcement policy for Bangladesh. The current study proposes that this enforcement guideline of Bangladesh can be named as the ‘Bangladesh Food Regulation Enforcement Guideline’.

The administrative enforcement authority of food safety regulations should be entirely given to the SIs and other work load should be cut from their (SIs) job responsibilities. Moreover, an adequate number of qualified SIs should be appointed and their employment depend on their qualifications and determined on the basis of their expertise and knowledge of food safety, and administrative experience. SIs should be empowered so that they can penalise the manufacturers on the spot.

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1462 However, the advice, persuasion, guidance need to be framed in a ‘clear, concise and accessible language.’ See Enterprise and Regulatory Reform (BERR) Department for Business, above n 754, 13.
1463 IMF, Poverty Reduction Strategy Paper, above n 691, 147.
A criminal penalty can be awarded if the offender is found to be not complying with the food safety regulations despite having been issued a caution notice or improvement notices and civil penalties. But this fine should not be immediately payable. The offender should be given an opportunity to pay the money or to bring the matter in the court. A time-frame of at least one month should be given to resolve the penalty issue.

The JEFFSL of Bangladesh needs to comply with the RRT. It should follow a gradual enforcement strategy where administrative enforcement strategies will be utilised first and then the judicial enforcements steps will be applied. The JEFFSL of Bangladesh can incorporate the idea of registering the penalty notices similarly to the ‘name and shame’ approach adopted by NSW. To allow the regulatory pyramid to work, Bangladesh should accept the concept of sanctioning corporate capital punishments at the final stage of enforcement. The manufacturers penalised under the corporate capital punishments should not be allowed to return in the food business further.

The GoB should respond with an order of the Supreme Court of Bangladesh for establishing the PFC in every district. Establishment of the separate food courts will bring the food safety problems into the light to try the cases more effectively. The judicial enforcement of the food safety regulations needs to be carried out without any restraint. Consumers should be given a right to directly sue the wrongdoers in the court. The courts should directly take the cognisance of consumer related issues without having prior permission from the authorities. It should be a general right of citizens to seek justice in the court personally and without any restraint. The time limit for instituting a lawsuit by the victim is inadequate under existing laws and should be extended to (at a minimum) 2 years.
Chapter 8: Enforcement Framework of Food Safety Regulations in Bangladesh

It is hoped that if the RRT is applied in the FSEF of Bangladesh, the number of cases will be lessen since most of the issues will be solved by administrative authorities through persuasion and improvement notices and so forth. Finally, this chapter demonstrates that both the administrative and judicial enforcement framework of the food safety regulations in Bangladesh contain several drawbacks. Therefore, it is imperative that the FSEF of Bangladesh be updated and developed without further delay. It can be concluded that if the above mentioned recommendations are followed, the enforcement regime of food safety regulations in Bangladesh will improve to a reasonable extent in due course.
Chapter 9: Summary and General Conclusions

9.1. Introduction

This thesis has examined the legal, regulatory and enforcement framework of food safety laws in Bangladesh, including the civil and criminal liability of food manufacturers under the current regulatory mechanisms. Responsive regulation theory (RRT) has been adopted as the regulatory philosophy to analyse and improve the food safety regulatory regime (FSRR) of Bangladesh. RRT is currently operating in the FSRR of NSW,\textsuperscript{1464} which has driven the adoption of NSW as the model regulatory jurisdiction for Bangladesh with a view to borrowing equivalent mechanisms where appropriate and necessary.\textsuperscript{1465}

The initial discussion in the introductory chapter shows that Bangladesh has long been facing a serious food safety problem and this has prompted the current researcher to conduct this study with the intention of updating and improving the existing FSRR. Bangladesh has a distinct food safety regulatory framework which contains several shortcomings from the perspectives of the legal, regulatory, liability and enforcement mechanisms for ensuring safe food. After identifying these deficiencies, this dissertation has comprehensively discussed and analysed these issues and formulated several recommendations to update the present regulatory framework.

This chapter has been intended to summarise the main outcomes of this thesis. Section 9.1 is the introduction to the chapter. Section 9.2 will discuss the major findings of the conceptual and theoretical approaches of this thesis. Section 9.3 will outline the key findings of the legal, regulatory, liability and enforcement frameworks of the food safety regulatory mechanism of Bangladesh. Section 9.4 will summarise the major recommendations. Section 9.5 will discuss

\textsuperscript{1464} See section 3.8 of chapter 3, section 8.2.1 and section 8.6.2 of chapter 8 of the thesis.
\textsuperscript{1465} For more details on why the current research has chosen NSW as the model jurisdiction, see section 2.12 of this thesis.
some recent changes in the food safety regulations in Bangladesh which occurred while this research was being conducted. This thesis will conclude in section 9.6 with a final conclusion.

9.2. Findings in Conceptual and Theoretical Accounts

This study demonstrates that RRT can be successfully applied in the FSRR of Bangladesh. To encourage compliance and to reprimand non-compliance with the laws, the existing research suggests certain modifications to this theory in order to ensure greater effectiveness. The modification endorsed in this thesis is referred to as the ‘responsibility ensures upgrading, irresponsibility risks downgrading’ approach,\(^{1466}\) which requires the introduction of a grading system in the FSRR in Bangladesh. Further, for an effective application of the RRT in Bangladesh, this thesis suggests the engagement of network partners (NPs) in the food manufacturing industry. The NPs should be chosen from the food safety authorities of the developed countries (for example, the NSW Food Authority). The NPs will help to update food standards and food manufacturing process in Bangladesh. Also they will participate in the upgrading or downgrading process of the food manufacturers by providing expert opinion as discussed in section 3.7 of chapter 3 of the thesis (also shown in Figure 9.2 of this chapter).

Chapter 3 and chapter 8 of this dissertation argue that the RRT is practically applied in the food safety regulatory framework of NSW and thus it can be applied in Bangladesh if the proposed modifications are observed. The justification of the efficient application of the RRT in the food safety regulatory framework of Bangladesh is provided in several chapters in this thesis which discuss and review the weaknesses of the FSRR of Bangladesh. While investigating the flaws of the FSRR of Bangladesh, the counterpart NSW framework has

\(^{1466}\) See section 3.7.1 of chapter 3 of this thesis.
been considered as the benchmark model for evaluating and improving the system in Bangladesh.

9.3. Key Findings of This Thesis

Chapter 1 provided an introductory discussion on Bangladesh and its historical background in relation to traditional foods, food cultures and food habits. Chapter 2 provided a general introduction to the scope, aims and methods of this thesis. Chapter 3 focused on the theoretical approach to the FSRR in Bangladesh as mentioned in section 9.2 of this chapter. This study then concentrated on five major aspects of food safety regulation in Bangladesh. A brief overview on the major findings of the thesis is provided below.

Chapter 4 revealed that the legal framework for food safety affairs in Bangladesh has been suffering from various problems, such as, the multiplicity of laws and the existence of several outdated enactments. Further, despite the existence of a multiplicity of the laws for dealing with food safety concerns, the nonexistence of coordination is identified. The necessity for a unified and amalgamated (of the all the existing laws) enactment that covers the entire range of food safety issues in Bangladesh was detailed in this chapter. Chapter 4 also revealed that many laws are still ‘on the books’ although they are outdated, have unnecessary provisions and limited jurisdiction.

Chapter 5 demonstrated that the regulatory framework for food safety in Bangladesh is not sufficiently effective to combat the severe lack of safety of foodstuffs in Bangladesh. The engagement of numerous administrative bodies involved in single food safety issue with the least possible degree of coordination among them is contributing to the problem of overlapping and the ultimate ineffectiveness of the entire regulatory mechanism. Chapter 5 also revealed that there is very little transparency in the regulatory agencies. These bodies fail to demonstrate even minimal accountability in some cases. Eventually the lack of
transparency and accountability aid the infiltration of corrupt practices among employees within the regulatory bodies. Finally this chapter addressed the lack of adequate personnel in several administrative bodies.

Chapter 6 found that the statutory law which allows affected consumers to claim for damages in Bangladesh is flawed by the presence of several loopholes. This chapter further identified that product liability laws under the law of torts are not practised in the food safety liability regime of Bangladesh. Various examples of international legal scholarship on the principles of negligence, implied warranty and strict liability in relation to product liability of the food manufacturers were analysed.

Chapter 7 of the thesis, while discussing the criminal liabilities of food manufacturers, showed that the food safety laws of Bangladesh are not effective due to the unstructured mens rea, and narrowed actus reus of the offences. Statutes also allow unrestricted defences for unsafe food manufacturers namely ‘due diligence’, and ‘mistaken belief’ which make it possible for alleged offenders to escape criminal liability. The literature supports the view that such defences should not be widely available given the gravity of the food safety offences and their close relevance to public health and safety. In addition, the laws have failed to encompass all the individual and corporate persons while criminalising the food safety conducts due to the use of ambiguous language. Finally, the criminal penalties for the accused food manufacturers provided in the statutes of Bangladesh are treated as unorganised and inadequate in taking into account the mens rea requirement and the gravity of the respective offences.

Chapter 8 examined the enforcement regime of the food safety regulations and discovered a number of drawbacks regarding the administrative and judicial enforcement of the food safety laws in Bangladesh. Significantly, the administrative and judicial enforcement regime
is not capable of adopting the RRT in its current form. Several steps of the enforcement pyramid under RRT — for instance, persuasion, prohibition orders, civil penalty, and corporate capital punishments — are omitted from the present enforcement mechanism. Chapter 8 also identified a number of issues that needed to be addressed in order to achieve an effective administrative enforcement framework. For example, although the Sanitary Inspectors (SIs) are assigned to ensure food safety, they cannot perform their job because they do not have any power to enforce or penalise the culprits except with the assistance of the mobile court (MC). Also the MC itself encounters several weaknesses. Regarding judicial enforcement, there are various restraints, such as problems in filing complaints and the ignorance of the provisions establishing food courts.

9.4. Major Recommendations

The present research formulates a number of recommendations to build an effective food safety regulatory framework for Bangladesh. Summarising the major recommendations of the thesis, the following discussion provides an overall picture of the proposed structure of the food safety regulatory framework for Bangladesh.

(a) A Legal and Regulatory Framework Based on Responsive Regulation

The proposed food safety legal and regulatory framework in Bangladesh should be based on the RRT which is enforced in a pyramidal approach. As discussed in section 3.7 of chapter 3 of this thesis, there can be three types of graded food products in the manufacturing industry. A particular food manufacturer can be upgraded or downgraded based on the compliance or non-compliance with the relevant laws and regulations. Persuasion, education or training will be the basic enforcement strategy to ensure compliance with the laws. In the event that initial persuasion, training or education fails to guarantee the observance of regulations, the enforcement authority may consider issuing an improvement notice or warning letter or
prohibition orders. These seem appropriate and necessary considering the circumstances. Gradually, escalation to the ‘regulatory enforcement pyramid of sanctions’ (REPS) may result in the imposition of civil penalties, and criminal penalties as well as the downgrading of the food manufacturers. This escalation may ultimately reach the stage of corporal ‘capital punishment’, that is, licence revocation and licence cancellation of the manufacturers. It is hoped that this application of RRT in the legal and regulatory framework of Bangladesh will build a trustworthy relationship between the regulators and the regulatees; and it will encourage the food manufacturers to comply with the food regulations for producing safe foods.

(b) Food Safety Issues Covered by a Single Act

In Bangladesh, the existence of numerous pieces of legislation for dealing with food safety issues seldom offers any logical basis and is an approach which is rarely encountered elsewhere. The existence of a dozen enactments involved with food safety concerns in Bangladesh is unusual and problematic. The current research recommends enacting one law by amalgamating all the existing statutes. In that case, the existing statutes can be amalgamated with the current Pure Food Ordinance 1959 (PFO 1959) (Bangladesh) and may be named the ‘Food Act 2013’ (FA 2013) as proposed in section 4.4 of chapter 4 of the thesis. The single law should embody the philosophy of RRT as detailed in the abovementioned and below mentioned recommendations.

(c) An Apex Coordinating Body

The present study advocates the creation of a highest, single coordinating body for implementing the food safety laws in Bangladesh. A total government approach may be

\textsuperscript{1467} See the details of regulatory enforcement pyramid of sanctions in section 3.7.5 of chapter 3 of the thesis.
\textsuperscript{1468} For a detailed discussion, see chapter 4 of the thesis.
\textsuperscript{1469} For a detailed discussion, see chapter 5 of the thesis.
effectiveness in countries with relatively lower populations, but food safety, an issue involved with public health protection, should better be dealt with by a single coordinating body in Bangladesh, which has a population of approximately 150 million people. It is recommended that one apex coordinating authority be established with responsibilities for looking after the overall food safety concerns in Bangladesh. The proposed body should be formed in the suggested amalgamated single law ‘FA 2013 (Bangladesh)’ mentioned in Recommendation (b) (above). The name of this single body can be the ‘Bangladesh Food Safety Authority’ (BFSA) as proposed in section 5.5 of chapter 5 of the thesis. It should report to the Ministry of Health and Family Welfare (MOHFW). As a lack of transparency and the influence of government officials in existing administrative bodies enhance the chances of corruption and a lack of accountability, it is highly recommended that the BFSA be an autonomous body. This will help the BFSA to work independently in order to implement the FA 2013 and for performing the functions mentioned in Recommendation (f) (below).

(d) Ensure Damages for Affected Consumers

The current civil liability regime is not capable of ensuring damages for a consumer who is affected by eating unsafe food products. This study recommends that in addition to resolving the problems of the current statutory laws for guaranteeing damages for consumers, Bangladesh should develop and practise the product liability laws under the law of torts.\textsuperscript{1470} This thesis has discussed numerous examples of legal scholarship on product liabilities of food manufacturers. Bangladesh should consider codifying these product liability matters under the law of torts as recommended in section 6.5.1 of chapter 6 of this dissertation. Doing so will not only ensure the availability of damages for consumers but also that, as a result, manufacturers will become more cautious and more likely to ensure the production of safe foods in order to avoid paying damages.

\textsuperscript{1470} For a detailed discussion, see section 6.3 of chapter 6 of the thesis.
(e) Building an Effective Criminal Liability Regime

The current FSRR of Bangladesh fails to effectively criminalise the dangerous food safety practices. This is essential to ensure that the manufacturers of adulterated foods are held criminally liable. In chapter 7, this study has recommended adopting the Three-Tier *mens rea* and penalty model embraced in the *Food Act 2003* (NSW). Considering the gravity and requirements of the fault elements, the Three-Tier *mens rea* model includes three types of offences, namely offences with subjective *mens rea* (Tier 1 offences), offences with objective *mens rea* (Tier 2 offences) and offences without *mens rea* (Tier 3 offences). Tier 1 offences impose the highest penalties; Tier 2 offences provide higher — but comparatively less than — Tier 1 penalties; and Tier 3 gives lesser penalties than other two Tiers. This Three-Tier model of offences will help to implement the RRT mentioned in Recommendation (a) (above) because both the Three-Tier model of offences and REPS present a gradual escalation from lower penalties to higher penalties based on the seriousness of the offences.

Besides the *mens rea* criteria outlined above (and related issues), this thesis has made some other important recommendations in regard to the food safety criminal liability regime of Bangladesh. For example, this study recommends a broadening of the *actus reus* of the offences related to food safety. This study also suggests restricting the defences of ‘due diligence’ and ‘mistaken belief’ in regard to food manufacturers with the aim of building a stronger food safety criminal liability regime in Bangladesh. Finally, while enacting the proposed FA 2013 mentioned in Recommendation (b) (above), the legislators may follow the equivalent examples in the *Food Act 2003* (NSW) mentioned in section 7.3 of chapter 7 of this thesis with the intention of adopting the Three-Tier model of offences and the advantages it offers for the effective criminalisation of dangerous food safety conducts.

(f) An Enforcement Guideline Based on Responsive Regulation
There is no enforcement guideline for food safety regulations in Bangladesh and the existing enforcement framework does not comply with the requirements of RRT.\textsuperscript{1471} Thus the present enforcement mechanism requires the introduction and use of a constructive enforcement guideline which can be designed to include the recommended steps of the REPS. For this purpose, the proposed BFSA mentioned in Recommendation (c) (above) may regulate the guideline as the key regulatory body. However, while implementing the guideline, the BFSA needs to employ a significant number of resources, ensuring recourse to the various tools of persuasion, advice, education and training to encourage compliance with the regulations following the approach mentioned in Recommendation (a)(above). The guideline needs to adopt improvement notices and civil penalties, before escalating to the direct imposition of criminal penalties. In order to create a new enforcement guideline, Bangladesh can follow the example of the Australia & New Zealand Food Regulation Enforcement Guideline,\textsuperscript{1472} which is discussed in section 8.2.1 of chapter 8 of the thesis. The food safety law enforcement guidelines of Bangladesh can be called the ‘Bangladesh Food Regulation Enforcement Guideline’ (BFREG) as proposed in section 8.10 of chapter 8.

\textbf{(g) Proposed Structure of Administrative Enforcement at the ‘in the Field’ Level}

Inadequate enforcement personnel can render a regulatory mechanism inactive. Therefore, it is suggested that the number of SIs, BSTI officers should be increased.\textsuperscript{1473} The SIs should be under the BFSA, to be formed under the proposed FA 2013. The SIs will enforce the FA 2013 following the BFREG mentioned in Recommendation (f)(above). Qualified SIs should be appointed (until qualified staffs are appointed, the current SIs can be trained) and they should be empowered to impose penalties upon manufacturers of adulterated foods. A food safety inspection team performing duties under the BFSA (mentioned in Recommendation

\textsuperscript{1471} For a detailed discussion, see chapter 8 of the thesis.
\textsuperscript{1472} ANZFREG, above n 1269, 2.
\textsuperscript{1473} For a detailed discussion, see section 8.5 of chapter 8 of the thesis. See also section 5.4.3 of chapter 5.
should be comprised of a Sanitary Inspector, a BSTI officer, and the police if necessary. The following figure demonstrates the proposed structure of administrative enforcement at the field level in Bangladesh.
(h) Proposed Structure of the Judicial Enforcement Mechanism

Administrative and judicial enforcement cannot run simultaneously under the RRT although this is happening in Bangladesh currently. In fact, judicial engagement under the RRT should be the least active, since most of the compliance regulatory actions are possible in the lower stages of the REPS by successful application of administrative enforcement. Judicial enforcement only need to be initiated at that lower level if a consumer chooses not to pay the penalties and wants to finalise the issues in the court. However, at the judicial enforcement at the higher levels of the REPS a criminal penalty should be enforced by the courts in cases that involve any imprisonment. Part II of chapter 8 of the thesis has discussed that the system of licence suspension and licence
cancellation should be included in the BFREG as the higher stages of corporate capital punishments for the food manufacturers (licence cancellation or revocation being the highest level as it effectively means the ‘death’ of the company’s activities). For individuals (directors, company officers or agents and so on), imprisonment may also be just one part of the applicable sanctions, which can include substantial fines. Another sanction recommended is the removal of the ability of such persons to re-enter the industry.

The provision for the establishment of the ‘Pure Food Court’ under the present PFO 1959 needs to be observed following the order of the Supreme Court of Bangladesh.\textsuperscript{1474} An affected consumer should be given the authority to directly file a case in the court to obtain justice. The consumer should also be able to file such a case within an extended time limit (a minimum of two years has been suggested). The proposed framework for judicial enforcement is portrayed in the following figure. As the RRT warrants the combination of administrative and judicial enforcement in a pyramidal approach, the escalating stages of REPS are also shown in the same figure.

\textsuperscript{1474} For a detailed discussion, see section 8.7 of chapter 8 of the thesis.
Figure 9.2: Proposed Structure of the Judicial Enforcement Mechanism
9.5. Recent Developments in Food Safety Regulation in Bangladesh

While the author has been conducting this research and formulating the above mentioned major recommendations, the Government of Bangladesh (GoB) has announced plans to enact a new law named Nirapod Khaddo Ain [Food Safety Law 2013]\(^{1475}\) [author’s trans] (FSL 2013) in late April 2013.\(^{1476}\) The proposed law basically reinforces the validity of findings in this thesis by incorporating some of its main recommendations.

Why This Law?

This thesis has repeatedly argued that, at present, the food safety situation is immensely dangerous in Bangladesh,\(^{1477}\) and consumers are constantly demanding the promulgation of an effective law. Therefore, due to the growing insistence of consumers, as well as the presence of clear, longstanding and uncontrolled food adulterations in Bangladesh, the Government has decided to enact the FSL 2013. The Minister of the Food Ministry has admitted that the people of the country are extremely troubled by the ongoing food safety situation and the many chronic and non-chronic diseases that have been spreading among the people. This has driven the GoB to draft the FSL 2013 for presentation to the Parliament.\(^{1478}\)

How Does the Draft Law Comply with the Recommendations of this Thesis?

The draft FSL 2013 incorporates some of the recommendations made in this thesis, such as creating an apex regulatory body, awarding adequate punishments and employing more personnel in the administrative bodies. In fact, implementing these recommendations vindicates the suggestions of this dissertation. It is worth mentioning that the

\(^{1475}\) MOFDM, Food Safety Law 2013 (draft), above n 261.
\(^{1476}\) Tapan Biswas, ‘Serious Law against Food Adulteration Providing Death Sentence: Seven Years Imprisonment for Use of Formalin or Other Chemical at First Time’, Daily Janakantha (online), 24 April 2013 <http://dailyjanakantha.com/news_view.php?nc=15&dd=2013-04-24&ni=133175> [author’s trans]. As at May 31, the legislation was still in its draft stages and subject to further alteration during the lengthy draft process of legislating in Bangladesh.
\(^{1477}\) For example, see section 2.4 and section 2.5 of chapter 2 of the thesis.
\(^{1478}\) See the interview of the Food Minister in the newspaper report, Biswas, above n 1476.
recommendations which the proposed law has incorporated for implementing mostly comply with the author’s recent publication from this thesis, namely ‘Food Safety and Public Health Issues in Bangladesh: A Regulatory Concern’ printed in the European Food and Feed Law Review in February 2013.1479

Recommendations That the Draft Law Does Not Incorporate

The draft FSL 2013 is yet to embrace several other recommendations of the thesis.

I. The present study has mainly focused on the application of the RRT in the food safety regulatory regime of Bangladesh. But the draft law does not indicate any enforcement strategy based on the RRT. The implementation of the law is still the same as the PFO 1959 which is why the author of this thesis suspects that the FSL 2013 may be simply an addition to the bundle of previous laws.

II. The proposed law will only replace the PFO 1959; but it does not declare the annulment of the previous laws or their provisions, such as the PC 1860 (ss 272, 273), SPA 1974 (s 25 C) and all others mentioned in section 4.3.3 of chapter 4 of the thesis.

III. The draft FSL 2013 has somehow offered ‘the old things in a new fashion’. It has offered an Advisory Committee which includes almost the same features as those of the National Food Safety Advisory Council (NFSAC) mentioned in section 5.3.4 of chapter 5 of the thesis. It seems that the expected food safety advisory committee will contain 20 Government officials of a total of 22 members. As of 31 May 2013, the draft FSL 2013 does not include a single member who represents the consumers. The advisory body is headed by the Food Minister, who is a member of the political government. And the suggested food safety authority as the so-called coordinating body has to work under this advisory body which hardly makes the coordinating body independent or autonomous.

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1479 See the full citation of the publication at, Ali, ‘Food Safety and Public Health’, above n 260.
Chapter 9: Summary and General Conclusions

IV. The draft FSL 2013 includes similar principles for damages that are included in the CRPA 2009, which has been discussed as inadequate in section 6.2 of chapter 6 of the thesis.

V. The draft FSL 2013 does not include the Three-Tier mens rea and penalty model to effectively criminalise the food safety offences. Rather, all the offences included in the proposed law appear identical with the laws mentioned in section 7.4 of chapter 7 of the thesis. Moreover, despite the imposition of higher penalties, the FSL 2013 provides several unexpected provisions for the offenders. For example, an alleged offender will be exempted from the criminal liabilities if he or she is not intentionally involved in the violation of the law. Also a retailer ‘walks free’ if he or she does not have any involvement with the manufacturer. Both of these provisions are similar to the provisions of the CRPA 2009, which has been discussed as inappropriate in 7.4.5 of chapter 7 of the thesis.

Therefore, although the draft FSL 2013 appears to have incorporated some of the recommendations of the present study, it is insufficient to minimise, much less halt, the existing food safety problems in Bangladesh.

9.6. Conclusions and Way Forward

This thesis has identified the major shortcomings of the regulation of food safety in Bangladesh. Numerous problems exist in the frameworks that have ultimately resulted in the entire mechanism being ineffective. The current research has chosen the RRT to underpin a new food safety regulatory mechanism for Bangladesh, following the example of NSW. The existence of numerous outdated laws without any single coordinating authority makes the laws worthless. Furthermore, the consumers do not have access to damages commensurate with their loss under the existing civil liability regime, and the criminal liability regime lets the manufacturers shirk their responsibilities, both of which are frustrating for an affected
Chapter 9: Summary and General Conclusions

consumer. The enforcement framework is unproductive owing to the unorganised implementation of the laws in the absence of proper guidelines. All these issues have made the entire food safety mechanism ineffective.

The current study has discussed all the issues in light of their equivalents in NSW. Recommendations have been made for all issues by analysing the counterpart NSW provisions where appropriate and necessary. All of the recommendations made in the preceding chapters, and summarised in this final chapter, are believed to be significant for the design and implementation of an updated and effective food safety regulatory regime in Bangladesh as well as in other least developed and developing countries. This thesis suggests that complying with the above mentioned recommendations without further delay is essential in order to ensure safe food for all as well as to ensure appropriate damages and justice for affected consumers.
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