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UNPRECEDENTED FACTORY FIRE OF TAZREEN
FASHIONS IN BANGLADESH:
REVISITING BANGLADESHI LABOR LAWS IN
LIGHT OF THEIR EQUIVALENTS IN AUSTRALIA

*S.M. Solaiman**

ABSTRACT

Right to life is a core human right, but workers' lives seem to be dreadfully cheap in Bangladesh. This is so because the government appears to be complacent by offering a small amount of money to the families of victims of fires at garment factories and collapses of factory buildings. Previously, at least 1,000 workers have been killed in garment factories alone in Bangladesh from 1990 to 2012, ironically, all went unpunished. Recently, the devastating fire at Tazreen Fashions Ltd. which killed 112 in November 2012 and, just a few months apart, the horrifying collapse of Rana Plaza which housed five garment factories causing death of 1,129 workers have wounded the conscience of humankind all over the world and have locally created public outcry for the exemplary punishment of the culprits to prevent further deaths at work. This article examines the Bangladeshi health and safety legislation to find criminal liabilities of the entity and its executives for the casualties of the unprecedented fire at Tazreen. It reveals that, though they all may be held liable under the legislation, the law needs to be amended to provide greater clarity of safety duties and increase penalties.

INTRODUCTION

The devastating fire at Tazreen Fashions Ltd. ("Tazreen") in November 2012 and just a few months apart, the horrifying collapse of Rana Plaza which housed five garment factories causing combined deaths of more than a thousand poor workers, have wounded the

conscience of the world community. Pope Francis has condemned workers' present conditions at garment factories and termed it as "slave labour," and said that "unjust salaries and the unbridled quest for profits were 'against God.'"¹ The United Nations ("UN") Secretary-General was "saddened by the loss of lives" and the European Union ("EU") Heads of Missions in Dhaka expressed their shock at the casualties of Rana Plaza.² The International Labour Organisation ("ILO") has urged the Government of Bangladesh to take immediate action to ensure safety of garment workers and to prevent a "recurrence of the latest in a series of entirely avoidable workplace tragedies,"³ while the United States has already taken a punitive measure by suspending Bangladesh from the Generalised System of Preferences ("GSP") program in the aftermath of the tragedies against such gross violation of safety requirements asking the country to improve its labor conditions.⁴ All these imply the extent of fatalities and the fragility of workplace safety in Bangladesh. Nonetheless, no serious effort to improve workplace safety has been put in place to date as reported by the Economist, a British weekly.⁵

The country's worst industrial blaze occurred when the fire ripped through a nine-story factory building of Tazreen in Ashulia on November 24, 2012.⁶ The fire killed at least 112 workers and injured

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1. Nurul Huda, Editorial, *Slave Labour: Practice of Political Impunity Has to Go*, NEW NATION (Dhaka), May 3, 2013 (Bangl.), <http://thenewnationbd.com/newsdetails.aspx?newsid=72885>.

2. Nizam Ahmed, *UN Chief Condoles Deaths in Savar Bldg. Collapse*, FIN. EXPRESS (Dhaka), Apr. 28, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDRfMjhMTNfMV8xOTBfMTY3ODI4>.

3. *ILO for Quick Action: Ensure Safety to Garment Workers*, NEW NATION (Dhaka), May 5, 2013 (Bangl.), <http://thenewnationbd.com/newsdetails.aspx?newsid=73071>; *ILO Suggests Steps on Factory Safety*, FIN. EXPRESS (Dhaka), May 3, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDVfMDNfMTNfMV8xXzE2ODIxMg==>.

4. Wasi Ahmed, Editorial, *US GSP Suspension and the Worry-Box*, FIN. EXPRESS (Dhaka), June 30, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDZfMzBfMTNfMV82XzE3NDY4NA==>.

5. *'No Serious Efforts' to Improve Factory Safety*, FIN. EXPRESS (Dhaka), July 13, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDdfMTNfMTNfMV8yXzE3NjM1NQ==> [hereinafter *No Serious Efforts*].

6. Tawfique Ali, *Tazreen Garment Factory: Unfit yet Licensed as Fire-Fit*, DAILY STAR (Dhaka), Jan. 30, 2013 (Bangl.), <http://archive.thedailystar.net/newDesign/news-details.php?nid=267090>.

about 100 others, which had been alarming news across the globe.⁷ Despite such a big flame, burning of factories is on the rise in Bangladesh. Smart Export Garment Ltd in Dhaka (the capital city of Bangladesh) caught fire on January 26, 2013 killing not less than seven female garment workers who had died of suffocation.⁸ A fire at Tung Hai sweater factory in Dhaka occurred on May 8, 2013 and killed eight people including its owner/managing director and Additional Deputy Inspector General of Police.⁹ Another blaze occurred on June 13, 2013 damaging the six-story Aerba Garment Factory in Ashulia that ended up injuring only a few; most of the workers were absent during the flame which started at 9:00 AM originating from its ground floor down.¹⁰ Yet another fire broke out at 3:30 AM on June 30, 2013, this time at a shoe factory called Papella Shoes Ltd. in Chittagong Export Processing Zone.¹¹ Luckily, fire fighters were able to contain the fire without any fatalities as the factory was closed during that early morning.¹²

Shockingly enough, mourning and grieving for factory casualties seem endless in Bangladesh as Rana Plaza at Savar (30 km away from the capital city Dhaka) collapsed on April 24, 2013 killing 1,129 and injuring more than 2,500¹³ who were reportedly forced to enter the

7. *Id.*; 37 Identified by DNA Test, DAILY STAR (Dhaka), Jan. 30, 2013 (Bangl.), <http://archive.thedailystar.net/newDesign/news-details.php?nid=267091>; 7 Killed: Workplace Safety Horrendous, DAILY STAR (Dhaka), Jan. 27, 2013 (Bangl.), <http://archive.thedailystar.net/newDesign/news-details.php?nid=266720>.

8. *EU Worried: Nationwide Factory Inspection Begins*, DAILY STAR (Dhaka), Jan. 31, 2013 (Bangl.), <http://archive.thedailystar.net/newDesign/news-details.php?nid=267288> [hereinafter *Nationwide Factory Inspection Begins*].

9. *Devastating Fire at Mirpur RMG Unit*, FIN. EXPRESS (Dhaka), May 10, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDVfMTBfMTNfMV8xXzE2ODkyMw==>.

10. *RMG Factory Godown Guttled in Ashulia*, FIN. EXPRESS (Dhaka), June 14, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDZfMTRfMTNfMV8xOTBfMTcyODk5>.

11. *Fire at CEPZ Shoe Factory*, FIN. EXPRESS (Dhaka), July 1, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDdfMDFfMTNfMV8xOTBfMTc0ODcw>.

12. *See id.*

13. *No Serious Efforts, supra* note 5; *US Congressman in City to Inspect RMH Factories*, FIN. EXPRESS (Dhaka), May 26, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDVfMjZfMTNfMV8xOTBfMTc0ODcw>. At the time of the writing of this article, search and recovery efforts are still underway. About four to five thousand workers were in the building at the time of collapse, a total of 2,437 survivors were pulled from the rubble. Rahman Jahangir, *Hard Lessons From Savar Tragedy*, FIN. EXPRESS (Dhaka), May 4, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDVfMDRfMTNfMV82XzE2ODMyNW==>; *2nd Phase of Rescue Operation Begins, Death Toll Now 381*, FIN. EXPRESS (Dhaka), Apr. 30, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDVfMDRfMTNfMV82XzE2ODMyNW==>.

building against their will on the dreadful day in defiance of all warnings from concerned authorities of its imminent demise.¹⁴ Several other buildings did collapse in the past but no one has been punished to date mainly because the victims were poor workers, said a retired Cabinet Secretary.¹⁵ An analysis of building collapse falls outside the purview of this endeavor as it is concerned solely with factory fires, which occur more frequent than other incidents.¹⁶

The Washington-based International Labor Rights Forum (“ILRF”) determined that at least 1,000 workers were killed, while 3,000 others were injured in more than 275 incidents in garment factories alone in Bangladesh from 1990 to 2012.¹⁷ Ironically, all went unpunished.¹⁸ It is now widely believed that the recurrence of this sort of tragedy could have been prevented had the wrongdoers been adequately punished.¹⁹

Right to life is the nucleus of all human rights regardless of any boundaries. But workers’ lives in Bangladesh seem to be extremely cheap as the government appears to be complacent by offering a small amount of money to the helpless families of victims in response to employers’ failure to ensure their safety at the workplace.²⁰

Admittedly, criminal liability has the potential to help promote a culture of safety at the workplace.²¹ Therefore, it is argued that a precedent of adequate punishment needs to be established; otherwise the law will continually be flouted by profit-hungry garment owners with

bd.com/index.php?ref=MjBfMDRfMzBfMTNfMV8xXzE2Nzk3Mg.

14. Zaglul Ahmed Chowdhury, *Savar Tragedy: Garment Industry Must Be Saved, Phasing Out the Errants*, FIN. EXPRESS (Dhaka), May 5, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDVfMDVfMTNfMV8xXzE2ODQyNg==>; Jahangir, *supra* note 13.

15. Ali Iman Majumdar, [*Public Administration: It’s Time to Wake Up*], PROTHOM ALO (Dhaka), Apr. 26, 2013 (Bangl.). Mr Majumdar was a Cabinet Secretary to the Government of Bangladesh. *List of Cabinet Secretaries*, CABINET DIV. (Bangl.), http://www.cabinet.gov.bd/index.php?page=c_sec_list&lang=en&next=0 (last visited Oct. 27, 2013).

16. *See Bangladesh Factory Fire Kills Nine*, SYDNEY MORNING HERALD (Oct. 9, 2013, 10:59 AM) (Austl.), <http://www.smh.com.au/world/bangladesh-factory-fire-kills-nine-20131009-2v788.html>.

17. *Nationwide Factory Inspection Begins*, *supra* note 8.

18. Mahmudur Rahman et al., *Garments Owners Never Punished*, PROTHOM ALO (Dhaka), Apr. 27 2013 (Bangl.); Golam Mortuza et al., *So Many Loss of Lives: But No One Punished*, PROTHOM ALO (Dhaka), Dec. 1 2012 (Bangl.).

19. *See, e.g., Sajjadur Rahman, Costly Neglect*, DAILY STAR (Dhaka), Nov. 29, 2012 (Bangl.), <http://archive.thedailystar.net/newDesign/news-details.php?nid=259209>.

20. *See Confusion Over Tazreen Toll*, DAILY STAR (Dhaka), Dec. 9, 2012 (Bangl.), <http://archive.thedailystar.net/newDesign/news-details.php?nid=260489>.

21. DAVID BROWN ET AL., *CRIMINAL LAWS: MATERIALS AND COMMENTARIES ON CRIMINAL LAW AND PROCESS OF NEW SOUTH WALES 477* (5th ed. 2011) (Austl.).

impunity.²² While the legal analysis of corporate manslaughter liability under general criminal law would be the task of another article, this piece aims to examine offenses of Tazreen as a company, its owner/managing director (“MD”) and other officers (“mid-level managers”) for the aforesaid fire casualties under the occupational health and safety (“OHS”) legislation as a case study. It finds that although the provisions of OHS offenses should have been an effective deterrent and a useful instrument to redress violations of workers’ safety, that is not the case in practice as their effectiveness is circumscribed by ambiguities in imposing liabilities and inadequacy in the prescribed penalties. There has been no record of successful prosecution of workplace fatalities in Bangladesh.²³ A desired outcome of any law entails clarity in liability and severity in punishment proportionate to the harm caused by, and the gravity of, the offensive conduct. This article thus examines the loopholes in the existing liability and penalty provisions, and provides suggestions for their further improvement. The following section highlights the obligation of the government to protect human lives in Bangladesh.

I. RIGHT TO LIFE AND WORKERS’ RIGHT TO OHS: A FUNDAMENTAL HUMAN RIGHT IN BANGLADESH

The denial of the right to life may render all other human rights worthless in that, enjoyment of any right requires a person to be alive. The right to life is an internationally recognized human right as it is incorporated in both the Universal Declaration of Human Rights 1948 (“UDHR”) and the 1966 International Covenant on Civil and Political Rights (“ICCPR”).²⁴ Article 3 of the UDHR declares that “[e]veryone has the right to life, liberty and security of person.”²⁵ It is subsequently included in the ICCPR under Article 6, section 1, which provides that “[e]very human being has the inherent right to life. This right shall be protected by law.”²⁶

Bangladesh is a state party to most of the major international

22. See *Confusion Over Tarzeen Toll*, *supra* note 20.

23. Mortuza et al., *supra* note 18.

24. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

25. UDHR, *supra* note 24, at 72.

26. ICCPR, *supra* note 24, 999 U.N.T.S. at 174.

human rights instruments including the ICCPR.²⁷ As a member state, Bangladesh is obliged under Article 2 of the ICCPR to “adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”²⁸ In addition to this international obligation to protect human lives, the Government of Bangladesh has assumed further responsibility to protect this right under its Constitution, which embraces most of the rights contained in the UDHR, including the right to life as a fundamental right of the people.²⁹

Article 32 of the Constitution provides that “no person shall be deprived of life or personal liberty save in accordance with law.”³⁰ This right is reinforced by the corresponding right to protection of law enshrined in Article 31 of the Constitution, which 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 the law, and only in accordance with the law.³¹ The High Court Division of the Supreme Court of Bangladesh firmly held in *Uddin v. Dhaka Municipal Corp.*³² that the protection of life under Article 31 of the Constitution means that one’s life “cannot be endangered by any action which is illegal.”³³

In *Acharjee v. State*,³⁴ the Supreme Court of Bangladesh held with great emphasis for the right to life that the perpetrator of violating this right should receive serious punishment so that justice is done for the victim and the society.³⁵ The Constitution also guarantees equality before the law under Article 27 which provides that “[a]ll citizens are equal before law and are entitled to equal protection of law.”³⁶ Giving

27. See, e.g., *Chapter IV Human Rights: International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTIONS (Oct. 30, 2013, 5:09 PM), http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en%23EndDec. Bangladesh ratified the ICCPR on 6 September 2000. *Id.*

28. ICCPR, *supra* note 24, 999 U.N.T.S. at 174.

29. CONSTITUTION OF THE PEOPLE’S REPUBLIC OF BANGLADESH Nov. 4, 1972, art. 32, available at <http://www1.umn.edu/humanrts/research/bangladesh-constitution.pdf>.

30. *Id.*

31. Right to protection of law. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

Id. at art. 31.

32. (1997) 17 BLD 577 (Bangl.).

33. BLD’s 10-Years Civil Digest (1993 – 2002), 2004 Digest, at 140 (Bangl.).

34. *Acharjee v. State*, (2004) 56 DLR 285 (Bangl.).

35. *See id.*

36. CONSTITUTION OF THE PEOPLE’S REPUBLIC OF BANGLADESH Nov. 4, 1972, art. 27, available at <http://www1.umn.edu/humanrts/research/bangladesh-constitution.pdf>.

emphasis to the enjoyment of fundamental rights, the abovementioned Supreme Court further pronounced in *State v. Deputy Commissioner of Satkhira*³⁷ that it is the constitutional responsibility of the Court to ensure that the fundamental rights of the citizens are preserved and strictly protected.³⁸

Inviolability is perhaps the most important feature of fundamental rights as they cannot be taken away by the state under ordinary legislation because of the supremacy of the constitutional law.³⁹ Article 7, clause 2 of the Constitution unequivocally declares its supremacy against any other law of the land.⁴⁰ In recognition of the superiority of fundamental rights, the United States Supreme Court in *Boyd v. United States*⁴¹ held long 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.”⁴²

In addition to the right to life, workers’ right to OHS is enshrined as a human right in Article 7 of the International Covenant on Economic, Social and Cultural Rights 1966 (“ICESCR”).⁴³ Article 7 provides that “[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular. . . (b) safe and healthy working conditions.”⁴⁴ Bangladesh has ratified the ICESCR.⁴⁵ Further, the right to OHS is also recognized as a core human right under two ILO conventions titled the Convention on Occupational Safety and Health 1981, and the Promotional Framework for Occupational Safety and

37. (1994) 14 BLD 266 (Bangl.).

38. BLD’s 8-Years Criminal Digest (1993 – 2000), 2000 Digest, at 80 (Bangl.).

39. See DAVID A. J. RICHARDS, *THE MORAL CRITICISM OF LAW* 39–56 (1997); David A. J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 958 (1979). See also, Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1075 (1981).

40. CONSTITUTION OF THE PEOPLE’S REPUBLIC OF BANGLADESH Nov. 4, 1972, art. 7, cl. 2, available at <http://www1.umn.edu/humanrts/research/bangladesh-constitution.pdf>.

41. 116 U.S. 616 (1886).

42. *Id.* at 635 (quoted in William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights* 90 HARV. L. REV. 489, 494 (1977)).

43. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Mar. 23, 1976) [hereinafter ICESCR].

44. *Id.* at 6.

45. *Chapter IV Human Rights: International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTIONS (Nov. 4, 2013, 5:09 PM), http://treaties.un.org/untc/pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-3&chapter=4&lang=en.

Health Convention 2006.⁴⁶ Although Bangladesh has not ratified these ILO conventions as yet, it is a signatory to both instruments.⁴⁷

The above discussion demonstrates that the right to life is a human right as well as a fundamental right in Bangladesh, and the State is obliged to protect this right and ensure equal protection of the law for every citizen treating everyone equal before the law.⁴⁸ Therefore, it would be a breach of this sacred obligation of the State if the persons responsible for factory fires are not brought to justice. Part III demonstrates how the right to life was violated at Tazreen.

II. FACTS OF THE TAZREEN FIRE

The Tazreen tragedy took place in a factory where about 1,150 people were working that night, the fire alarm went off, and two managers blocked the way to run towards staircases asking the workers to stay in work.⁴⁹ The ordinary exit gates of the nine-story building were locked at the time of the blaze concealing the last opportunity for the panicky workers to escape the trap of death.⁵⁰ Perhaps more shockingly, Tazreen had no emergency fire exit, therefore the workers who desperately tried to flee from the flame could not get out of it.⁵¹ Besides the lack of emergency or fire exits, the building's three staircases ended

46. See Convention Concerning Occupational Safety and Health Convention and the Working Environment (ILO No. 155), art. 4, cl. 2, June 22, 1983, 1331 U.N.T.S. 279 (entered into force Aug. 11, 1983); Convention Concerning Promotional Framework for Occupational Safety and Health Convention (ILO No. 187), Preamble, June 15, 2006 (entered into force Feb. 20, 2009), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C187.

47. See *Up-To-Date Conventions Not Ratified by Bangladesh*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:103500 (last visited Nov. 5, 2013).

48. See *supra* Part II. In addition to the right to life, the right to health is also both a human right as well as a fundamental right in Bangladesh as recognised by its Constitution and many international human rights instruments. Md. Ershadul Karim, *Health as Human Rights Under National and International Legal Framework: Bangladesh Perspective*, 3 J. OF E. ASIA & INT'L L. 337, 337 (2010).

49. *Fire Revealed A Gap In Safety For Global Brands*, DAILY STAR (Dhaka), Dec. 8, 2012 (Bangl.), <http://archive.thedailystar.net/newDesign/news-details.php?nid=260360>.

50. Wasi Ahmed, Editorial, *Tazreen Fire: Our Share of Corporate Criminality*, FIN. EXPRESS (Dhaka), Dec. 5, 2012 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBMTJfMDVfMTJfMV82XzEIMjA2Nw==>.

51. M. Shahidul Islam, *Conspiracy Theory Lacks Credibility: Deadly Garment Fire Shakes Buyers' Confidence*, WKLY. HOLIDAY (Dhaka), Nov. 30, 2012 (Bangl.), <http://www.weeklyholiday.net/homepage/pages/UserHome.aspx?ID=2&date=11/30/2012>.

in the ground floor inside the building.⁵² The ground floor had been used as a store or warehouse stacking huge quantities of garment materials where the fire originated,⁵³ which made exiting even more difficult, if not impossible.⁵⁴ The warehouse was unauthorized, and the fire services authority admits that “none of the three staircases at Tazreen was fire protected as required by safety law.”⁵⁵ Moreover, “fire extinguishers were left unused as none knew how to use them, or were dysfunctional.”⁵⁶

The factory is located in Nischintapur village within the Ashulia Industrial Area, which is situated just outside Dhaka. Hundreds of factory buildings including Tazreen have been erected there in violation of the national building code and the master plan of the capital city (Dhaka Metropolitan Development Plan – “DMDP”), which does not permit construction of factories in the “so-called” Ashulia Industrial Area.⁵⁷ This area had been brought under the control of Rajuk (Capital Development Authority) in 1987 and subsequently the DMDP in 1997.⁵⁸ Despite being obligatory for the owners of these factories, they had obtained neither the land-use clearance nor the building approval from Rajuk.⁵⁹ Evidently, the Tazreen building was constructed on a narrow pathway in the village without Rajuk’s approval as confirmed by concerned officials.⁶⁰

In addition, as asserted by the President of the Institute of Architects Bangladesh, “the mandatory safety provisions as per the national building code and construction rules had been grossly violated there.”⁶¹ According to the national building code, a high-rise building like Tazreen is required to have safety compliances which include “emergency exits, fire-resistant doors, dedicated water reservoirs for fighting fire, easy access to fire engines and alternative power supply, etc.”⁶² Paradoxically, the Tazreen building lacked all of these

52. Tawfique Ali, *Factories Set Up Violating Rules*, DAILY STAR (Dhaka), Dec. 22, 2012 (Bangl.), <http://archive.thedailystar.net/newsDesign/news-details.php?nid=262080>.

53. Abdur Rahman Khan, *Garments Tragedy Raises Many Questions About Workers’ Safety In Bangladesh*, WKLY. HOLIDAY (Dhaka), Nov. 30, 2012 (Bangl.), <http://www.weeklyholiday.net/homepage/pages/UserHome.aspx?ID=3&date=11/30/2012>.

54. Ali, *supra* note 52.

55. Ali, *supra* note 6.

56. Islam, *supra* note 51 (internal quotation marks omitted).

57. Ali, *supra* note 52.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

mandatory facilities.⁶³

The Tazreen factory originally started off as a three-story building in 2008 when the fire department first issued it a license.⁶⁴ However, the fire department kept renewing the license on a regular basis until June 2012 despite the fact that the owner of the factory kept illegally adding floors to the building.⁶⁵ The Deputy Director of Fire Services confirms that the Tazreen owner extended the factory building up to the ninth floor “without complying with necessary fire safety measures.”⁶⁶ Thus the President of the Institute of Architects Bangladesh logically blamed the sheer negligence of the concerned regulatory agencies and their lack of supervision for the Tazreen tragedy.

In such a perilous situation, MD of Tazreen reportedly said that “I’m concerned that my business with [foreign importers] will be hampered.”⁶⁷ However, in another statement the MD admitted that the loss of life at Tazreen was his fault but that nobody had informed him of the lack of emergency exits which could have been made accessible from the outside.⁶⁸

The Tazreen fire exposes deliberate violations of, and absolute disregard for, the law of the land. Both the MD of Tazreen as well as the governmental agencies disobeyed or at least ignored the legal requirements allegedly relying on corruption.⁶⁹ The owners are believed to put their profits above workers’ safety as they sometimes discourage workers from taking part even in monthly fire drills, as it “would cost them production losses.”⁷⁰ As will be discussed below, the rules currently in place require the factories to ensure safety of their

63. *Id.*

64. Ali, *supra* note 6.

65. *Id.*

66. *Id.*

67. Islam, *supra* note 51. Interestingly, in an official statement, U.S. retail giant Wal-Mart noted that Tazreen had been making clothes for them as a result of the actions taken by a supplier who had subcontracted work to Tazreen in violation of Wal-Mart’s policies. *Id.*

68. Refayet Ullah Mirdha & Sarwar A. Chowdhury, *My Fault, But None Alerted Me: Tazreen MD Tells Star*, DAILY STAR (Dhaka), Nov. 29, 2012 (Bangl.), <http://archive.thedailystar.net/newDesign/news-details.php?nid=259221>.

69. Sajjadur Rahman, *Safety Gets Risky for Corruption*, DAILY STAR (Dhaka), Dec. 7, 2012 (Bangl.), <http://archive.thedailystar.net/newDesign/news-details.php?nid=260241>; *Safety at RMG Units: Europe for Dhaka to Make Tougher Laws*, DAILY STAR (Dhaka), Jan. 18, 2013 (Bangl.), <http://archive.thedailystar.net/newDesign/news-details.php?nid=265720>; Janet Keeping & Ifekharuzzaman, Op-Ed., *Tazreen Fire, Corruption and Rule of Law: Lessons for Canadians*, DAILY STAR (Dhaka), Dec. 22, 2012 (Bangl.), <http://archive.thedailystar.net/newDesign/news-details.php?nid=262067>.

70. Rahman, *supra* note 69.

workers.⁷¹ This sort of tragic accident recurrently happens due to the negligence or recklessness of factory owners and executives in adhering to workplace safety and the failure of regulators in enforcing the relevant laws.⁷²

It is reported that two dozens of licenses manifestly failed “to ensure improved workplace condition as unscrupulous [government] staff join hands with errant factory owners.”⁷³ The people involved with the industry say that “rampant corruption by regulators and factory owners “greed” for excessive profit lead to many such accidents.”⁷⁴ A director of another garment factory categorically claims that “[f]actory owners without having to put in place any safety measures can get licenses from the government authorities in exchange for bribe.”⁷⁵ There are obvious corrupt practices and regulatory failures, which fall beyond the scope of this article.

The Tazreen incident is comparable only with the 1911 fire at the Triangle Shirtwaist Factory in New York City, which killed 146 people.⁷⁶ The historic Triangle Shirtwaist Factory incident contributed to bringing about significant changes in the United States workplace.⁷⁷ The government of Bangladesh is currently under a tremendous amount of pressure from big importers such as the United States, the EU and the ILO to make legal reforms in order to ensure safety at work.⁷⁸ A failure of Bangladesh in effectively responding to the demand of improving, amongst other things, health and safety conditions at the workplace may result in permanent suspension of GSP for the job-hungry country by many developed nations.⁷⁹

The garment industry is made up of more than 4,000 units which constitute the single largest sector of export earnings worth over \$20

71. See *infra* Part IV.

72. Rahman, *supra* note 69.

73. *Id.*

74. *Id.*

75. *Id.*

76. See *Mozena for Quick Safety Measures in GMG Factories, Warns of Losing GSP in Failure*, WEEKLY HOLIDAY (Dhaka), Dec. 7, 2012 (Bangl.) (citing United States Ambassador to Bangladesh Dan Mozena) [hereinafter *Mozena for Quick Safety Measures*].

77. *Id.*

78. As mentioned earlier, the ILO has already urged Bangladesh to take immediate action to improve its labour conditions and the United States has suspended Bangladesh's GSP advantage. See *supra* notes 3-4 and accompanying text. See also Editorial, *Safety Accord Framework for Garments Industry*, FIN. EXPRESS (Dhaka), Aug. 1, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDdhfMDFfMTNfMV82XzE3ODUzMA==>; *ILO for Further Steps to Fulfil Obligations*, FIN. EXPRESS (Dhaka), July 23, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDdhfMjNfMTNfMV8xXzE3NzQ3Ng==>.

79. *Mozena for Quick Safety Measures*, *supra* note 76.

billion (United States dollars) annually and accounts for over 10% of the national Gross Domestic Product (GDP).⁸⁰ Bangladesh is already overstrained by unemployment and cannot afford to lose the garment industry which is a driving force of the national economy and workplace of about four million workers, 90% of whom are women in the country.⁸¹ Therefore, in the wake of such pressures and the complete failures of prosecutors in convicting errant companies and their executives for frequent factory fires in the past, it is crucial to conduct an in-depth analysis of the prevailing legal provisions concerning workplace safety in Bangladesh. This will permit exploration into the potential liabilities that companies and executives may face in Bangladesh for such fatalities.

This investigation focuses on the provisions of the workplace safety legislation called the Bangladesh Labour Act 2006 (BLA2006)⁸² which will be looked through the prism of the Work Health and Safety Act 2011 (WHS2011).⁸³ In Australia, all jurisdictions have replaced their previous health and safety legislation with a new enactment embodying the Model Work Health and Safety Act 2009 from the beginning of 2012.⁸⁴ Accordingly, the Parliament of New South Wales (“NSW”) has enacted the WHSA2011, which took effect on January 1, 2012.⁸⁵ This new legislation has been put in place as an outcome of harmonization of WHS laws throughout Australia, including the Commonwealth jurisdiction aiming at achieving a consistent and coherent regulatory approach across all Australian jurisdictions.⁸⁶ Hence the WHSA2011 of NSW will be used in this article as the law of Australia in discussing the relevant provisions of the BLA2006 where necessary and appropriate, though the legislation of other Australian jurisdictions may slightly vary.

III. OCCUPATIONAL HEALTH AND SAFETY REQUIREMENTS: STATUTORY

80. Islam, *supra* note 51.

81. Md Zonae Emran, *The Rana Plaza Tragedy*, FIN. EXPRESS (Dhaka), May 4, 2013 (Bangl.), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMDVfMDRfMTNfMV85OV8xNjgyODQ=>.

82. Bangladesh Labour Act, 2006.

83. *Work Health and Safety Act 2011* (NSW) (Austl.).

84. *See SAFE WORK AUSTRALIA, GUIDE TO THE MODEL HEALTH AND SAFETY ACT 2* (2002) (Austl.), *available at* <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/guide-to-the-work-health-and-safety-act-> [hereinafter *SAFE WORK AUSTRALIA*]; Karen Wheelwright, *Company Directors' Liability for Workplace Deaths*, 35 CRIM. L.J. 223, 233-34 (2011).

85. *Work Health and Safety Act 2011* (NSW) (Austl.).

86. *Id.* at s 3(h).

OFFENSES UNDER HEALTH AND SAFETY LEGISLATION IN BANGLADESH
AND AUSTRALIA

The area of occupational health and safety is regulated primarily by the BLA2006 in Bangladesh.⁸⁷ Broadly, Part 6 of the BLA2006 contains provisions for safety of workers in which section 62 deals with the measures to be taken by a factory to avoid dangers and damages that may be inflicted by fire.⁸⁸ Section 62 requires a factory to have the following:

At least one alternative exit with staircases connecting all the floors of the factory building as described in the rules for each and every factory.

No door affording exit can be locked or fastened during the working hours so that they can be easily or immediately opened from inside.

The doors affording exit must be open outwards, unless it is sliding in nature, if the door is between two rooms it must open in the direction of the nearest exit.

Marking in red letter in proper size, in the language understood by the majority of the workers, on such doors, windows or any alternative exit affording means of escape in case of fire.

There shall be an effective and clearly audible means of fire-warning system to every worker.

There shall be a free passage-way giving access to all means to escape.

Where more than ten workers are employed other than in the ground floor, there shall be a training for all the workers about the means of escape in case of fire.

There shall be at least one fire-extinguisher parade and escape-drill at least once a year in a factory where more than fifty workers are employed.⁸⁹

It is worthwhile mentioning that that some minor changes have

87. Bangladesh Labour Act, 2006, pmb1.

88. *Id.* at § 62.

89. *Id.*

been made in section 62 by the Bangladesh Labour (Amendment) Act 2013 passed on July 15, 2013.⁹⁰ These changes are not included here mainly because they have rather widened the safety duties to some extent, but they will not retrospectively apply to the Tazreen fire. Therefore those changes are unrelated to this study.

The duties imposed under section 62 are straightforward and mandatory.⁹¹ Admittedly, an obvious purpose of these legal duties is to protect the people from fire at work.⁹² An accident may occur despite strict compliance with regulations, but casualties can be minimized by such obedience which entails due diligence exercised by employers and factory executives. The facts of the Tazreen fire stated above do provide compelling evidence that the factory was in gross violation of section 62 of the BLA2006. This is because the building itself was constructed without proper authorization; it did not have any alternative safe exits; an unauthorized warehouse was established in the ground floor where the fire originated; employees were not imparted training as how to effectively respond to factory fires and so on.⁹³ Even more distressingly, all the staircases of the illegally erected nine-story Tazreen building ended inside the ground floor and the main collapsible gates were deliberately locked-up after the eruption of the fire perhaps to protect the products from being stolen.⁹⁴

Evidently, comprehensive duties concerning safety from fire are laid down in section 62 of the BLA2006, but it does not explicitly clarify who owes those duties and to whom.⁹⁵ However, in its preamble, the legislation does mention that it is enacted to regulate the relationships between employers (owners) and their employees of any form of business.⁹⁶ In addition to criminal liability, section 150 of the BLA2006 makes owners civilly liable to pay compensation to injured workers for breaching the same duties under section 62.⁹⁷ So, it can be inferred that the duties are primarily imposed on the “owner/employer” in control of the establishment.⁹⁸ This ambiguity may impede the enforcement of the legislation, and therefore can be inhibitive to achieving its purposes.

90. Bangladesh Labour Act, 2006, § 62, *amended by* Bangladesh Labour Act, 2013.

91. *See* Bangladesh Labour Act, 2006, § 62.

92. *Id.*

93. *See supra* Part III.

94. *See id.*

95. *See* Bangladesh Labour Act, 2006, § 62.

96. *Id.* at pmb1.

97. *See id.* at § 110.

98. The BLA2006 among other persons, includes owners and managers in the definition of “employer” in the Act. *See id.* at § 2(xlix).

This issue will be explored further in this article when persons who can be held criminally responsible are addressed.⁹⁹

Unlike the BLA2006, the WHSA2011 imposes statutory duties on several persons ranging from the entity to its workforce (including officers) to do all that is reasonably practicable to ensure a safe and healthy work environment.¹⁰⁰ The central requirement of these duties is that one should take reasonable care to protect oneself and others at work, and that officers have a duty to “exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.”¹⁰¹

The WHSA2011 explicitly places a duty not only on the business entities, but on everyone who can be injured at work or die from a workplace accident.¹⁰² Although the BLA2006 lacks such clarity, if a company or any other business establishment commits the offense, all people concerned are liable unless they prove their innocence under section 312 of the BLA2006.¹⁰³ Section 312 provides that:

Where an offence punishable under this act or under any other rule, regulation or scheme is committed by a company or other body corporate or by a firm, every director, partner, manager, secretary or other officer or agent thereof shall, if actively concerned in the conduct of the business of such company, body corporate or firm, be deemed to have committed the offence unless he proves that the offence was committed without his knowledge or consent, or that he exercised all due diligence to prevent the commission of the offence.¹⁰⁴

The difficulty in not placing a duty on directors and officers independently of the business establishment is that to punish the individual(s) whose act or omission caused the fatalities could not be held liable unless the liability of the entity itself is proved. The breach of the safety duty is not per se an offense under the BLA2006, therefore it is difficult to accuse the company itself of a breach of duty.¹⁰⁵ If all breaches are to be attributed to the entity, businesses' may be burdened too heavily.¹⁰⁶ On the other hand, no duty has been imposed on

99. See *infra* Part VII.

100. See *Work Health and Safety Act 2011* (NSW) ss 27-29 (Austl.).

101. See *id.*

102. See *id.*

103. See *Bangladesh Labour Act, 2006*, § 312.

104. *Id.*

105. See *id.* at § 61.

106. See *id.* at § 312.

individuals, so no question of breach alleged by them may arise.¹⁰⁷ It would not always be easy to prove the liability of the company by applying the directing mind doctrine as applied in *Tesco Supermarkets Ltd. v. Natrass*¹⁰⁸ and more recently in *Transco Plc v. Her Majesty's Advocate*.¹⁰⁹

Even after the proof of the entity's offense, individuals' liability is subject to subjective *mens rea* (knowledge or consent) and due diligence defences that make the burden of proof of their guilt even more onerous for the prosecution.¹¹⁰ To make the BLA2006 useful, a duty should be imposed on all businesses, their officers and workers corresponding to the provisions of the WHSA2011. It should be mentioned that, contractual duties might extend even beyond the contractual relationships when it comes to issues involving the health and safety of people.

Although the contractual duty of an employee is primarily owed to the employer, the former may be personally liable for a breach of the duty resulting in deaths or injuries of human beings.¹¹¹ For example, in *Rex v. Pittwood*,¹¹² a gatekeeper at a railway level crossing failed to keep the gate shut.¹¹³ As a result, a train collided with a horse and cart resulting in the death of the train driver.¹¹⁴ The gatekeeper was found liable for the death caused by his failure to observe his contractual duty to keep the gate closed.¹¹⁵ While the defense counsel in *Pittwood* argued that the defendant owed a duty of care to his employer rather than to the victim, the court held that it makes no difference whether the contractual duty of care is owed to the employer or to the victim.¹¹⁶ The existence of such a duty can be a sufficient basis for criminal liability for omission demonstrating gross and culpable negligence.¹¹⁷ Nonetheless, an explicit statutory duty for everyone in the workplace would be helpful in Bangladesh in the absence of a well-developed body of case law.

107. *Id.*

108. [1972] A.C. 153 (H.L.) [10-11] (appeal taken from N. Ir.) (U.K.).

109. (2004) S.C.C.R. 1, (Scot.). A detailed discussion of the directing mind theory falls beyond the scope of this article.

110. *See* Bangladesh Labour Act, 2006, § 312.

111. *See id.* at §309.

112. [1902] 19 T.L.R. 37 (Eng.).

113. *Id.* at 37-38.

114. *Id.* at 37.

115. *Id.* at 38.

116. *Id.*

117. *Id.*

IV. OFFENSES UNDER THE HEALTH AND SAFETY LEGISLATION

There are three offenses concerning health and safety issues that can be connected with a factory fire under section 309 of the BLA2006.¹¹⁸ These offenses are committed if there are: a breach causing death, a breach causing serious bodily harm and a breach causing bodily injury or other harm.¹¹⁹ Hence, all offenses are related to a specific consequence of a disputed breach of law, but a breach per se without a consequence may not be prosecutable.¹²⁰ Although the legislation has a direct provision regarding death of workers at work, it does not impose liability for homicide by itself.¹²¹ Rather it is a regulatory offense with much lower penalties than those of “culpable homicide,” a phrase used in the penal law of Bangladesh for what many other jurisdictions such as Australia and the United Kingdom (except Scotland) call “manslaughter.”¹²²

Unlike the BLA2006, the WHSA2011 contains three categories of offenses (sections 31, 32 and 33) that can be committed by a person who has a “health and safety duty” placed under section 30.¹²³ All three sections impose liability on persons who owe a health and safety duty to the victim.¹²⁴ Describing the duty, section 30 of the WHSA2011 states that “health and safety duty” means “a duty imposed under Division 2, 3 or 4 of Part 2 of the WHSA2011.”¹²⁵ Section 19 in division 2 defines the “primary duty of care,” which is imposed on a person conducting business or undertaking.¹²⁶ It provides that the person “must ensure, so far as is reasonably practicable, the health and safety of,” amongst others, workers.¹²⁷ More specifically, section 19(3) asserts that the person “must ensure, so far as is reasonably practicable . . . a work environment without risks to health and safety. . . the provision and maintenance of safe plant and structures” and “the provision and maintenance of safe systems of work. . . .”¹²⁸ Interestingly, section 19(5)

118. Bangladesh Labour Act, 2006, § 309.

119. *Id.*

120. *See id.*

121. *See id.*

122. *See id.* In Bangladesh, the maximum penalty for a culpable homicide which is meant to be equivalent to manslaughter in NSW is imprisonment for life under § 304 of The Penal Code of 1860. The Penal Code, 1860, § 304 (Bangl.).

123. *See Work Health and Safety Act 2011* (NSW) ss 30-33 (Austl.).

124. *See id.* ss 31-33.

125. *See id.* s 30.

126. *See id.* s 19.

127. *Id.* s 19(1).

128. *Id.* s 19(3).

requires the self-employer to ensure his/her own safety at work.¹²⁹

Section 20 is concerned with further duty of the person involving management or control of a workplace.¹³⁰ Section 20(2) provides:

The person with management or control [in whole or in part, of the workplace]¹³¹ must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person.¹³²

There is strict liability, which allows a single defense of “reasonably practicable.”¹³³ Section 18 provides the meaning of “reasonably practicable” in ensuring health and safety.¹³⁴ It reads as follows:

In this Act, *reasonably practicable*, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

- (a) the likelihood of the hazard or the risk concerned occurring, and
- (b) the degree of harm that might result from the hazard or the risk, and
- (c) what the person concerned knows, or ought reasonably to know, about:
 - (i) the hazard or the risk, and
 - (ii) ways of eliminating or minimising the risk, and
- (d) the availability and suitability of ways to eliminate or minimise the risk, and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available

129. *Id.* s 19(5).

130. *See id.* s 20.

131. *See id.* s 20(1).

132. *Id.* s 20(2).

133. *See id.* s 18.

134. *Id.*

ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.¹³⁵

The above description of the meaning of the “reasonably practicable” defense precisely suggests that a person must do everything reasonably possible to avoid or at least minimize any potential risk to health and safety of workers in the workplace. Notably, the WHSA2011 requires a self-employer to ensure his/her own health and safety.¹³⁶ This implies the profound importance of ensuring health and safety at the workplace.

While all offenses in the WHSA2011 are duty-based unlike those in the BLA2006 that are consequence-based, category one and category two offenses are fault based offenses, whereas category three offenses are of “standard” absolute liability.¹³⁷ Category three offenses require the prosecution to prove only the conduct element that the person had a health and safety duty, and that the person failed to comply with that duty.¹³⁸ Hence, there is no indication of any sort of risk required to be caused by category three.¹³⁹ These two requirements (having a health and safety duty, and failure to comply with that duty) are common in all three categories.¹⁴⁰ In addition to the category three requirements, category two offenses stated in section 32 require that “the failure exposes an individual to a risk of death or serious injury or illness.”¹⁴¹ Therefore, a causal link between the failure in performing the duty and resultant exposure of someone to a designated risk is essential. Although section 32 offenses have been argued to be fault based,¹⁴² it may also be argued that “causation” and “fault element” are different as causation is primarily attached to the consequence which is first a component of *actus reus* and no corresponding *mens rea* is required for that causation under section 32.¹⁴³ From this point of view, the offenses under section 32 can also be regarded as an absolute liability offense.

The highest offense or the most serious one amongst these three is defined in category one under section 31 which requires the prosecution to prove, amongst other things, defendant’s “reckless conduct” in

135. *Id.*

136. *Id.* s 19(5).

137. *See* Wheelwright, *supra* note 84, at 233.

138. *See id.*

139. *See id.*

140. *See id.*

141. *Work Health and Safety Act 2011* (NSW) s 32 (Austl.); *see also* Wheelwright, *supra* note 84, at 233.

142. *See* Wheelwright, *supra* note 84, at 234.

143. *See id.* at 226.

breaching that duty.¹⁴⁴ Section 31 provides that the person having a health and safety duty “without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness, and . . . the person is reckless as to the risk to an individual of death or serious injury or illness.”¹⁴⁵ Recklessness is a subjective *mens rea* element, which “requires proof of foresight of, or advertence to, the consequences of an act as either probable or possible and a willingness to take the risk of the occurrence of those consequences.”¹⁴⁶ In addition to recklessness, a defense of reasonable excuse is allowed where the onus of proof has been imposed on the prosecution.¹⁴⁷ Hence, this is clearly a fault-based offense and not a strict liability offense as indicated in section 12(A) of the WHSA2011.¹⁴⁸

In *He Kaw Teh v. The Queen*,¹⁴⁹ the High Court in Australia recognized three types of statutory offenses: (1) offenses involving subjective *mens rea* element; (2) strict liability offenses where no subjective fault element is required to be proved but the defendant can raise a defense of honest and reasonable mistake of fact; and (3) absolute liability offenses where no fault element needs to be proved, but specific defenses incorporated in the statute creating the offense, if there are any, may be established by the defendant on the balance of probability.¹⁵⁰ The obvious difference between a strict liability offense and an absolute liability offense is that the former allows a single specific defense which is honest and reasonable mistake of fact, whereas the latter does not offer such a pre-set defense; rather it relies on the statute defining the offense with respect to a defense.¹⁵¹ They also differ in terms of burden of proof as the defendant bears only evidential burden to raise the defense of honest and reasonable mistake of fact, and then the proving or legal burden is shifted to the prosecution to prove beyond reasonable doubt that such a mistake did not exist at the time of committing the offense.¹⁵² Whereas, in a case of absolute liability, the defendant bears

144. *See id.* at 233.

145. *Work Health and Safety Act 2011* (NSW) s 31(1) (Austl.).

146. Wheelwright, *supra* note 84, at 234 (citation omitted); *see also R v Crabbe* (1985) 156 CLR 464 (Austl.) (holding that a person acts recklessly if he does an act knowing that it is probable that certain consequences will result).

147. *See* Wheelwright, *supra* note 84, at 233.

148. *See Work Health and Safety Act 2011* (NSW) s 12A (Austl.).

149. (1985) 157 CLR 523 (Austl.).

150. SIMON BRONNIT & BERNADETTE MCSHERRY, *PRINCIPLES OF CRIMINAL LAW* 187 (2d ed. 2005) (citing *He Kaw Teh* 157 CLR 523).

151. *See He Kaw Teh* 157 CLR at 533-34.

152. *See id.* at 532-33; *see also Proudman v Dayman* (1941) 67 CLR 536, 540-41 (Austl.).

the burden for the defenses allowed by the statute, if there are any.¹⁵³ Accordingly, the offense under section 31 is not a strict liability offense; rather it is an exception under section 12A of the WHSA2011, which provides that all offenses are of strict liability unless otherwise stated in the section defining the offense.¹⁵⁴ However, the phrases “strict liability” and “absolute liability” are loosely used as synonymous sometimes.¹⁵⁵

Unlike the offenses under the BLA2006, section 31 does not require the prosecution to prove any actual loss of life or illness whatsoever, but exposure of someone to such a specified risk is sufficient.¹⁵⁶ However, if a death occurs, bringing a criminal charge under either the WHSA2011 (regulatory offense) or the Crimes Act 1900 (manslaughter) remains open, and the health and safety regulator and the police will decide the appropriate action.¹⁵⁷ Such a laxity has both positive and negative sides. The positive side is that this allows prosecution for regulatory offense even without a real harm being caused, while the burden appears too onerous for the prosecution as a regulatory offense (proving reckless conduct, exposure to such a risk, duty owed to an individual worker, and absence of reasonable excuse, which would be its negative facet).

Unlike the WHSA2011, the BLA2006 does not explicitly stipulate the nature of liability it imposes on the businesses. The WHSA2011 categorizes the offenses in general as of strict liability,¹⁵⁸ whereas the BLA2006 is silent about it.¹⁵⁹ The common law principles set forth in *He Kaw Teh* regarding *mens rea* requirements and silence of the statute creating the offense presume, that silence does not mean no *mens rea* is required.¹⁶⁰ Rather the relevant *mens rea* has to be determined by taking into account the wording of the law and nature of the offense such as whether the offense is truly criminal and efficacy of the law.¹⁶¹ Unlike the offenses defined in the general criminal law, the offenses created by the BLA2006 are of inherently regulatory nature.¹⁶² Section 312 of the BLA2006 implies that the offenses are of absolute liability in that it

153. See *He Kaw Teh* 157 CLR at 524.

154. See *Work Health and Safety Act 2011* (NSW) ss 12A, 31 (Austl.).

155. See Wheelwright, *supra* note 84, at 234.

156. See *Work Health and Safety Act 2011* (NSW) s 31(1) (Austl.).

157. See Wheelwright, *supra* note 84, at 225.

158. *Work Health and Safety Act 2011* (NSW) s 12A (Austl.).

159. See Bangladesh Labour Act, 2006, § 312.

160. See *He Kaw Teh* 157 CLR 523 at 528.

161. See *id.* at 529-30.

162. See Bangladesh Labour Act, 2006, § 312.

contains a deeming provision for all directors, managers and other officers who were actively engaged in the business of the entity at the time of violation of the law by the entity itself.¹⁶³ Section 312 makes all of them liable unless he or she proves that the offense was committed without his or her knowledge or consent, or that he or she exercised all due diligence to prevent the commission of the offense.¹⁶⁴ As currently worded, section 312 does not require the prosecution to prove any subjective *mens rea* element.¹⁶⁵ Rather it provides statutory defenses to individuals to prove their innocence, and departing from the golden thread of criminal law, it overtly places onus of proof on the defendants themselves.¹⁶⁶ Further, penalties are not truly severe compared to the consequence of the offense, and the law may lose its efficacy if subjective *mens rea* is presumed to exist. All this clearly resembles the character of a standard of absolute liability offense as decided by the High Court of Australia in *He Kaw Teh*.¹⁶⁷ So, the liability of individuals under the BLA2006 is arguably absolute.

Regarding due diligence defense under section 312 of the BLA2006, a statutory meaning of the defense can be helpful and it can be borrowed from the WHSA2011. Describing the duties of officers, section 27(5) of the WHSA2011 provides that “due diligence” includes taking reasonable steps:

To acquire and keep up-to-date knowledge of work health and safety matters, and

(b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations, and

(c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking, and

163. *See id.* § 312.

164. *Id.*

165. *See id.*

166. *See id.* (“[An entity or its officer is] deemed to have committed the offence unless he proves that the offence was committed without his knowledge or consent or that he exercised all due diligence to prevent the commission of the offence.”).

167. *See* BRONNIT & MCSHERRY, *supra* note 150, at 187 (citing *He Kaw Teh* 157 CLR 523).

(d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information, and

(e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act.¹⁶⁸

Providing some examples of duties under section 27(5)(e), the legislation states that:

For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include: reporting notifiable incidents, consulting with workers, ensuring compliance with notices issued under this Act, ensuring the provision of training and instruction to workers about work health and safety, ensuring that health and safety representatives receive their entitlements to training.¹⁶⁹

Section 27(5)(f) further adds the duty to verify the provision and use of the resources and processes referred to in paragraphs (c)-(e).¹⁷⁰

It is to be noted that under section 27(1) of the WHSA2011 an officer owes duty to the company, however, section 27(4) provides that an officer can be convicted regardless of conviction of entity in relation to the duty.¹⁷¹ This is confusing for which it has been recommended that a deeming provision, that officers shall be deemed to have a duty to individual workers, may help remove this confusion.¹⁷² The BLA2006 is unclear whether the duty is owed to the company or individual workers.¹⁷³ It is submitted that for the purposes of health and safety regulation, officers should owe duty to individual workers, otherwise the basis of their conviction may sometimes be questionable and unjustified in that proving breach of duty may be difficult.¹⁷⁴ Moreover, in the

168. *Work Health and Safety Act 2011* (NSW) § 27(5) (Austl.).

169. *Id.*

170. *Id.*

171. *See id.* §§ 27(1), (4) “An officer of a person conducting a business or undertaking may be convicted or found guilty of an offence under this Act relating to a duty under this section whether or not the person conducting the business or undertaking has been convicted or found guilty of an offence under this Act relating to the duty or obligation.”).

172. *See Wheelwright, supra* note 84, at 233-34.

173. *See Bangladesh Labour Act, 2006*, § 312.

174. *See Wheelwright, supra* note 84, at 233-34.

absence of clear statutory provisions, the applicable law may be common law in which the duty of care is owed by the company itself and not by its managers or directors as held in *Salomon v. Salomon & Co.*¹⁷⁵ and it was reaffirmed by the High Court of Australia in the context of workplace safety in *Andar Transport Oty Ltd v. Brambles Ltd.*¹⁷⁶ Therefore, officers' duty of care to workers should be statutorily imposed on them.

V. WHO CAN BE HELD LIABLE

The BLA2006 does not clearly identify the persons who are responsible, nor does it use the terms "company/corporation" or partnership.¹⁷⁷ However, its coverage seems to be very wide in that it encompasses all forms of businesses.¹⁷⁸ It imposes an obligation on a business "establishment" to ensure health and safety of workers.¹⁷⁹ An establishment includes "any shop, commercial establishment, industrial establishment, or houses or premises where workers are employed for running an industry."¹⁸⁰ This section is quite similar to section 5 of the WHSA2011 which imposes obligations on "a person conducting a business or undertaking" and such a person includes all types of business organizations excluding volunteer associations.¹⁸¹ Although it does not identify by name, it is clear that in both jurisdictions, regardless of the form of a particular business, every business falls within the scope of statutory regulation in respect of ensuring health and safety at work.

Unlike sections 31-33 of the WHSA2011, section 62 of the BLA2006 does not mention anything about who owes the duty of care and to whom as mentioned earlier.¹⁸² However, there is mention of "owner" of a business establishment in section 62(2) that "if noncompliance is found by an inspector he/she must serve a written notice on the owner advising what needs to be done with a stipulated time."¹⁸³ Consistently, section 62(8) also imposes responsibility on the owner by requiring "maintenance of a record of mock fire fighting at

175. [1897] A.C. 22 (H.L.).

176. See Wheelwright, *supra* note 84, at 227 (citing *Andar Transport Oty Ltd v Brambles Ltd* (2004) 217 CLR 424 (Austl.)).

177. See Bangladesh Labour Act, 2006, §§ 61, 62.

178. See *id.* § 2(31).

179. See *id.* §§ 61, 62.

180. *Id.* § 2(31).

181. *Work Health and Safety Act 2011* (NSW) § 5 (Austl.).

182. See Bangladesh Labour Act, 2006, § 62.

183. *Id.* § 62(2).

least once a year by the owner.”¹⁸⁴ In the absence of a clear indication, these mentions of the word “owner” imply that section 62 imposes liability on the owner of the business regardless of its particular form (company, partnership, sole trader etc.).¹⁸⁵ This inference is reaffirmed by some other sections of the BLA2006.¹⁸⁶ Section 2(49) defines the meaning of “owner” for the purposes of BLA2006.¹⁸⁷ It provides a comprehensive list of persons who will be regarded as the owner of a business establishment.¹⁸⁸ The list includes, amongst others, a person who employs workers for the establishment and his or her heirs, managers of the business or any person who is responsible for the management of the business, and the possessor or directors or managers where the premises is possessed by a person other than its owner.¹⁸⁹ Section 2(31) provides the meaning of “establishment” which includes any shops, commercial establishments, industrial establishment or any premises where workers are employed to run an industry.¹⁹⁰ Section 312 of the BLA2006 provides further clarification about the persons responsible for an offense committed by a company.¹⁹¹ It says that, if a company or a firm is held liable for an offense under the BLA2006 or any rules, regulations or scheme made thereunder, every director, partner, manager, secretary or other officer and agent thereof shall, if actively engaged in its business, be deemed to have committed the offense, unless he or she proves that the offense was committed without his or her knowledge or consent, or that he or she exercised all due diligence to prevent the commission of the offense.¹⁹² Furthermore, section 309 of the BLA2006 states that notwithstanding anything contained elsewhere in Chapter 19 of the BLA2006 which incorporates the provisions regarding crimes, penalties and procedure, if “whoever” contravenes any provisions of the BLA2006 or any rules, regulations, or scheme made thereunder, that person shall be punishable with penalties based on the consequence of the contravention as described in the section (details are discussed below in the penalty section).¹⁹³ Section 309 mentions the term “whoever” without providing any clarification

184. *Id.* § 62(8).

185. *See id.* § 62.

186. *See id.* § 2(49)(e)

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.* § 2(31).

191. *See id.* § 312.

192. *See id.*

193. *See id.* § 309.

about its meaning. However, from the above description of the statutory meaning of different terms used in imposing or defining liability and prescribing penalties under this legislation, it is obvious that the word “whoever” mentioned in section 309 encompasses all natural persons and all types of commercial or industrial establishments.¹⁹⁴ Hence, a company like Tazreen and its MD and mid-level managers who blocked the door do fall within the scope of the duties and penalties at hand. Providing greater clarity, sections 31, 32 and 33 of the WHSA2011 vividly state that both individuals and entities can be held liable for breaching the health and safety duty as discussed above.¹⁹⁵

As alluded to earlier, facts of the Tazreen fire unequivocally suggest that the company has manifestly violated the requirements set forth in section 62 of the BLA2006 by its failure to ensure safe environment at the workplace.¹⁹⁶ In an OHS case, the Supreme Court of Victoria in *DPP v Esso Australia Pty Ltd*¹⁹⁷ imposed a fine of AUD two million on the company for two failures that include failure to conduct hazard identification and failure to adequately train employees about risks.¹⁹⁸ The House of Lords in *R v Miller*¹⁹⁹ held that a person accused of homicide may also be found liable for “failing to take measures that lie within one’s power to counteract a danger that one has oneself created.”²⁰⁰ In relation to OHS, a corporation can be convicted for both an overt and a covert or latent failure.²⁰¹ Covert or latent failures are defined as those due to design failures, insufficient training, and inadequate supervision.²⁰²

As the company itself has failed to comply with the requirements, it makes the owner/MD and mid-level managers criminally liable under section 312 of the BLA2006 as they were all actively engaged in its

194. *See id.* It should be noted that section 309(3) provides that nothing in this section shall apply to any contravention of the BLA2006 or any rules, regulations or scheme made thereunder for which a higher penalty is available. *See id.* § 309(3). The Bangladesh Penal Code 1860 does provide a higher penalty, but it would be difficult to prove their guilty under the general criminal law. *See* The Penal Code, 1860, § 304A (Bangl.).

195. *See Work Health and Safety Act 2011* (NSW) ss 31-33 (Austl.).

196. *See supra* Part III; *see also* Bangladesh Labour Act, 2006, § 62.

197. (2001) 124 A Crim R 200 (Austl.).

198. *See id.*

199. [1983] 2 A.C. 161 (H.L.).

200. *Id.* at 176.

201. *See* Celia Wells, Derek Morgan & Oliver Quick, *Disasters: A Challenge for the Law*, 39, WASHBURN L.J. 496, 499-501 (2000) (discussing the nature of latent organizational failure in context of causation and legal responsibility).

202. JAMES REASON, *MANAGING THE RISKS OF ORGANISATIONAL ACCIDENTS* 10 (1997).

business.²⁰³ In addition, the noncompliance discussed earlier was irrefutably known to the MD, and mid-level managers shut the doors and prevented the panicked workers from running away from their rooms.²⁰⁴ Arguably, they all can be held liable for their wrongful action under section 62 and section 309 which prescribes punishment for whoever contravenes any provision of this legislation or any rules or regulations made thereunder.²⁰⁵ The fire has caused serious casualties and the evidence of breach of safety duty is obvious.²⁰⁶ Therefore, they can be punishable under section 309 of the BLA2006. Although individual liability is subject to specific defenses as stated earlier, given the blatant breaches of the duty apparently without any valid defense, they all are likely to be found guilty.²⁰⁷ However, further clarity of law in relation to safety duty and the liability arising from a breach of that duty is desirable to facilitate smooth enforcement of the law and the enhancement of its deterrent effects.

VI. PENALTIES OF THE OFFENSES UNDER THE HEALTH AND SAFETY LEGISLATION IN BANGLADESH

As mentioned previously, section 309 of the BLA2006 sets out punishments for contraventions of any provisions of the BLA2006 or bylaws made thereunder.²⁰⁸ The punishments provided in section 309(1) are directly connected with the consequences of violations, and no punishment has been prescribed for the non-compliance per se.²⁰⁹

The maximum penalty for the highest offenses where violations results in death is four years' imprisonment, a fine of Taka 100,000 (approx. AUD 1388), or both.²¹⁰ The penalty gets lighter when the breach causes a serious injury which attracts a maximum penalty of two years' imprisonment or a fine of Taka 10,000 (approx. AUD 138) fine,

203. See Bangladesh Labour Act, 2006, § 312.

204. See *supra* text accompanying notes 49-56.

205. See Bangladesh Labour Act, 2006, §§ 62, 309.

206. See *supra* text accompanying notes 49-68.

207. See *supra* notes 163-173 and accompanying text (discussing the defenses embodied in section 312 of BLA2006). In addition to the company itself and its executives, the licencing authorities who granted licenses without having to check the legal requirements, inspection authorities who bear the responsibility for checking the compliance with safety requirements may also be held liable for their negligence, but their liability falls beyond the scope of this article as mentioned earlier. See *supra* text accompanying notes 72-78.

208. See Bangladesh Labour Act, 2006, § 309.

209. See *id.* § 309(1).

210. *Id.* § 309(1)(a).

or both.²¹¹ The lowest offense is committed when the contravention causes other harms or injuries, and the maximum punishment goes as low as six months' imprisonment, or a fine of Taka 2,000 (approx. AUD 27) fine, or both.²¹² Section 309(2) states that the amount of the fine, either in full or in part, can be ordered by the Labour Court, the sole competent court to try offenses under this law, to compensate the victims or their legal representatives.²¹³ However, the amounts of fines beg an answer to the questions whether such a small fine can truly compensate a single victim, let alone the victims of numerous deaths or injuries, or whether it bears any deterrent value, general or specific deterrence regardless. It is appreciable that section 309(3) allows the application of the general criminal law that provides for higher punishment for the same offense, although any conviction under the general law for workplace deaths remains elusive to date in Bangladesh.²¹⁴ This is so because it has been discussed elsewhere that the general criminal law regime has significant drawbacks in relation to its articulation and application against business entities, which are evident from a serious lack of conviction for workplace offenses despite institution of several prosecutions in the past.²¹⁵ Thus the drawbacks render the BLA2006 factually the sole law to deal with workplace safety in Bangladesh until the criminal law is amended. It means the above low penalties apply to the cases even where deaths occur. From this point of view, the penalties are manifestly low and so is the penalty for serious injuries. Therefore, penalties need to be increased in order to reap the benefit of this law by punishing offenses adequately and deterring potential violators effectively. It is worth mentioning that although a better articulated criminal law regime is in place in New South Wales and the WHSA2011 creates duty-and-risk-based offenses rather than consequence-based offenses, the highest penalty under the WHSA2011 is higher than that of the BLA2006.²¹⁶

In New South Wales, if an offense is committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking) under section 31, the maximum penalty is a fine of AUD 300,000 or five years

211. *Id.* § 309(1)(b).

212. *Id.* § 309(1)(c).

213. *See id.* § 309(2).

214. *See id.* § 309(3).

215. *See Mortuza, supra* note 18.

216. *See Work Health and Safety Act 2011* (NSW) s 31(1) (Austl.).

imprisonment or both.²¹⁷ Where the offender is an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking, the penalty is AUD 600,000 or five years imprisonment or both.²¹⁸ However, if a breach of section 31 is committed by a body corporate, the penalty is AUD three million.²¹⁹

Although a commonality between the penalties exists that neither of the two jurisdictions provides for a mandatory imprisonment of any term, they are significantly different. Penalties under the BLA2006 are considerably lower than those of the WHSA2011 even though the former punishes for causing death, serious injury or bodily harm, while the latter prescribes punishment for exposing an individual to a risk of death or serious injury or illness. The penalties in Bangladesh appear to be too low to work as an effective deterrent. This is so because, in the absence of mandatory imprisonment, a fine can be any amount within the prescribed limit as may be determined by the sentencing judge.²²⁰ Moreover, a company or its executives may get rid of this liability by paying a fine alone.²²¹ The figures are manifestly insignificant compared to those provided under section 31 of the WHSA2011. The figures under the BLA2006 themselves are self-explanatory to be too low to constitute an effective deterrent and compensate any victim in the true sense. Penalties need to be painful,²²² but the amounts of these fines may not reasonably inflict any pain to an individual offender, let alone a business establishment. Hence, it is open to question whether such a low penalty would work as sufficient deterrence or it reflects the community's denunciation of the wrongful conduct. It can be argued that in order to achieve the objectives of sentencing such as punishing the offense adequately and creating deterrence,²²³ both the jail terms and fines should be increased in section 309 of the BLA2006 to a reasonable extent.

Another important point to ponder is that there is no punishment for non-compliance per se under the BLA2006, whereas section 33 of the WHSA2011 makes failure to comply with the statutory duty an absolute liability offense without any consequence being required.²²⁴ So, a

217. *Id.*

218. *Id.*

219. *Id.*

220. See Bangladesh Labour Act, 2006, § 309(1).

221. See *id.*

222. See DAVID BROWN ET AL., *supra* note 21, at 1079.

223. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A (Austl.).

224. See *Work Health and Safety Act 2011* (NSW) s 33 (Austl.).

failure to comply with the health and safety duty per se is an offense in NSW.²²⁵ In line with section 33 of the WHSA2011, a new provision needs to be inserted in the BLA2006, so that a breach of the legislation which has the potential of causing severe harms including deaths of humans may be punished without having to wait for a consequence. This is justified from the theory of prevention of harm²²⁶ and protection of community.²²⁷

Further, unlike the WHSA2011, there has been no higher penalty prescribed for a business entity under BLA2006.²²⁸ It is plausible to markedly distinguish between an entity and individual with respect to fines as it has been done in New South Wales where the penalties are prescribed based on the offender and the highest fine has been stipulated for a body corporate. No such consideration is apparent in the BLA2006²²⁹ which needs to be amended by increasing fines for the offending entity, otherwise treating an individual and entity alike will not be helpful in achieving the objectives of punishment.

Appreciably, if the offense is committed by a company or other business entity, all of its executives and officers can be punished based on their engagement with the breach subject to statutory defenses.²³⁰ This is a good provision for the purposes of deterrence, but their duties with regard to workplace health and safety needs to be clarified as alluded to earlier.

CONCLUSION

The foregoing discussions reveal that garment factory fires have burnt down numerous poor workers predominantly young women in Bangladesh over the years, yet evidently no serious concern is shown for their lives as well as for several millions of those who are fortunately still alive. The workplace safety in the country will not improve unless the perpetrators including the errant companies are adequately punished. This punishment warrants useful workplace health and safety laws which should succinctly define the offenses and offenders, and prescribe

225. *See id.*

226. *See* DAVID BROWN ET AL., *supra* note 21, at 76-79.

227. *See Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A (Austl.).

228. *Compare* Bangladesh Labour Act, 2006, § 309(1) (penalties apply to “any person”), *with Work Health and Safety Act 2011* (NSW) s 31(1) (Austl.) (distinguishing offenses committed by “an individual” and “a body corporate”).

229. *See* Bangladesh Labour Act, 2006, § 309(1).

230. *See id.* § 312.

stringent punishments that work as specific and general deterrence. Pritchard finds in relation to OHS that, fines alone do not work as a deterrent penalty.²³¹ Similarly, Broussard argued referring to fines that “OSHA regulations and penalties are not an effective means of ensuring workplace safety. Corporations often consider both OSHA penalties [pecuniary] and civil liability as a cost of doing business. . . .”²³² Despite deterrence being the most appropriate theory for negligent crimes,²³³ the OHS laws largely rely on fines.²³⁴ A study of the U.K. health and safety executives conducted in 1988 found that most of the workplace deaths occurred due to a lack of simple planning and precautions and their deaths were avoidable.²³⁵ Alarming, it found that seventy percent of 739 deaths investigated in the study could have been avoided if the management had taken appropriate measures.²³⁶

Although both jurisdictions theoretically allow manslaughter prosecutions under their relevant general criminal law, in practice, there is no instance of such a criminal proceeding being successful for workplace deaths in Bangladesh.²³⁷ Consequently, the offenders remain unpunished for such a heinous offense, the right to life of workers is denied, the most vital sector of the national economy is on the verge of losing benefits of preferential access to developed countries, and the image of the nation is also at stake owing to the absence of workers’ safety.

Presently, penalties for workplace deaths are not sufficient to create effective deterrence and to punish offenders adequately in either jurisdiction. The overall penalties under section 309 of the BLA2006 are low. Such a low penalty does not demonstrate community’s opprobrium against such disgraceful conduct.²³⁸ Penalties under section 309 of the BLA2006 may be too low to achieve most of the objectives of punishment. It is therefore recommended that the existing penalties be increased to a reasonable extent.

231. See Melanie Pritchard, *Corporate Manslaughter: The Dawning of a New Era*, 27 H.K.L.J. 40, 46 (1997).

232. Judy K. Broussard, *The Criminal Corporation: Is Ohio Prepared for Corporate Criminal Prosecutions for Workplace Fatalities?*, 45 CLEV. ST. L. REV. 135, 163 (1997).

233. Leslie Yalof Garfield, *A More Principled Approach to Criminalising Negligence: A Prescription for the Legislature*, 65 TENN. L. REV. 875, 879-80 (1998) (noting that other major theories of punishment are retribution, rehabilitation and incapacitation).

234. See, e.g., *Work Health and Safety Act 2011* (NSW) ss 31-33 (Austl.).

235. Pritchard, *supra* note 231, at 45 (citation omitted).

236. Celia Wells, *Manslaughter and Corporate Crime*, 139 NEW L.J. 931, 932 (1989) (U.K.).

237. See Mortuza, *supra* note 18. The drawbacks of general criminal law governing homicide have been discussed elsewhere. See Wheelwright, *supra* note 84, at 235.

238. See Wheelwright *supra* note 84, at 235.

It is justified that the criminal liability of companies and their executives for deaths and injuries of workers at work due to the entity's failure to comply with the safety requirements set out in section 62 is absolute under section 309 of the BLA2006. No defense is available to the company itself. However, statutory defenses of lack of knowledge or consent or exercise of due diligence are available to executives under section 312, though they bear the onus to prove the defenses in order to escape the liability. The description of imposition of duties and corresponding penalties for breaches suggest that the liability of both companies and their executives for any of the three specified consequences is absolute under the BLA2006. This is supportive of workers' safety.

It is unclear whether officers owe duty to their employers alone or to workers as well. A reading of section 309 together with section 312 of the BLA2006 suggests that the legislation imposes liability on both the entity and its executives, but section 62 which imposes the duty apparently on the entity alone creates confusion. In common law, the duty of care is owed by the company itself, not by any officer. So the basis of their penalty needs to be clarified.

As all breaches are punishable based on their consequences under section 309 of the BLA2006, no individual or delinquent company can be punished for contravention or omission per se. By contrast, section 33 of the WHSA2011 provides punishment for mere failure to comply with the duty. This is reasonable from the perspective of regulatory offense, and it would be unwitting to wait for a consequence to occur. Therefore, the BLA2006 should include a provision similar to section 33 of the WHSA2011.

In the BLA2006, entities and individuals are not distinguished with respect to penalties. This sounds unreasonable. Generally, the amounts of fines for entities are significantly higher than those prescribed for individuals. This distinction is well reflected in the WHSA2011.

Enforcement of law denotes the realization of the ends clearly stated or inherent in a particular legal principle. Clarity in the law of its purpose and purview is essential for its smooth enforcement in any jurisdiction. Any ambiguity in the articulation of law in relation to liability may ultimately favor the offender based on the principle of benefit of doubt. The workplace health and safety laws aim to protect people especially the workers at work by deterring the potential offenders. But the law has miserably failed to achieve this end in Bangladesh where several hundreds of people have died in the workplace over the past two decades, no one has been punished for

“killing” the innocent workers. The garment industry in Bangladesh is at stake now following frequent fires, collapses of factory buildings, the impunity of their perpetrators and resultant insecurity of workers at the workplace. Even a 2012 U.S. report on human rights situation in Bangladesh released on 19 April 2013 has highlighted the “poor working conditions and labour rights” as a significant human rights problem in Bangladesh.²³⁹ The government needs to address the loopholes in the BLA2006 without any further delay not only in the interest of the national economy, but also for saving the lives of the millions of people who are the breadwinners for their families and, at the same time, diligent earners of direly needed foreign currencies for the country.

239. 2012 HUMAN RIGHTS REPORTS: BANGLADESH (2012), *available at* <http://www.state.gov/j/drl/rls/hrrpt/2012/sca/204395.htm>.

