

LAW
THE POLITICS OF LEGISLATION 7/8/79

CONSUMERS ASSOCIATION OF PENANG

SEMINAR ON

HEALTH, FOOD & NUTRITION

HEALTH AND LEGISLATION:

Legal Rights of Consumer in Health

by

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RESCAM, Gelugor, Penang
15 - 20 September, 1979

Article 41 of the Federal Constitution

More than half of the Members of Parliament are members of
Board of directors of companies.

THE POLITICS OF LEGISLATION

Legislation is by nature politically innovated, oriented and enacted. Exceptions being disaster and tragedy when something happens somewhere somehow then only some truly social legislation can somehow be enacted. Legislator responds more speedily and quickly to what the government has to offer, and the government will in turn quickly respond to what the big and influential people in business and industry will have to offer. In other realms, only disaster, tragedy and misfortune can move the government to offer protection to the members of the general public, the consumers and the victims.

Donations to party funds mainly come from the manufacturers, the producers, the bankers and the industrialists, and a small percentage come from party members, and nothing from the public and the consumers. Because of this, our economic system, our economic thought and our leaders in economy think more about the producers and the manufacturers and think less about the consumers and the general public. Ironically, it is the general public, the consumers and the followers who put the government in office. Whither we?

Organised groups such as the Manufacturers Association, the Chambers of Commerce, business clubs, the mining and planting industries, etc. all have their representatives in the government and in Parliament, either directly through nominations¹ or indirectly through political parties.² They can safeguard their vested interests. But consumers have no representatives anywhere in government or in Parliament, except as members of Advisory Council. One may argue that the MPs are representing the constituents which also includes the consumers. But the question remains the same. If MPs were the champion of the general public, then how come we have problems ranging from short-weight and misleading advertisements to ignorance and poverty. To put it crudely, consumers' needs are frequently ignored. Consumers want not only legislation but also adequate enforcement of such legislation.

Fearing that the free enterprise mechanism of demand and supply will work towards the disadvantage of poor consumers, laws were passed to control prices of some essential commodities. The Price Control Act (Act 121) was passed with the object of controlling price abuses by the merchants.

Past efforts by the government in protecting the consumers were in the realm of price control, control of supplies, sales of food and drugs, fraud and deceit and mis-representations, whether fraudulent or innocent. While

¹Article 45 of the Federal Constitution.

²More than half of the Members of Parliament are members of board of directors of companies.

extensive government intervention in the economy designed to protect the consumer has been made, yet the government machinery has not been geared towards full realization of its objectives. In spite of the large machinery that exists in government, enough is not done to correct the imbalance between the powerful manufacturers and the gullible consumers and to adhere to fair trade practices.

"Consumers, beseiged by misleading advertisement, deceived by colourful wrappers and packages, confused by an expanding range of goods, limited in time to decide, are not qualified to buy discriminately and wisely."³

II

HEALTH AND LEGISLATION

This paper will attempt to review the various legislations regulating medicine and health, and to determine whether these laws are adequate to protect the consumers and the man-in-the street.

At present there are no less thirty sets of legislation dealing directly and indirectly with medicine and health. The full list of legislation is attached as Appendix A.

For purposes of this paper, it is proposed to deal with the subject matter in two parts. First, laws directly dealing with the protection of consumers from unscrupulous and immoral "get-rich quick" money makers; and secondly, other laws dealing with various aspects of medicine, health and environment which indirectly protect the consumers.

A. Legislation Directly Protecting Consumers

1. The Penal Code

Sections 269 - 278 of the Penal Code deal with offences affecting public health, safety and convenience. Section 269 seeks to punish anyone who unlawfully or negligently does any act which is likely to spread the infection of disease dangerous to life. Section 271 prohibits any one who disobeys any rule made for regulating the intercourse between places where an infectious disease prevails and other places. Section 272 punishes adulterators of any article of food or drink so as to make such article noxious as food or drink, intending to sell such article as food or drink. Section 273 punishes the vendors or sellers of any noxious food or drink unfit for human consumption. Similarly, it is a criminal offence to adulterate any drug or medicine in

³ Barber, 64 Michigan L.R. 1204.

such a manner as to lessen the efficacy or to make it noxious, and to sell such adulterated drugs. (Sections 274 & 275). Section 277 provides that it is a criminal offence for anyone to corrupt or foul the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used. Finally, section 278 provides that anyone who vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public highway commits an offence. The maximum punishment for these offences range from a fine of \$250 - \$500 and imprisonment not exceeding two years.

2. Law Reform (Eradication of Illicit Samsu) Act, 1976
(Act 165)

This Act was passed in 1976 to provide for the eradication, the manufacture, trafficking and consumption of illicit samsu. Illicit samsu is defined as any intoxicating liquor which has been manufactured without authorization. Section 3 imposes a mandatory prison sentence between two to five years and a fine not exceeding \$20,000 on anyone who manufactures or makes preparations to manufacture illicit samsu. The section imposes a heavier prison sentence between 4 - 10 years plus whipping of not less than six strokes, if the illicit samsu contains any deleterious substance.

Section 4 provides similar punishment for anyone who trafficks in illicit samsu. Section 5 provides a presumption that if anyone who is found in possession of illicit samsu of less than a quarter of a gallon, he is deemed to be a consumer, and such person shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding \$2,000. Sections 6 and 7 seek to punish the owner or occupier of any premises used for the manufacture of illicit samsu or any person in possession of manufacturing apparatus.

The Act further provides for machinery of enforcement wherein powers of search, seizure and arrest are given to specified officers.

3. Sale of Food and Drugs Ordinance, No. 28 of 1952.

The Ordinance makes an offence for any person who sells any adulterated food or drug, or sells any food or drug in any package which bears misleading statement, word, brand, label or word purporting to indicate the nature, quality, strength, purity, composition, weight, origin, age or proportion of the article, or any person who sells food which contains methylated alcohol or food which is unfit for human consumption.

4. Destruction of Disease-Bearing Insects Act, 1975 (Act 154)

This Act provides for the destruction and control of disease-bearing insects and for the medical examination and treatment of persons suffering from insect borne diseases. It contains 27 sections dealing with substantive and procedural matters connected with the destruction of disease-bearing insects including the imposition of punishments on violators and offenders.

5. Pesticides Act, 1974 (Act 149)

This Act seeks to control and regulate the manufacture, importation, sale and storage of pesticides through registration and licences. Section 21 is interesting to human beings for it gives the power to the Minister to make regulations to prohibit the addition to, or the use, or presence in food or in the treatment of food with any specified pesticide, of more than the specified quantity, proportion, strength or concentration of pesticide.

6. Lepers Enactment, 1926 (Cap. 180)

This Enactment seeks to prohibit certain callings, namely as baker, butcher, cook, washerman, tailor, barber, domestic servant, nurses, ricksha puller, taxi driver and boatmen, by a leper. The Enactment prohibits any leper to handle any trade which comes into contact with articles of food or drinks, medicines or tobacco, or any wearing apparel, or to lodge in any hotel or bathe in public baths. The reason is obvious for leprosy is a contagious disease. The Enactment isolates the lepers from the members of the general public thorough the establishment of a Leprosy Settlement at Sungei Buloh.

7. Trade Description Act, 1972.

The Act was passed with the object of preventing misleading statements made to induce consumers into believing something which is false. Basically of English origin, it was hailed as the "shoppers charter". However, it was later discovered that the Act contains apparent weaknesses and serious omissions.

The Act prohibits false trade descriptions. It also applies to trade descriptions used in advertisements and trade marks. It prohibits false and misleading indications as to price of goods or false representation as to supply of goods or services (S. 15). With the exception of s. 15, the Act speaks only of misleading description of "goods" but not services. It is therefore not an offence for a barber or massage parlour to take an extreme example - to mislead the customers into believing such a slogan as "Enter as a tired old man; go out as a vigorous young man."

8. Advertising

Drug advertising is regulated by the Medicines (Advertisement and Sale) Ordinance, 1956. It prohibits certain advertisements relating to medical matters. It is an offence to advertise articles for procuring the miscarriage of women or any advertisement referring to any skill or service relating to treatment of any disease, ailment, etc. so as to induce any person to seek the advice of the advertiser. It also bans advertisements on the treatment on 17 types of diseases or sickness. As it stands, advertisement on medicines can only be made after the approval given by the Medicine Advertisements Board.

9. Other Statutes

Suffice to summarise that other statutes listed in Appendix A were enacted for the common good and welfare of the population in general. Environmental Quality Act, 1974 for example was passed with the object of controlling and regulating industries that causes pollution. The problem of statutes remains the same. Is there enough officers to enforce those legislations?

B. Legislation Indirectly Protecting Consumers

1. The Medical Act, 1971 (Act 50)

The Medical Act regulates and controls the practices of the medical profession. Only registered persons can practise as medical doctors. However exceptions are made with regards to native therapeutics whereby bomohs, sinsehs or others may practise traditional native methods of curing patients so long as they do not claim to be qualified to practise medicine according to modern scientific methods, for example claiming oneself to be a doctor or surgeon (section 34).

Any person who is not a registered medical practitioner who practises medicine to surgery or falsely pretends to be a doctor qualified to practise medicine, or uses the name or title of physician or falsely takes or uses any name implying that he is a doctor, or falsely uses any instrument calculated to induce any person to believe that he is qualified to practise medicine, or uses the term "clinic", "dispensary" or "hospital" in the signboard over his place of practice shall be guilty of an offence (section 33).

In other words, the Act protects the members of the general public from unscrupulous persons who claim to be medical doctors. Without the Medical Act, 1971, a person who commits the offence can only be charged for fraud under the Penal Code. However, the burden of proof is heavier on the prosecution under the Code than under the Act.

2. Dental Act, 1971 (Act 51)

Similarly, the Dental Act regulates and controls the practice of dental surgery. Only registered persons can practise as qualified dental surgeons under section 12 or as dentists under section 13. The Act protects the members of the general public from unscrupulous persons who claim to be dental surgeons or dentists.

Any person who is not a registered dental surgeon or a registered dentist who practises dental surgery or falsely pretends to be a dental surgeon or a dentist or uses the name or title of dental surgeon or falsely takes or uses any name implying that he is a dental surgeon, or falsely uses any instrument calculated to induce any person to believe that he is qualified to practise dental surgery or uses the term "dental clinic", or "dental dispensary" shall be guilty of an offence (section 36).

3. Private Hospitals Act, 1971 (Act 43)

The Act seeks to regulate and control private hospitals, nursing homes and maternity homes thorough registration and inspection of such hospitals. The minister may regulate or prohibit the admission into private hospitals of persons suffering or suspected of suffering from infectious diseases such as chicken-pox, cholera, encephalitis, leprosy, malaria, rabies, small-pox, yaws, yellow fever or any one of the 36 diseases listed in the schedule.

4. Other Statutes

The same comments in A9 applies to other statutes indirectly protecting the consumers and the members of the general public.

III

REMEDIES

There are two types of remedies available to the victims viz. under criminal law and under civil law thorough an action under contract and tort.

1. Criminal Prosecution

All statutes dealing with food and drugs impose duties of enforcement on the state, department, local authorities or agencies. The complainant must initiate the proceedings in the sense that he must lodge a complaint to the police or the authorities concerned. Only then can the police or the authorities act. There are also instances when the authorities themselves may initiate proceedings either through investigation, tip-off or as a result of the news or complaints in the newspapers.

It is to be noted in this respect that part of the blame should go to the consumers. The authorities cannot act unless the consumers are prepared to come forward to complain. Herein lies consumer education. When a consumer complains, he initiates the proceedings. But if no one complains, the authorities can do nothing about it, and as a result, more victims will fall prey to the unscrupulous act of the manufacturers, producers, retailers and shopkeepers. On the other hand, to lodge a complaint is not that easy, for it might be a futile effort, because of the lack of machinery in government departments, or simply because of the attitude of the officers concerned.

2. Civil Proceedings

Any person who suffers as a result of a tortious act by the defendant may bring a civil action against the parties concerned to recover damages. However, it is to be noted that there are various constraints in bringing up a civil suit. First, most complainants are not prepared to

institute civil actions for it might be a futile effort considering that the would-be-defendants are economic giants. Secondly, there is a delay in the hearing - sometimes up to 10 years. This might frustrate the litigants. Thirdly, legal actions are considered as taboos by a great majority of the members of Malaysian society. As far as possible they want to avoid legal actions. Fourthly, legal actions are so technical in nature in that not many laymen can file a statement of claim, and if he were to engage a counsel, this will entail expenses.

It is submitted that the law, as at present, and the machinery for its enforcement is inadequate. There is no incentive for the individual consumer to take civil proceedings against manufacturers when there are only few dollars at stake. Moreover, civil actions are expensive, luxurious and time consuming. Because the consumer, as an individual, suffers from inertia, lack of energy, lack of funds and is naive and gullible in many respects, the businessworld tends to make more profits from unfair practices could be substantial.

IV

RECOMMENDATIONS

For the past 22 years the government has viewed the existence of consumer associations as a necessary evil. Because of the conflict of interest between the consumers and producers, the government tends to listen more to the producers; because the producers are organized, they generate employment, pay corporate tax, have representatives in government and in Parliament. Whereas the consumers have nothing. Even if the government were to set up a Ministry of Consumer Affairs, such a ministry will not be as effective as it should be. This paper has five suggestions to offer.

1. Independent Consumer Council

To be effective, efficient, independent and responsible, the function of consumer affairs should be carried out by private enterprise. But the government, as trustees of the people, should provide the necessary grants for a Consumer Council - with branches all over the country - to function. After all, all of us, including ministers and producers are consumers in one way or another. To be more effective, the Council should submit its annual report and be responsible to Parliament.

2. Enforcement Officers

The main problem is enforcement. However, if proper machinery is provided, enforcement is no problem at all. This paper strongly advocates the necessity of appointing all Division I government officers numbering 15, 120 in the whole of Malaysia as part-time enforcement officers and in the same manner as appointing District Officers and magistrates. This does not mean that all Division I government officers must go out and arrest shopkeepers who

contravene the law. What is envisaged is that if and when a Division I government officer is confronted with any breach of written laws before his own eyes or he himself is a victim of malpractices through short-weight, hoarding or being cheated, he may use his power of arrest, or he may compound the offence. Even if no arrest is made, psychologically speaking the appointment of these vast number of officers is enough to deter the would-be-law-breakers, for the businessman, the shopkeeper, the taxidriver knows that from one out of 10 customers, he is bound to confront an enforcement officer. The government must have trust in its own officers. The likelihood of corruption is not there, for these officers earn a four-figure income, though there might be exception.

3. Royal Commission

How do we go about getting fair trade practice? It is submitted that time is now opportune for Parliament to set up a Royal Commission to investigate and report to Parliament on what changes in the law would be desirable for the further protection of the consuming public, similar to that of the Molony Report of the United Kingdom.

4. Consumer Protection Act

At present, laws which protect the consumers from the hazards to life and limb caused by consumer goods are sporadic, haphazard, containing loopholes because they were enacted on an ad hoc basis. It is submitted that new legislation be enacted by Parliament in the form of a Consumer Protection Act, giving the Prime Minister a general power to make regulations about any goods or services in order to protect the public from the risk of death, injury or disease. To give the power to the Minister of Commerce and Industry would be a conflict of interest and also would nullify the efforts of his ministry in wooing investors from abroad.

5. Consumer Complaints Bureau

Life would be easier and more meaningful if a consumer can walk up to the nearest local authority to lodge a complaint that he was cheated by the shopkeeper across the street. To the ordinary Malaysian, going to the police station to lodge a complaint that he has been cheated by the shopkeeper is a taboo. To go to court and stand in the witness box availing himself to the gruelling cross-examination and insult by the defence counsel is suicidal. It is therefore submitted that proper facilities be made available at the local authority offices for any consumer to lodge a complaint. The Bureau acts as an agent of the police and the ministry, besides acting on its own behalf in certain matters where it has jurisdiction.

References:

1. Evelyn Wan, "Some Aspects of Consumer Protection in West Malaysia" Faculty of Law, University of Malaya Unpublished Project Paper, 1977.
2. Visu Sinnadurai, "Consumer Protection" 1 Sing. LR 107-126.
3. Gordon Borrie and A.L. Diamond, The Consumer, Society and the Law, Pelican Book, 3rd Ed. 1973.
4. Lim Chin Joo, "The Law of Advertising and Consumer Protection in Singapore" University of Singapore, Unpublished Thesis.

LIST OF STATUTESA. Law which Directly Protect the Consumers

1. The Penal Code, (F.M.S. Cap 45)
2. Law Reform (Eradication of Illicit Samsu) Act 1976 (Act 165)
3. Sale of Food and Frugs Ordinance, No. 28 of 1952
4. Hire Purchase Act, No. 24 of 1967
5. Medicine (Advertisement and Sale) Ordinance, No. 10 of 1956
6. Minor Offences Ordinance, No. 3 of 1955
7. Dangerous Drugs Ordinance, No. 30 of 1952
8. Dangerous Trades Ordinance, (F.M.S. Cap. 91)
9. Trade Description Act, 1972 (Act 87)
10. Malaria Eradication Act, 1971 (Act 52)
11. Environmental Quality Act, 1974 (Act 127)
12. Poison Ordinance, No. 29 of 1952
13. Lepers Enactment (F.N.S. Cap. 180)
14. Destruction of Disease-Bearing Insects Act, 1975 (Act 154)
15. Qurantine Enactment (F.M.S. Cap 185)
16. Prevention of Disease Enactment (F.M.S. Cap. 186)
17. Price Control Act, 1946 (Revised 1973) (Act 121)
18. Control of Supplies Act, 1961 (Act 122)
19. Sale of Goods Ordinance, No. 1 of 1957
20. Contracts Act, 1950 (Act 136)

B. Law which Indirectly Protect the Consumers

21. Medical Act, 1971 (Act 50)
22. Dental Act, 1971 (Act 51)
23. Pharmacists Registration Ordinance No. 62 of 1951
24. Hospital Assistants (Registration) Act, 1977 (Act 180)
25. Nurses Act, 1950 (Act 14)
26. Factories and Machinery Act, 1967 (Act 139)
27. Agricultural Pests and Noxious Plants Act, 1976 (Act 167)
28. Street, Drainage and Building Act, 1974 (Act 133)
29. Veterinary Surgeons Act, 1974 (Act 147)
30. Chemists Act, 1975 (Act 158)