

FOOD QUALITY AND SAFETY CONTROL IN TANZANIA: SOME OBSERVATIONS:

By

R.A.Mwaipopo

"The nature and extent of consumer protection regulation in a modern society says a great deal about that society, about its social and economic development, about its legal values, about its sense of justice, about its political sophistication and maturity..."¹

ABSTRACT

This paper is an attempt to examine the provisions of the law pertaining to the regulation and control of foods that are intended for human consumption (ie. The food (Control Quality) Act 1978) so as to see if the consumer is sufficiently protected from poor quality and unsafe foods. In Tanzania like elsewhere in the world, the quality and safety of foods being sold to the consumer have all along been an important concern of both the government and the consumer. Consumers concern in this respect have late become enhance and continue to rise due to happenings that tend to indicate that there is no effective control of food dealers and in general the whole food industry.

It is observed that although there are comprehensive stipulations of the law for the protection of the consumer, their importance is diminished by several limitations some exogenous and others endogenous the Act itself. Overall the Act has not lived to its impressive title, henceforth, recommendations are made to redress the many set backs that impinge its effectiveness. The formation of consumer oriented non-governmental organisations could be the purge against the government's weakness and failure to guarantee consumer protection

1.0 INTRODUCTION

One of the intractable problems facing the consumer in Tanzania today concerns the quality and safety of various consumable and non-consumables that are found in the market place. The liberalisation of trade, which is part and parcel of the general economic reforms adopted by the government since the mid - 1980s has brought with it a tremendous increase in the traffic of imported goods of all sorts, some hitherto unknown to the local consumer. Unfortunately, no consumer safety law exists for the protection of the consumer against defective and dangerous products. This though excepts foods and drugs.

'Consumer protection' in the context of this paper means the prevention of things from going wrong for the consumer. 'Food quality'² refers to all aspects of production, processing, distribution, marketing and preparation that has an impact on the quality of food. It includes nutrient content, aesthetic properties, safety and accurate labelling. 'Food safety'³, likewise, is broadly defined to include all aspects necessary during production, processing or preparation, packaging and distribution of food to ensure that it is safe, sound and unwholesome and therefore fit for human consumption.

The need for comprehensive enactment to regulate food and drugs was appreciated well before the liberalisation of trade. But despite the legislative attention in this area, problems of food quality and safety still remains. Of recent cases of importation, distribution and sale of expired,

misbranded and substandard drugs and of poor quality and unsafe foods have become more prevalent than ever before.⁴ The most appalling of these cases is the scandal involving the Mohamed Enterprises (T) Ltd Company.⁵ The continuing scandals of this nature, tend to indicate that remedial measures imposed by the government are either not enough or are not being effectively enforced.

The purpose of this paper is to examine the law relating to control of food quality and safety. The aim is to see whether the existing system of control (i.e. both law and practice) provides adequate safeguards for the protection of the consumer against unsafe foods. To accomplish this task the institutional set up of the regulatory body established under the Act, that is the National Food Control Commission is looked at first followed by an exploration of the different areas and aspects of control enacted under the Act. In part three the paper looks at the mechanics of enforcement of the laid down regulatory controls while part four makes an appraisal of the whole regulatory framework and its enforcement.

2.0 THE REGULATION OF FOOD QUALITY AND SAFETY

2.1 The relevant legislation

The legislation governing the regulation of food quality and safety is the Food (Control of Quality) Act, 1978⁶ (here-in after referred to as the Act). Prior to the enactment of this Act a single legislation governed both foods and drugs.⁷ At present drugs are regulated by the Pharmaceuticals and Poisons Act, 1978⁸. Each of these two legislations repealed (with some minor savings) and replaced the former colonial law in the respective area. In addition the Act, also repealed the Meat Hygiene Ordinance⁹, so that the whole food industry (meat, game, fish, and poultry inclusive) is regulated by a single legislation.

The main objective for the enactment of the Food Act was to provide for a more efficient control of the food industry. This Act therefore represents the government's view as to the extent and nature of protection to be given to the consumer. The Act affects only foods which are intended for human consumption. Its scope extends to food imports as well as food exports that are meant for human consumption.¹⁰ Food is defined to mean any article other than drug used as food for human consumption and includes any substance used in the manufacture of food.¹¹

2.2 The Institutional Framework

The National Food Control Commission (NFCC) is the main enforcement agency of the Act.¹² The NFCC is part and parcel of the public service and does its work under the general guidance of the Minister of Health. Its functions are broadly spelt under section 5(1) of the Act. In general, the NFCC is empowered to police all persons dealing in foods for human consumption whether in the course of trade or otherwise.

There is the office of the Registrar, who is appointed by the Minister of Health. The Registrar also acts as the Secretary to the NFCC.¹³ While enforcement of the Act is the prerogative of the NFCC, the actual players on the field, performing the day to day surveillance and inspection of foods are the authorised officers. Authorised officers are public officers (mainly health officers) who are appointed by the Minister of Health to be authorised officers by notice in the official gazette.¹⁴ By definition all members of the commission are authorised officers and so are all police officers of or above the rank of a corporal.¹⁵

2.3.0 The Scheme of Control

The Government's intervention in order to meet food quality objectives is manifest in the control of persons seeking to do business in foods, the setting of standards of quality to be complied with by manufacturers and importers of food, the imposition of consumer safety requirements, and the control of information supplied to the

consumer through advertising, food labelling and the presentation of food for sale.

Registration and licensing are the major techniques used in controlling manufacturers and importers of food. The aim of the licensing system is to ensure that only fit persons are allowed to transact food business. The ultimate compulsions as will be seen lie in prohibitions, prosecution of offenders, penal sanctions, seizure and destruction of offending foods.

2.3.1 Control of Manufacturers

Section 7(1) of the Act, makes it an offence for any person to carry on or advertise that he is carrying on the business of a manufacturer of food unless he is a holder of a licence issued by the NFCC. Breach of this provision may be visited by a fine not exceeding one million shillings or imprisonment for five years or both.

The term manufacturer (including its grammatical variations and cognate expressions) is defined in a catch all fashion to mean; to subject any article or substance of food to any process including preparation which,

- a) materially changes the article or substance of food in its composition, character or appearance; and
- b) results in that article or substance of food, after being processed, being possible of consumption by human beings, whether on purchase or otherwise.

Somewhat curiously, the term manufacturer is not defined. However, the necessary implication deriving from the definition above is that any person who subjects food to a process which leads that food to result into what amounts to a 'manufacture' is to be deemed a manufacturer. Hence pursuant to section 7(1) all persons who process food for purposes of trade such as street food vendors, food kiosk operators, hoteliers etc. require licence from the NFCC.

According to the law, the manufacture of food must be done in premises which have been registered by the NFCC¹⁶. As such, possession of registered premises for the manufacturer of food is a condition precedent for the grant of a licence to manufacture food. Registration of premises is granted after the premises have been inspected and upon the inspecting authorised officer being satisfied that the premises are suitable for the manufacture in them of any food for human consumption or for the manufacture of the type of food which the applicant proposes to manufacture in them, and that the applicant has sufficient financial resources such as would enable him to maintain the premises in accordance with the requirements of food hygiene.¹⁷ The registration of premises may be cancelled once the premises are no longer found to be suitable for the manufacturer in them of food for human consumption. Such cancellation may also be a ground for the suspension or revocation of a licence to manufacture food.¹⁸

The other considerations upon which a licence to manufacture food may be granted, includes; honesty and integrity of the applicant with regard to food business and possession of financial resources, facilities, expertise, skill or qualified personnel that would enable him to execute the business of a food manufacturer.¹⁹

2.3.2 Controls on Importation of Foods

All imports into the United Republic of Tanzania (mainland only) are governed by the Imports Control Ordinance, Cap. 292, whereunder, the Governor of the Bank of Tanzania is the Imports Controller.

Only persons who are in possession of import licences issued or deemed to have been issued by the Imports Controller may import goods into the United Republic of Tanzania.²⁰ But the necessity for a specific import licence, may be dispensed with by the operation of the so called 'Open General Licence' (OGL) issued or deemed to be issued by the Imports Controller.²¹

There are no conditions laid down under the Imports Control Ordinance concerning the quality of the goods to be imported. There of course, exist a system of pre-shipment inspection which at present is entrusted to foreign companies. This system though, is primarily geared at import duty assessment for purposes of revenue collection. Thus consideration of the quality of the goods (if at all) is but only a secondary issue. At any rate the system cannot give sufficient safeguards to the food consumer for it is not extended to imports through road borders with neighbouring countries.²²

On considerations of health, certain items (food and drugs inclusive) are excluded from the operation of Open General Licences²³ Food importers have to apply for food import permits from the NFCC. The Food Act lays down a very strict procedure for the importation of food²⁴. The procedure is as follows:-

(i) The food importer must first be registered with the NFCC as a food importer. A food importer may only import foods in respect of which he is registered. Registration with the NFCC has to be sought on every occasion the importer intends to import food which was not included in his original or previous application for registration.

(ii) A pre-shipment sample of the food which the importer intends to import must be submitted to the NFCC for verification and approval of quality and fitness of the food for human consumption.

(iii) Once the NFCC is satisfied with the quality of the food to be imported it will issue an import permit. As with registration, a new import permit has to be obtained from the NFCC on every occasion the registered food importer places a fresh importation order even for foods that were included in his original or previous order.

(iv) On entry into the United Republic, the food must be accompanied by a health certificate issued by a competent authority acceptable to the

NFCC stating that the food is fit for human consumption at the time of exportation and that it meets the standards of quality prescribed for it by the food control authority of the country of origin, stating such standards. This requirement aside, the food must be inspected approved by an authorised officer.²⁵

Pursuant to this procedure no imported food consignment, may be removed from the customs area before an authorised officer has examined the food. Where an authorised officer procures a sample of the food for analysis, it is incumbent on him to inform customs officers as to his decision concerning the fate of that food as soon as possible receiving the results of analysis so that the food is either released to its owners or disposed off as soon as reasonably possible (i.e. if found to be unfit for human consumption). This means that a food consignment which undergoes analytical test, has to be detained until the result of the test are known. No demurrage charges are payable on such food for that period of detention in the customs area²⁶

Elaborate though the procedure is, it still have been subject to gross violations either wilfully or an account of ignorance of it. It is for instance noted that, food importers at times seek import permits after arrival of their food consignments at Tanzanian ports. To discourage this, a recent directive²⁷ by the Registrar reiterates that, the NFCC will consider food import application including gift foods²⁸ only after inspection of preshipment samples of the foods and importers are advise to ensure that they obtain their products from trusted, licensed and approved dealers abroad so as to minimise the chances of importing poor quality foods. The directive also states that the NFCC will no longer entertain applications for reconditioning of food.

2.3.3 Consumer Safety Requirements

Consumer safety provisions are considered not only to be the most important but also the most problematical area of any food safety legislation.²⁹ Safety, it is said is a question of degree rather

than absolute safety. Hence the regulators task here is to convert a health hazard which will typically be one of degree into specific rules.

Consumer safety, generally relates to two broad areas, that is, food hygiene and food additives. The former is directed at preventing food contamination and poisoning. Thus the legal provisions may be couched in terms of microbiological standards, that is the number of bacteria in a given quality of food, or at methods of food preparation, packaging and storage, in order to minimize the possibility of contamination.³⁰

The Food Act, empowers the Minister of Health (in collaboration with the NFCC) to make regulations prescribing the standards to be complied with by manufactures and importers with regard to the composition of food or its bacteriological or chemical standards.³¹

These regulations could among other things prohibit or regulate the addition to food or extraction from it of any specified substance or any substance of any category or the use of any substance as an ingredient in the manufactured preservation of food.³² However to date, no such regulations have been made by the Minister. Safety evaluation (particularly with regard to additives is said to be complex, ambiguous and expensive.³³ Lack of expertise and financial resources are the major constraints impeding the making of the required regulations and standards.³⁴ And in the absence of own standards the NFCC draws heavily from the FAO/WHO Codex Alimentarius. It also relies on standards established by the Tanzania Bureau of Standards (TBS).³⁵

As for food hygiene, there are regulation to be complied with by manufacturers so as to secure observance of sanitary and clean conditions, and acceptable practice or methods in connection with the manufacture of food.³⁶ Thus the regulations contain stipulations relating to how the designs, layout and construction of premises should be so as to facilitate easy cleaning and maintenance, ventilation, lighting and extraction of fumes,

cleanliness of equipment and utensils used in food premises, maintenance of the premises in general, processing and control operation, food storage facilities, growing and harvesting operations of raw materials to be used in the manufacture of food, etc. Sanitation inspection under these regulations insist a clean plant and authorised officers have powers to stop work until the objectionable areas are cleaned, reconstructed or repaired.

However, despite the existence of food hygiene regulations, maintenance of proper hygiene in food manufacturing and processing units is still a big problem. The problem is attributable to insufficient training of personnel at all levels, from management to operational staff and the tendency by industries to reduce operational costs at the expense of hygiene so as to maximise profits. The latter is also manifest in the use of cheap raw materials in disregard of food quality standards.³⁷

Failure to observe the requisite sanitary conditions or food hygiene requirements in the storage of food is one of the major causal factors for otherwise good quality imported foods later being found to be unfit for human consumption. For instance, in the 1994/95 financial year, out of 441 samples of food analysed at the Government's Chemical Laboratory (GCL), 45.6% were found to be unfit for human consumption whereas in the 1993/94 financial year 16.8% of 540 samples tested at the GCL were found to be unfit for human consumption. This represented an increase of 9.0%. According to the Minister of Health this increase was brought about by an increase in the importation of rice and cooking oil which were stored in premises not designed for food storage.³⁸ In the 1995/96 financial year 6.1% of 862 samples of imported food tested at the GCL were found to be unfit for human consumption.³⁹ As for locally produced foods it is poor post harvest and handling practices that are the major causes for the destruction and loss of food. Such loss allegedly ranges between 2-10% and sometimes more.⁴⁰

Transport, packaging, exposure for sale, service or delivery of food are also crucial aspects of food safety although no regulations have been made to regulate them.⁴¹ Consequently the use of inferior or unsuitable packaging materials is common among food manufactures and food vendors and hence poses a serious health hazard to consumers.

Turning to food additives, these are a diverse group of substances which are added to food to achieve a wide range of technological and organoleptic objectives. Food additives include preservatives, anti-oxidants, colouring and flavouring agents, emulsifiers, stabilisers, thickeners and gelling agents etc.⁴² While some of the food additives are chemically synthesised (particularly colouring matters) the majority are substances which but for being artificially added to food are otherwise natural minor components of foods e.g. vitamins and minerals.⁴³

In some countries, food additives are a grave area of health concern. Besides the general prohibition for not adding harmful substances to food, many non-nutritive food additives are specifically regulated. In the UK for instance what may be added to foods and used in their manufacture is covered by extensive and detailed regulations.⁴⁴ In the European Union the regulation of food additives involve the listing of the substances that may be added to food, often specifying the foods in which they can be used and, or the maximum levels of uses. In addition, regulated additives must satisfy the regulating authorities of their technological justification, their chemical purity and their toxicological safety.⁴⁵

In contrast, there are no comprehensive provisions or regulations under the Food Act dealing with food additives.⁴⁶ But a general prohibition against the addition to food of harmful substances or substances of no nutritional value as foods, is found under section 17(1) which states that:

No person shall with intent to cause food to be sold for human consumption,

- a) add any substance to the food, use any substance as an ingredient of that food in its manufacture or abstract constituent from it, or
- b) so as to produce food of a quality below the prescribed standard, whether or not the food thereby becomes injurious to health.

Food additives are among the several declarations that must be made on food labels under the labelling regulations.⁴⁷

2.3.4 Consumer Information

Consumer information is another crucial facet of consumer safety. The safety of product is not solely dependent on compliance with compositional standards but also on warnings and instructions supplied with it may enable the consumer to avoid any risks which are inherent in it. Nutrition labelling requirements also serve as a primary source of information about the contents of the food and therefore its nutritional value. Whether consumers are actually able to understand or perceive the importance of the declarations which are placed on food labels is however, something which needs to be researched on.⁴⁸

According to the labelling regulations under the Act,⁴⁹ no person may sell a manufactured, processed, prepacked or repacked food unless a label has been affixed or applied to that food. The language to be used on the labels must be Swahili or English. The regulations details the several kinds of declarations which must appear on a label as well as the manner of their display. For instance; any food which has been treated with ionizing radiation has to be so designated on the label, and where food has been imported, the label must indicate the country of origin of such food. To avoid ambiguity where such food undergoes processing in a second country it is the second country which is considered to be the country of origin.

The regulations also prohibit any direct or indirect reference to the Food Act and to regulations under it in any label attached to food or in any advertisement of a food. The prohibition is ostensibly aimed to curb any importations of a reference or approval by the NFCC, as to say, the safety, quality or the nutritional value of the food.

Food advertising such as regarding the taste, flavour, style, quality, etc. is a very powerful mechanism of influencing food choice. Often businesses marketing ploys tend to mislead consumers in very subtle ways. A good example of these is the use of the word "no cholesterol" or "cholesterol free" on a vegetable cooking oil label. While it is true that there isn't any cholesterol in the oil, the labelling is nevertheless misleading because cholesterol is only found in foods from animals. The import given by these words is that the oil is safe for use. But is the oil safe for use in any quantities? In the US the Food and Drug Administration (FDA)⁵⁰, decided that these words were deceptive and banned their use on vegetable oil labels. It also on the same ground banned use of the term "fresh" on orange juice made from concentrates and pasteurised.⁵¹ The 'no cholesterol' label is commonly seen on imported brands of vegetable cooking oil and local manufacturers have began to adopt it.⁵²

To protect the consumer against deceitful and alluring presentation of food, the labelling regulations requires that the grade designation and pictorial information on a food label should not be misleading, deceptive or falsely describe the food.⁵³ However, the cornerstone of the Act in the protection of consumers against misleading falsehoods pertaining to foods is section 19(1). Section 19(1) provides that; any person who gives out with any food sold by him or displays any food sold or exposed by him for sale a label whether or not attached or printed on the wrapper or container, which:-

- a) falsely describes the food; or
- b) is calculated or, as reasonably likely to mislead as to its nature, substance or quality, shall be guilty of an offence.⁵⁴

Contravention of this provision is punishable by a fine of not less than one million Tanzania shillings.⁵⁵

Generally any claims or suggestions in advertisements that a food will produce effects which have not been proved scientifically are prohibited. Thus as a special protection for infants, advertisements or any other form of promotion of infants milk formulae and other breast milk substitutes are prohibited and labels on infants milk formulae have to carry a special notice, displayed distinctly, emphasizing inter alia that breast feeding is superior to artificial feeding.⁵⁶

3.0 ENFORCEMENT

The previous section has gone a long way examining the provisions that are aimed at ensuring that foods are of the appropriate quality and safety. We now turn to examine the provisions for the enforcement of the several safeguards mentioned above.

As noted earlier enforcement of the Act is principally carried out by authorised officers. Under section 22(1), authorised officers are empowered to examine any food which is intended for human consumption which appears to be unfit for human consumption.⁵⁷ However, the general powers to examine any food which appears to be intended for human consumption are found under section 37(1). Foods found to be unfit for human consumption may be seized by an authorised officer and condemned by a magistrate.⁵⁸

Literally food, is unfit for human consumption if it is putrid, diseased, or unwholesome in any other way. The addition of any extraneous matter to food under section 17(1) renders the food unfit for human consumption, even though it does not render the food to be actually or potentially unwholesome.⁵⁹

Food which is condemned for being unfit for human consumption ends up being destroyed or disposed of by the NFCC.⁶⁰ Procedurally, where

the owner of food disagrees with the views of the authorised officer concerning the fitness of the food for human consumption and makes a complaint to a court or the authorised himself decides that the matter be dealt with by a magistrate, the compulsory seizure and condemnation of the food must be confirmed by the court before such food could be legally destroyed or disposed of.⁶¹ Contrary to the laid down procedure and in fact against the rule of law, the Dar es Salaam City Council (DCC) employed soldiers and vehicles from the army to destroy about 8000 tons of imported wheat after the importer had already obtained an injunction against the DCC restraining it from removing and destroying the condemned consignment.⁶²

Where the NFCC deems fit, it may give permission for food to be reconditioned so as to make it fit for human consumption. Food reconditioning takes various forms. It may entail the separation between the damaged and the undamaged; or the repackaging of the food such as where the original containers, in the case of tinned foods, are dented thus rendering it more susceptible to food poisoning. Reconditioning may also entail the removal of any misrepresentations on labels which are likely to mislead the consumer, or the re-processing of the food.

The latter method was for instance employed in a case involving a large consignment of sugar which on analysis, was found to contain *Escherichia coli*, a food borne pathogen (bacteria) generally found in the intestine of man and many other animals and which is therefore shed into the environment via faeces.⁶³ The pathogen known to cause blood diarrhoea, haemorrhagic colitis and in vulnerable groups haemorrhagic ureamic syndrome (Hust) i.e. renal failure.⁶⁴ The seriousness of the health hazards posed by the consignment, would have warranted an order for a quick destruction and disposal of the sugar. However instead, the NFCC allowed its reconditioning on the consideration that its destruction and disposal would have been against public interest. But what and whose public interest? To any perceptive observer the interest

protected here was that of the state and not the consumer for whose benefit the Act was enacted.⁶⁵

Large amounts of food are being destroyed each year. However no data are available to show the actual amounts destroyed as there is no systematic reporting to the NFCC and to the Ministry of Health. Rough figures obtained from the Registrar's office indicate that, in 1993 and 1994 some 110,692.6 and 129,782.9 metric tones of food were condemned and destroyed or disposed of respectively.⁶⁶ And in 1994/95, 266 importers brought, 1,976,000 tons of food out of which 423 tons were found to be unfit for human consumption.⁶⁷ The destruction and disposal of condemned food whether on voluntary surrender by the owner or upon compulsory seizure and condemnation by an authorised officer or magistrate, is at the expense of the owner of such food. If the owner fails to pay the expenses, the food would nevertheless be destroyed or disposed off, the cost being recoverable from the owner as a civil debt.⁶⁸ The costs for the destruction or disposal of condemned food can run into large sums of money, that when combined with the loss the food itself, it may spell a serious financial ruin on the affected trader.

The obtaining of evidence to prove that food was found to be unfit for human consumption is very crucial for the successful prosecution of any case relating to the quality food and its fitness for human consumption. Power to take samples is given to authorised officers under section 39(1) of the Act. Where food is sold or exposed or offered for sale, the common method of obtaining samples is by purchasing the food or substances capable of being used in the manufacture of food. Refusal to sell or allow an authorised officer to take the quantity he requires as a sample is deemed to be a wilful obstruction of the authorised officer and is an offence under the Act.⁶⁹

Similarly, observance of sampling procedure is also very important since the weight to be attached to the results of analysis of the food would to a large extent depend on the manner in

which the sample was procured and handled. Important to note, is the requirement that whenever taking a sample, the authorised officer must ensure that the sample is a fair sample of the bulk of the food or the substances concerned.⁷⁰

Authorised officers are empowered to enter into premises at all reasonable times with or without warrant. Entry at hours of the night must be authorised by a warrant issued by a magistrate on a sworn information in writing showing that there are reasonable grounds necessitating entry at any hour of the night.⁷¹

Authorised officers may also examine food in the course of transit section 45(1) of the Act empowers any authorised officer to enter and examine the contents of any vehicle, vessel, train, or container if he reasonably suspects that it contains food which is in the course of delivery after sale for human consumption. These powers are particularly important as they afford authorised officers the opportunity to check on illegal food imports that are imported through unofficial routes and transit foods which are aren't infact transit foods but rather consignments or imports that are falsely declared to be destined to neighbouring countries and ends up being clandestinely off loaded, distributed and sold within the United Republic of Tanzania.

The science and technology applied in the food industry is continually undergoing a dynamic process. This poses great difficulties to regulators. However, insight into the safety of food may be discerned through orders for disclosure of information. Pursuant to section 43(1) the Registrar acting on the instructions of the NFCC, may order in writing, any person who carries on a business including the manufacture, importation or use of any substances specified in the order to furnish him within a specified period of time, with any specified particulars of the composition and use of substances sold in the course of that business for use in the manufacture of food for human consumption.

The information sought to be furnished may relate to particulars of investigations carried out

by or to the knowledge of the business concerned for the purposes of determining whether and to what extent the substance or the product formed when the substance is used in the preparation of food nutritionally, enriches that food or becomes injurious to or in any way affects health; or for determining the cumulative effect on the health of a person consuming such food in ordinary quantities.⁷²

Disregard of the Registrar's order is an offence. However as a measure to induce compliance, protection is given to the businesses in that the NFCC strictly receives such information in confidence. As may be seem some of the information required to be disclosed is likely to be important trade secrets. Hence any particulars furnished in accordance with the Registrars' order as well as any information obtained by means of these particulars may not be disclosed to anyone save with the previous written consent of the business concerned.⁷³

3.1 Penal Sanctions

Force is given to the Food Act by the creation of several offences. Offences directly touching on the safety and quality of foods are basically four.

- (i) Food adulteration under section 17(1)
Sale of adulterated food is a separate offence under section 17(2). A conviction for each of the two offences may attract a fine not exceeding one million Tanzania shillings or imprisonment for five years or both.⁷⁴
- (ii) Sale to the prejudice of the purchaser of food which is not of the nature, substance or quality demanded under section 18(1)

For the offence to be committed the property in the food must pass to the consumer. ⁷⁵

- (iii) Sale of food which is unfit for human consumption under section 20(1).
Where food in respect to which such an offence was committed was sold to the

offender by some other person, that person is also guilty of an offence. A person who deposits or consigns to any person for the purpose of distribution, sale etc food which is unfit for human consumption, is also guilty of the offence.

Under section 21(1), any food intended for human consumption which is offered as a prize or reward in connection with any entertainment to which the public are admitted either on payment of money or not, or which given away for purposes of advertisement or for the furtherance of any trade or business shall be treated as if it were or had been offered for sale.⁷⁶

(iv) Falsely describing, advertising or presenting the food under section 19(1)

A person who is a party to the publication of an advertisement of the nature described under section 19(1)⁷⁷ is also guilty of an offence and is liable to a fine not exceeding one million shillings unless he proves that he did not know and could not with reasonable diligence have known that the advertisement was false. His rather absolute defence will be that he is a person whose business is to publish or to arrange for publication of advertisement and that he received the advertisement for publication in the ordinary course of business.⁷⁸

In addition to the above, a special prohibition exists in relation to milk under section 28, which makes it an offence for any person to sell, or offer for sale or use in the manufacture of food for sale milk of any dairy animal which he knows to be diseased.⁷⁹

In establishing the commission of these offences, unless the contrary is proved, it is to be presumed that any article commonly used for human consumption is intended for sale if it is sold or offered, exposed or kept for sale or found in premises used for the preparation storage or sale of that food. A similar presumption applies in respect of articles used in the manufacture of

products for human consumption if found on premises used for the preparation, storage or sale of such products.⁸⁰ The onus is thus placed on the defendant to rebut these presumptions on a balance of probabilities.

It is to be noticed that the government exacts criminal penalties against offenders, without compensating the consumer for injuries or prejudices suffered as a result of the commission of these offences. As such a consumer who wishes to vindicate his claim against a food trader, will have to rely on the provisions of the provisions of the Sale of Goods Ordinance⁸¹ and or the law of torts as developed from the case of Donoghue Stevenson.⁸² Paternalist though this approach may be seen, it is, as have been rightly pointed out a better approach than that which leaves the consumer to rely solely on contractual warranties. The relative weakness of the consumer vis-a vis the manufacturers and businessmen generally is one of the rationales being given for preference of public protection of the consumer.⁸³ The consumer lacks both the expertise and resource to investigate the methods used in the production of articles of food and their possible effects on the human body etc.

4.0 APPRAISAL OF THE REGULATORY CONTROLS AND ENFORCEMENT

4.1 General Remarks

It can be seen that there are very comprehensive provisions of the law for controlling the activities of food manufacturers, importers and food traders in general so as to safeguard the consumer against poor quality and unsafe foods.

The conditions relating to registration and licensing of food importers and manufactures are very restrictive that only a few persons, can meet them. This is strategically sound since observance of the requisite standards of quality and hygiene in the manufacture of food largely depends on honesty, the moral integrity of the food dealer and the possession of sufficient financial resources.

The procedure for the importation of food is clear and elaborate enough. It is however very cumbersome. Failure to comply with it stems mainly from lack of incentive to comply since the procedure is undoubtedly in a direct conflict with the business man's motive of maximising profit.

As for authorised officers, they have sufficient powers to enable them execute their functions without undue inhibitions. However lack of essential facilities such as transport due to limited resources, poor remuneration etc. tends to diminish their motivation to work.

It is also noted that unlike some statutes, penal sanctions are stipulated for all of the offences in the form of either a fine or imprisonment or both. The removal of any illegal profit gained from the particular offending transaction is an important deterrent technique. The parliament enhanced the deterrence calculus with legislative amendments so as to deter any wilful breach of the law⁸⁴. However the rise in the incidence of cases of bad foods indicates that this technique is not the panacea for the problem. Moreover, the relevant penal provisions fixes not the minimum but only the maximum penalties awardable by the courts. Such formulation leaves a lot of discretion to the courts in the award of sentences. And so even if penal sanctions were the sure fire shots the would still in some cases misfire⁸⁵

4.2 Balancing of Interests

While striving to protect the consumer against the acts of unscrupulous traders, it is also evident that certain provisions of the Act are aimed at striking a balance between the interests of the consumer, and those of the trader and the nation at large. It have for instance been noted that:

"The task of the law maker who is charged with the responsibility of considering the position of the consumer in a commercial world is to see that the system of the law, substantive and procedural is so designed that it holds a fair and reasonable balance between the parties. It is not a question of giving immunity or overwhelming right to the consumer"⁸⁶

As a reflection of the above expressed view, several offences under the Act, although of a strict liability nature, are nevertheless restricted by the due diligence defences. These defences allow the defendant to escape liability where he proves that he took all reasonable steps or that he exercised the due diligence to avoid committing the offence. The question whether or not reasonable diligence has been exercised or not exercised, is a question of fact depending on the facts of the particular case.

As concerns the NFCC's powers to suspend or revoke a licence to manufacture food, the Act explicitly incorporates the rules of natural justice. For instance the Act directs that such powers should only be exercised after an enquiry has been conducted and the license in writing about the decision made by the NFCC, stating the reasons behind it.⁸⁷ Similarly a conviction for an offence involving the disregard of food quality standards prescribed by the NFCC cannot be a ground for the revocation of a licence unless the court by which the license was convicted so recommended.⁸⁸

In the same vein the existence of the right of appeal and the tribunal to which the appeal lies is also explicitly stated where appropriate. Under section 57, a licensee who appeals against a decision of the NFCC or an authorised officer refusing, cancelling, suspending or revoking a license or registration of premises, is given the right to continue to carry on his business and to use the premises for that purpose pending the appeal. The scales here are obviously precariously tipped in favour of the trader. Appeals to the high court take a long time to finalise and this means that all along such time the consumer will be left without any protection against the hazards which led to the revocation of the licence. It is to be noted that the NFCC like other regulatory agencies elsewhere, prefers to use compliance strategies which emphasize the importance elsewhere, prefers to use compliance strategies which emphasize the importance of co-operation with their subjects (e.g. advising, and educating them) and it is only against recalcitrant

or repeated violators that resort is made to the harsh statutory techniques of compulsion such as prosecution and revocation of licenses. We would thus urge the government to pay heed to a recommendation that was made just a year after the Act come into force that the provision be repealed and substituted for by one which would make it an offence for any person to carry on business while the revocation or suspension of a licence remains in force.⁸⁹

A further reflection of the government's resolve to balance the competing interests, may be seen in the factors which the NFCC is enjoined to consider in deciding whether or not to allow the importation of foods into the United Republic of Tanzania. Considerations of the standards of quality aside, the NFCC is required not to lose sight of the national nutrition policy,⁹⁰ the agricultural policy and questions of food security or the situation of food in the country. The latter is particularly important since food production in this country continue to depend on rain fed techniques and rainfall will for a long time remain unpredictable. For this matter food imports are strategically indispensable.

It is also to be borne in mind that higher safety standards, generally involve higher production costs, which ultimately have to be paid for the consumer. The benefits in each individual case have therefore to be weighed carefully against the costs. Not surprising, an examination of the reports of analysis of food samples by the Government's Chief Chemist, indicate that unlike some countries eg Kenya and the USA, in Tanzania, certain levels of aflatoxins in foods are permitted.⁹¹ What is important it appears is the fate of a thing in the human body.⁹²

4.3 Problem and Limitations

The application of the Food Act as a consumer protection law is curtailed by several limitations arising from the Act itself as well as problems and weaknesses that are exogenous the Act.

ONE, the several offences which prohibit the sale of foods which are not fit for human

consumption, presupposes the existence of standards of quality prescribed by the NFCC, absence of standards make enforcement difficult. With rules regulations and standards, the food industry and dealers will clearly know what the NFCC expects of the them. This may facilitate voluntary compliance by them. The International standards under the FAO/WHO Codex Alimentarius on which the NFCC is allegedly reliant, are not known to the local traders and manufacturers. And as for standards by the TBS, the majority (of which only a few relate to food) are non-mandatory compliance standards.⁹³ As such, non-compliance with them is not illegal per se.

TWO, the institutional set up of the NFCC also creates several limitations in the enforcement of the Act. The NFCC exist as a multi-member institution with no formal organisational structure. It does not have an independent budget nor is it empowered to recruit its own employees. Thus being a mere appendage of the Ministry of Health the NFCC is not an independent agency and this makes it susceptible to political or executive pressures.

THREE, enforcement of the Act, again is dependent on authorised officers who are employees of other institutions. Yet the working relationship between them and the Registrar's office or the NFCC itself remains oblivious. Arguably, the NFCC has no control over authorised officers.

FOUR, the question of resources is definitely crucial. Inadequacy of resources has often been cited as one of the major constraints that the NFCC faces in the enforcement of the Act. For instance not all of the 37 approved ports⁹⁴ through which imported foods may be legally brought into the country are being monitored or policed by authorised officers due to lack of financial resources and personnel. Yet, it is alleged that there are also about 18 unofficial crossing points⁹⁵ which in our view, may necessitate official recognition, considering the territorial expanse of the country. Without the necessary resources, the several unofficial routes

will continue to pose a challenge to both the government and the statutory powers of the NFCC. Lack of financial resources is also inevitably a cause for lack of morale on the part of authorised officers to execute their powers with the requisite vigour.

FIVE, lack of expertise, the expenses and difficulties of procuring the requisite evidence results in many offenders escaping prosecution. The near absence of prosecutions and convictions in the wake of the rising scandals of bad foods being distributed and sold to consumers is a clear testimony that there is inadequate enforcement of the law. It should be noted, that the NFCC has no prosecutors of its own. It therefore relies on State Attorneys from the Attorney General's Chambers to prosecute its cases. This office as Nditti point out, deals with a miscellany of other businesses, some more pressing than the NFCC's cases.⁹⁶

SIX, the existence of several government agencies and departments with some jurisdiction on areas of concern to the consumer also creates formidable hurdles in the enforcement of the Act. This is a problem essentially because no modalities exist for co-operation and co-ordination of activities between the parties involved. For instance the licensing of food dealers is not the sole prerogative of the NFCC as it is also done by the Ministry of Industries and Trade (MIT). Considerations taken into account by the NFCC in granting licenses may not necessarily be observed by the latter and moreover its powers (the NFCC) to revoke or suspend licences do not extend to licences issued by MIT. As a testimony to this, the Minister for Health is quoted saying that, "...we turned down license applications...only to realise later that they have been granted by the Ministry of Trade"⁹⁷ The need for co-ordination on the issue of licences or to have a clear demarcation of such power on the various state organs is therefore obviously crucial and need not be emphasized here.

Enforcement of the provisions of the Act is also simultaneously done by local government

matters pertaining to food quality and safety of local produce are within the jurisdiction of the Ministry of Agriculture. The NFCC for instance controls the quality and safety of meat, game and poultry but it is the Ministry of Agriculture which controls the quality of animal feeds. In the Said Salim Bakhressa case⁶², the complainant imported a large consignment of wheat relying on a permit issued by the Ministry of Agriculture under the Plant Protection Import Order, 1950 only to have the consignment impounded by the DCC for being in contravention of the Food Act. Such state of affairs, not only creates confusion among otherwise law abiding business people but also breeds hostility towards the law and therefore diminishes its effectiveness. It is therefore very important that there should be close co-operation between the state organs concerned so that the implementation of the law is directed consciously by all of them.

SEVEN, the position of Zanzibar also poses same difficulties. There seems to be a misconceived view among business people that since Zanzibar is part of the United Republic of Tanzania, then food consignments from Zanzibar to Tanzania mainland are not subject to the food importation for regulatory controls being enforced by the NFCC. The argument was for instance raised in the matter of M/S Interpharm Service Ltd and the Pharmacy Board.⁹⁸ The late Justice Mkude in this case rightly pointed out that controls being enforced by the Pharmacy Board against imported drugs and pharmaceuticals would likewise apply to drugs imported from Zanzibar (and by the same token, food imports as well) in the same way that they apply to similar imports from third countries.

CONCLUSION

The paper have delved to show what legal safeguards there are for the protection of consumer in relation to foods. It is clear that Food (Control of Quality) Act 1978 contains comprehensive provisions for the protection of the consumer against health hazards and other prejudices emanating from poor quality and unsafe or deleterious foods. However, the

important of this impressive legislation is diminished by not being strongly enforced due to many contains, mainly lack of the necessary finances and expertise. Consequent to these limitations, violations of food quality and safety requirements continue often with impunity. The problem of limited funds is a continuing one and so, as of necessity the consumer cannot rely on the government or its agency the NFCC for protection but rather on himself so as to avoid the many health hazards that are associated with poor quality and unsafe foods found in the markets.

However to enable the consumer do that, there is need for the establishment of consumer oriented organisations which may not only assist to arouse the awareness of the consumers as to their rights and the protection available to them but may also through their work, force the food industry and food dealers to observe food quality and safety requirements rather than take the consumer for granted as appears to be the case now.

NOTES & REFERENCES

1. Belobaba, E. "The Development of Consumer Protection Regulation: 1945-1981" in Bernier I and Lajoie A (eds) *Consumer Protection, Environmental Law and Corporate power*, and as quoted in Rasmsay 1. *Consumer Protection Text and Materials*, Weidenfeld and Nicolson, 1989, p4
2. The National Food Control Commission plan of Action 1993
3. Ibid
4. e.See, "Expired Drug Scandal Exposed" The Sunday News, August 13th 1995, p.1; "Expired Counterfeit Drugs", Daily News, Monday, August 14th 1995, p.1.; "Makontana 28 ya mchele yameozea bandarini" Majira, April 2, 1996; "Mohamed Enterprises Yazua Sokomoko Tena mchele uteketezwe au najituzulu" Rai June 14, 1996 p.1
5. The scandal arose in the year 1994. It involved the sale, distribution and consigning for purposes of sale with impunity several tones of rice and wheat flour (which the company had imported into the country in 1992/93) after the Government's Chief Chemist and Analyst had found to be unfit for human consumption and that is advise should be destroyed. A private MPs motion in the Prliament led to investigations of the scandal by a subcommittee of the Parliamentary legal and constitutional Affairs committee. See the report of this committee submitted to the speaker of the National Assembly in November 1994
6. Act No. 10 of 1978
7. ie. The Food and Drugs Ordinance, Cap 93
8. Act 432
10. Section 5(1)
11. Section 3 as repealed and substituted for by Act No. 11 of 1992
12. The commission is established under s.4(1) of the Act. For its composition, see GN No. 39/1988
13. Section 6(1)
14. Section 61(1)
15. Section 3 as repealed and substituted for by Act No. 11 of 1992
16. Section 13(1)
17. Section 14 (2) a, b and c
18. Section 15(1)
19. Section 8 (2)

20. The Imports Control Ordinance, Cap 292, section 4
21. An OGL is a blanket licence issued by the imports controller by publication in the official gazette
22. See The Confederation of Tanzania Industries (CTI) Industrial Policy Proposals Dar es Salaam 1994, p.33
23. eg. See The First Schedule to the Open General Licence Notice, 1993 GN No. 1972 Published on 18/6/1993
24. Sections 24 to 26, supplemented by The Food (Control of Quality) (Importation of Food) Regulations, 1981, GN No. 63/1992-
25. Ibid
26. Food (control of Quality) (Importation of Food) Regulations 1981, Regulation 8 (1)
27. Ref. NFC/FI/11 of 5th January 1996
28. Previously, gift foodstuff could alongwith other items, be imported without licence. See the imports control (Importation of Charitable Gifts without Licence) Notice 1971, GN. No. 55/1971
29. Josling, T. and Riston C. "Food and the Nation" in Josling, T. Ritson, C. and Mckenzie J. (eds) *The Food Consumer*, John Willey and Sons, Chichester, 1986, pp. 12-13
30. Ibid
31. Section 16 (1)
32. Section 16 (2)
33. Josling T. and Ritson C. op.cit, ibid
34. It was presumably in recognition of these limitations upon the NFCC that the Act from the outset enjoins the NFCC, to maintain a system of consultation and cooperation with the Tanzania Food and Nutrition Centre (TFNC) the Tanzania Bureau of Standards (TBS) and other bodies having functions similar to those of the NFCC.
35. Regulations on Standards of quality made under the repealed Cap. 93 and preserved, include; the food and Drug (standards of quality) (Milk and Milk products) Regulations, 1964 GN No. 49/1964;
The Food and drugs (Standards of Quality) Regulations 1972, GN No. 21/1971
The latter covers bread, dried peas of all kinds including 'maharage, njugu, kunde choroko mbaazi' maize meal, red palm oil (mawese) curry powder and margarine.
36. The Food (control of quality) (Food Hygiene) Regulations, 1982, GN. No. 63/1982
37. The National Food Commission, Plan of Action, 1993
38. 1995/96 Budget Speech, of the Minister for health, National Food and Nutrition Centre, Dar es Salaam, page 33. The common practice among food importers then, was 33. The common practice among food importers then, was to store imported consignments of food in the so called "constructive custom bonded warehouses" pending payment of the owing duty.
39. 1996/97 Budget of the Minister for Health
40. Riwa W. H. "Post Harvest Technologies in Tanzania, Experience in the Kilimo

- Sasakawa G. 2000 Programme", Approach January/February, 1996, p.18
41. There are but specific regulations in respect of meat and poultry. These are, The Food (control of Quality) (Transport of Meat) Regulations, 1993, GN No. 83/1994; slaughtering and inspection) Regulations, GN No. 85/1994 and The Food (control of Quality) (Slaughter Houses, Slaughtering and Inspection of Meat) Regulations, 1993, GN. No. 86/1994
42. Gormley T.r., Downey G. and O'beire D.. Health and the Consumer Elsevier Applied Science London 1987 p.281
43. Ibid
44. See Halsbury's Laws of England, 4th ed. Paragraph 1082
45. Gormley T.R. Downey G. and O;beirne D. op. Cit pp. 282-283
46. Existing regulations on food additives are those made prior to the enactment of the Food Act but preserved. They include: The Food and Drugs (preservatives) Regulations, GN. No. 128/1946; and the Food and Drugs (colouring matters in Food) Regulations, 1958 GN No. 358/1958
47. Food (control of Quality) (Food Labelling) Regulations, 1989, GN No. 237/1989, Regulation 5(b)
48. The results, of a survey done in the UK on this issue, showed that the less educated and people in the lower socio-economic groups (who are the majority) had less socio-economic groups (who are the majority) had less understanding or could not perceive the usefulness and meaning of nutrition labels whereas people with a higher nutrition knowledge and those in the higher socio-economic ladder understood them. See
- the Editorial, Nutrition and Food Science, No.2 March/April 1996 p.3
49. Footnote No. 47
50. The FDA is a consumer watchdog in the US
51. Smith, L.Y. Mann, R.A; and Roberts B.S. Essentials of Business Law and the Legal Environment, 4th ed, West publishing company, st paul, 1992, pp 830-831
52. From discussions with the NFCC Chief Food Controller it would appear tht the label is in the NFCC's view a harmless business gimmick.
53. The term presentation here is used in its literal sense. Neither the Food Act nor the regulations under it uses this term. In the UK, according to Halsbury Law's of England, 4th ed, Para 1119A the term presentation in relation to food is expressed to include shape, appearance, or packaging of food, the way in which food is arranged when exposed for sale and the setting in which food is displayed with a view to sell but does not include any form of labelling or advertisement.
54. A label which is calculated to mislead as to the nutritional or dietang value of any food is by virtue of s. 19(4) deemed to be calculated to mislead as to the quality of that food.
55. Contrast the formulation of this section with other penal provisions under the Act.
56. The Food (Control of Quality) (Marketing of Breast -Milk substitutes and designated products) Regulations, 1994, GN No. 256/1994 Regulations 12(1) and 12(3).
57. See also section 23 dealing with power to seize and dispose of carcasses of

slaughtered animals, poultry game and fish.

58. Section 23 (3) and 37(6)
59. Under the Food (Control of Quality) (Treatment and Disposal of Unfit Food) Regulations, 1993 GN. No. 82/1994, Food unfit for human consumption means any food which is in any way unfit for human consumption whatever cause or food which is likely to cause health hazards. Expired and violative food shall be construed accordingly.