

# **INFLUENCE OF POLITICAL, SOCIAL AND ECONOMIC CONDITIONS ON RISE AND DEVELOPMENT OF CONSUMER PROTECTION LAW**

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## **Abstract**

Consumer protection law is one of the mechanisms for protection of consumers. It comprises of both principal and subsidiary legislation aiming at protecting consumers' rights from being abused by producers. It is viewed as an appropriate mechanism of protecting consumers due to its coercive nature. However, the enactment and enforcement of such law depend on willingness of a state to do so. History shows that such willingness is influenced by political, social and economic interests which the state has to preserve. This article gives a brief historical account on how political, social and economic conditions from medieval era up to the present time has influenced legislative measures taken by the state to protect consumers' rights. This account is crucial in grasping reasons why the consumer protection law, be it in western developed countries or in the least developed countries like Tanzania, is in the form it is today.

**Keywords:** *consumer, law, consumer rights, consumer duties, consumer protection law.*

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## 1. INTRODUCTION

Consumer protection law is a branch of law which aims at protecting rights of consumers in businesses.<sup>1</sup> It obliges producers to avail to consumers relevant information about products at pre contractual stage, to use fair and reasonable terms and practices, to refrain from producing and supplying shoddy products, and to resolve consumers' complaints timely and adequately.<sup>2</sup> By that obligation, the law plays an important role of protecting consumers from vices which are associated with purchase and consumption of unsafe, defective or substandard products.<sup>3</sup> Indeed such protection is crucial in maintenance of peace and order in a society since every person is a consumer.

As law is coercive in nature, its enactment and enforcement depend on the institution with coercive apparatuses.<sup>4</sup> History shows that it is a state which is always linked with effective enactment and enforcement of the law. However, such actions are influenced by conditions of the day on which the state has overriding interests and wants to protect through legislation.<sup>5</sup> These conditions may be political, social or economic. Indeed, the enactment and enforcement of consumer protection law have been determined by similar conditions. Ultimately, this has influenced the context and contents of consumer protection intended to be offered by the enacted laws.

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<sup>1</sup>Mniwasa, E.E., "The Protection of Rights of Consumers of Goods in Tanzania: A Law - based Approach", 25(1) *The African Journal of Finance and Management*, 2016, p. 31, at p. 31.

<sup>2</sup> Part iii(5) of the United Nations Guidelines for Consumer Protection, 1985, UN General Assembly Resolution No. 39/248 of 16 April 1985.

<sup>3</sup>Mniwasa, "The Protection of Rights of Consumers of Goods in Tanzania: A Law – based Approach", above note 1, at p. 31.

<sup>4</sup>Nyasani, J.M., *Legal Philosophy: Jurisprudence* (3<sup>rd</sup>Edn.), Nairobi: Consolata Institute of Philosophy Press, 2010, at p. 11.

<sup>5</sup> Id, at p. 16.

On the basis of the aforementioned, this article gives a historical account on rising and development of consumer protection law. It aims at showing how various political, social and economic conditions, both in Western Europe and in Tanzania, have impacted the nature of consumer rights and protection.

## **2. RELEVANT INFORMATION ON CONSUMER, CONSUMER RIGHTS AND DUTIES AND CONSUMER PROTECTION**

### **2.1 Consumer**

A consumer is a person who uses products.<sup>6</sup> He acquires products mainly for his own use and not for resale or use in production<sup>7</sup>. By buying products, consumers play a vital role in the economic system of a nation. Without consumers' demands, producers are said to lack motivation to produce. Lack of such motivation may affect the entire chain of distribution of goods and services in the economy. The consumer is thus very important in any economy and is entitled to certain rights.

### **2.2 Consumer Rights and Duties**

A consumer has rights which are internationally and domestically recognized.<sup>8</sup> He is given these rights as a means of redressing the market failures, which have been and still are, inclining towards

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<sup>6</sup>Nditi, N.N.N., "Efficacy of Legal and Institutional Framework Relating to Consumer Protection in Tanzania", 42(1) *Eastern Africa Law Review*, 2015, p. 150, at p. 153.

<sup>7</sup> S. 2 of the Tanzania Fair Competition Act, No. 8 of 2003.

<sup>8</sup> At the international level, Consumer International (CI) has been acting as an international body for representation of consumer rights. CI, "History of Consumer International", available at <https://www.consumersinternational.org/who-we-are/our-history/> (accessed 16 January, 2019).

interests of producers. These rights include the right to basic needs, right to safety, right to be informed, right to choice, right to be heard, right to redress, right to health and sustainable environment and right to consumer education.<sup>9</sup>

For purposes of striking a balance between a producer and a consumer, the consumer has his own duties. Some of these duties include: duty to inquire for relevant information on products, duty to use products appropriately, duty to protect his consumption by refusing to accept shoddy products, duty to know complaint process when his rights are violated, duty to ensure safety of environment during consumption and duty to liaise with other consumers or consumers' bodies in order to protect consumers as a group.<sup>10</sup>

### **2.3 Consumer Protection**

Consumer protection includes all efforts intended to protect consumers from contracts which would take away their rights.<sup>11</sup> It is a mechanism of promoting and protecting interests of consumers. It is viewed as a need for consumers to have what they want, at a reasonable price and without danger or inconvenience.

Consumer protection came into being as a means of correcting failures in the market system.<sup>12</sup> These failures included unfair trade practices and unequal trade bargains. It (consumer protection) arose as a public intervention on private markets for

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<sup>9</sup> Nditi, *Efficacy of Legal and Institutional Framework Relating to Consumer Protection in Tanzania*, above note 6, at p. 157.

<sup>10</sup> Id, at p. 161.

<sup>11</sup> Mniwasa, *The Protection of Rights of Consumers of Goods in Tanzania: A Law – based Approach*, above note 1, at p. 32.

<sup>12</sup> Nditi, *Efficacy of Legal and Institutional Framework Relating to Consumer Protection in Tanzania*, above note 6, at p. 151.

purposes of protecting consumers. Such intervention purported to create a standardized model of transaction, in which all the parties in businesses were to trade without one party dominating the rights of the other. It is a state which came in and created policies, laws and institutions trying to ensure that the level of transaction was equal amongst the parties. The intervention mainly uplifted the side of consumers as traditionally, consumers were and still are weaker parties in businesses.<sup>13</sup>

Consumer protection comprises of both, law based and non-law based mechanisms.<sup>14</sup> Law based mechanism includes laws and institutions aiming at standardizing business conduct for purposes of protecting consumers. Collectively, this is what is referred to as consumer protection law. The non law based mechanism includes non legislative intervention such as a market self regulatory approach. In it, businesses are left to regulate themselves. This article is concerned with the law based mechanism.

### **3. RISING AND DEVELOPMENT OF CONSUMER PROTECTION LAW IN WESTERN EUROPE**

Consumer protection evolved around social, political and economic principles developed from medieval era to modern times.<sup>15</sup> The concept emerged as a means of maintaining peace and order in the society. Such maintenance came as a result of harmonization of conflicting interests in a class society between producers and consumers.

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<sup>13</sup> Ibid.

<sup>14</sup> Mniwasa, *The Protection of Rights of Consumers of Goods in Tanzania: A Law - based Approach*, above note 1, at p. 31.

<sup>15</sup> Nditi, N.N.N., "Consumer Protection Law and Practice: Its Relevance and Reality in a Developing Economy with Special Reference to Tanzania", Ph.D Thesis, University of Dar es Salaam, 1987, at p.10.

During the medieval era, Western Europe was predominantly rural and agriculture was the major economic activity. Land was monopolized by the church and other few landed aristocrats; who also controlled political powers. The landless masses were to work in estates for production of foodstuffs mainly for immediate consumption. Absence of surplus production hindered flourishing of trade.<sup>16</sup> However, when there was a failure to produce in a particular season, necessity forced the exchange of essential commodities between those who produced and those who failed to produce. The little trade that existed was for rare cases of necessities and not a routine economic activity.<sup>17</sup>

As time passed, gradually production of surplus emerged. The emerging trade was initially done occasionally, for example on weekly basis. As the need for commodities increased, trade became a major daily economic activity. In the course of that trade, there occurred some malpractices such as excessive pricing, inaccurate measurements and shoddy goods. With the presence of these malpractices, consumers started to be affected.

In order to resolve the above malpractices, the state had to intervene. As noted earlier, in the feudal order, state powers revolved around the landed gentry. These gentry consisted of both the church and other private land owners. During the early stages of feudalism state powers were not much organized. The executive powers were not centered into the government due to its weakness. It was the church which had a superior hand on the running of the state.<sup>18</sup> The church exercised both spiritual and temporal authorities. It influenced the philosophy behind consumers' protection.

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<sup>16</sup> Id, at p. 16.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

The church's philosophy on protection of consumers was centered on the concept of morality. According to the church, acts of man were to be evaluated on the basis of right or wrong. Righteous acts were considered just, whilst the wrongful acts were considered unjust and illegal, and in the eyes of the church, sinful. The acceptance of the moral philosophy led producers and traders to believe that good practices such as honest manufacture, reasonable price and fair wage were morally right; hence, they were just and legal deeds. It influenced them to refrain from malpractices such as forestalling, regretting and engrossing as these acts were considered immoral, unjust, illegal and sinful.<sup>19</sup>

The consolidation of feudalism in later stages of the medieval age changed the protection which consumers enjoyed in the moral philosophy. Factors such as monetization, commercialization and urbanization gradually emerged. These factors influenced the feudal order. They made the feudal lords richer as the serfs and tenants started to pay their rent in cash. The gained economic powers were reflected in state powers. At this point, state powers which were previously in the domain of the church were assumed by the secular land lords. As the church became less influential, its moral philosophy on consumer protection lost ground.<sup>20</sup>

The decline of moral persuasion on consumer protection led to the resurfacing of trade malpractices. In order to control them, the state which was now secularized and centralized, had to intervene. This was done through enactment of laws which criminalized the malpractices. A good example of such enactments was the Corn Laws in England during the 15<sup>th</sup>

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<sup>19</sup> Id, at p.19.

<sup>20</sup> Nell, E.J., "Economic Relationships in the Decline of Feudalism: An Examination of Economic Interdependence and Social Change", 6(3) *History and Theory*, 1967, p. 313, at p.313, available at <http://www.jstor.org/stable/2504121> (accessed on 7 December 2017).

century.<sup>21</sup> These laws aimed at regulating price of corns and prohibiting unfair trade practices of regrating, engrossing and forestalling.

A similar position was also taken in France. In 1481, King Louis XI took stern measures to protect consumers against trade abuses when he gave the following proclamation:

Anyone who sells butter containing stones or other things to add to the weight will be put into our pillory; then the said butter will be placed on his head and left until entirely melted by the sun. Dogs may come and lick him and people offend him with whatever defamatory epithets they please without offence to God or the King.<sup>22</sup>

Such intervention was taken in order to appease the emerging consumer class which consisted of poor people who could not afford high price of basic needs, notably food. These people migrated into newly formed urban centres as a result of the increasing commercialization of the economy in urban centres, which made the rural based feudal economy gradually phase away.<sup>23</sup>

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<sup>21</sup> These were laws and Orders in Council applied to regulate imports, exports and internal conduct of the grain trade. See Fay, C.R., "The Significance of the Corn Laws in English History", 1(2) *The Economic History Review*, 1928, p. 314, at pp. 314 - 18, available at [https://www.jstor.org/stable/pdf/2590338.pdf?ab\\_segments=0%252Ftbsub-1%252Flevance\\_config\\_with\\_tbsub&refreqid=excelsior%3Abeafb8dcf19c145dd1590cb2ccdd335](https://www.jstor.org/stable/pdf/2590338.pdf?ab_segments=0%252Ftbsub-1%252Flevance_config_with_tbsub&refreqid=excelsior%3Abeafb8dcf19c145dd1590cb2ccdd335) (accessed on 7December 2017).

<sup>22</sup> Kazanjian, J.H., "Consumer Protection by the State Attorneys General: A Time for Renewal", 49(2) *Notre Dame Law Review*, 1973, p. 410, at 410.

<sup>23</sup> Nell, *Economic Relationships in the Decline of Feudalism: An Examination of Economic Interdependence and Social Change*, above note 20, at pp. 315 - 24.



With time feudalism in Western Europe began to decline. This was caused by factors such as growth of trade and commerce, crusades, the hundred year war, the Black Death and other political and social changes which started to occur as early as the 13<sup>th</sup> century. Amongst these factors, it was the growth of trade and commerce which highly influenced the demising of the feudal order. With such growth, urbanization became prominent. The new urban centres provided opportunities for work. These opportunities attracted the serfs and tenants from rural areas to abandon their land lords and took up new opportunities in urban areas. This changed the earlier economic pattern which was dominated by the landed gentry.<sup>24</sup>

Consolidation of trade and commerce in the urban sector led to the emergence of mercantile class. As this class became richer, its wealth was transformed into industries and expansion of trade and commerce. As a result of it, a new mode of economy, capitalism with a capitalist class was born. In it, possession of capital, and not land, became the major factor. This class transformed its economic power into political power. It influenced the state power to take deliberate measures to protect its interests.<sup>25</sup>

The capitalist mode of production was based on industries which needed massive human labour. The labour requirement was met by the class of former serfs and tenants, who migrated into towns without any means of making their living except to sell their human

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

labour to the industries. It also turned into a consumer class of the industrial goods.<sup>26</sup>

As state power was in the hands of capitalists, the protection which the consumer class previously enjoyed had to change. The legislative mechanism which prohibited and criminalized trade malpractices such as regrating, forestalling, engrossing, exorbitant pricing and unjust measurements was abandoned. A good example of this abandonment was the repealing of the Corn Laws in England.<sup>27</sup> This shift by the State was done deliberately on the justification that the emerging industries were still at infant stage; hence needed protective approach to stimulate their growth.

In reality, it can be argued that the state's alignment in favour of capitalist class came out of necessity and convenience of the day. The emerging capitalist class, with its economic strength, was the main source of the state's revenue through taxes and other levies. Hence in order to appease it, the state had to intervene in its favour. The protection of the working class cum consumers was regarded as less important. The protection of consumers which hinged around the moral philosophy of the church could no longer be upheld as it could have gone against the economic interests of the emerging industries.

The church and its yester influential moral philosophy could not come back to rescue the plight of consumers. At this point in time, the church had already lost its temporal authority. The reformation of the 16<sup>th</sup> century and establishment of various national churches

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<sup>26</sup> Nditi, *Consumer Protection Law and Practice: Its Relevance and Reality in a Developing Economy with Special Reference to Tanzania*, above note 15, at p.36.

<sup>27</sup> Id, at p. 49.

with vested supreme jurisdiction on national monarchies, contributed to the demising influence of the church.<sup>28</sup>

At that initial stage of capitalism, the protection of consumers hinged around business self regulation and private law remedies. Business self regulation was a result of the doctrine of *laissez faire*. The doctrine emphasized on economic freedom, freedom to compete, freedom to contract and freedom to property right. The intervention through public law was discarded.<sup>29</sup>

Consumers were left to protect themselves through their own bargaining power and contractual skills under pretense of safeguarding freedom of contract. The concept of *caveat emptor* operated. In it, a consumer was required to be aware of the nature of products before buying and consuming them. If after buying, products were discovered to be of poor quality or quantity, *caveat emptor* concept was used to bar a buyer from either rescinding the contract or claiming for damages. The buyer was left to put up with the consequences of his poor choice. The concept underpinning *caveat emptor* was based on the assumption that buyers and sellers were in equal bargaining positions.

After the withdrawal of the state's protection of consumers through public law remedies, it was the judiciary which had to step into protecting consumers. In England, for example, the judicial intervention was done through development of the common law principles based on contract or tort. However, the decisions made

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<sup>28</sup> A good example is the Act of Supremacy, 1534 which made King Henry VIII the supreme head of the church of England and extinguished the Papal jurisdiction in England.

<sup>29</sup> Nditi, *Consumer Protection Law and Practice: Its Relevance and Reality in a Developing Economy with Special Reference to Tanzania*, above note 15, at pp. 41 - 4.

by the courts were not in favour of consumers. The common law courts, like what the state did, were making decisions aimed at protecting the emerging capitalist industries. The Judges' hands were tied up to the political and economic realities of the day; therefore, they avoided as much as they could, to pronounce decisions which could have derailed development of capitalism.<sup>30</sup>

The above judicial stand made consumers not to be in a position where they could easily and successfully sue producers. Such hindrance was based on the common law principle of privity to contract. The principle was developed to restrict contractual rights and responsibilities only on shoulders of the contracting parties. Under it, strangers to the contract were entitled to neither rights nor responsibilities. The denial included the right to sue. In that juncture, a consumer who did not buy a product directly from a producer was not permitted to sue the producer even if he suffered injuries.

Such confinement of contractual rights was strictly applied in a number of cases instituted by consumers. In *Winterbottom v. Wright*,<sup>31</sup> the plaintiff was denied to have any right to sue the defendant. The court held that consumers who were injured by defective products had no legal action against the defective execution of a contract which they were not expressly parties thereto. It was pointed out that if the plaintiff was able to sue the defendant (Postmaster General), that permission would have been absurd and outrageous as it would have opened floodgates of litigations, which could have adverse effects on the economic condition of that time.

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<sup>30</sup> Ibid.

<sup>31</sup> [1842] 152 E.R 402.

In *Tweddle v. Atkinson*, the plaintiff also did not succeed as he was not a party to the contract, even though the contract was made for his benefit. The court ruled that:

A promisee cannot bring an action unless consideration from the promise moved from him. Consideration must move from party entitled to sue upon the contract. No legal entitlement is conferred on third parties to agreement. Third parties to the contract do not derive any rights from that agreement nor are they subject to any burdens imposed by it.<sup>32</sup>

The application of privity of contract denied consumers the right to sue directly manufacturers or suppliers of defective products. As consumers normally bought products from retailers, it was almost impossible for them to take any legal actions against manufacturers or suppliers. The alternative avenue which was available to them was to take actions through the retailers. This avenue did not work in their favour as it depended on the ability and willingness of retailers to do so.

In tort, like it was in contract, the courts took similar approach of aligning with the protection of manufacturers to the detriment of consumers. Manufacturers of defective products could only be held liable if they had a prior knowledge of the defect in their products. If a manufacturer was not aware of the defect, the courts were not ready to impose any liability on him. The courts also did not extend the scope of the manufacturer's liability to cover all the affected consumers. As it was in privity of contract, the

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<sup>32</sup> 123 E.R. 762.

manufacturer's liability was only upheld in favour of consumers who were in contract with him.<sup>33</sup>

The above position was clearly stated in *George v. Skivington*.<sup>34</sup> In this case a manufacturer of a defective hair wash was judged to be liable for damage caused by his product to a consumer, who was the wife of the plaintiff. The court entertained the plaintiff's claim because he was the one who bought the hair wash, *albeit* for his wife. For that matter, he was in a contractual relationship with the defendant, the manufacturer; hence within the matrix of privity of contract.

As capitalism evolved into a monopoly stage, the paradigm of consumer protection shifted. The growth of capitalism increased competition in production which led to over production, reduction of prices and profits. Weaker firms were forced either to shut their businesses or merged or acquired by stronger firms. By such merger or acquisition, the surviving firms constituted themselves into monopolies.<sup>35</sup>

The advent of monopoly capitalism created a class of strong and powerful manufacturers. It watered down the pillars of protection of consumers through business inbuilt mechanism which the doctrine of *laissez faire* claimed to uphold. The contractual freedom and equality of parties, which were the basis of *laissez*

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<sup>33</sup> R.C.H., "Liability of Contractor to Third Persons for Negligence", 59(1) *University of Pennsylvania Law Review and American Law Register*, 1910, p. 46, at pp. 47 – 50, available at <https://www.jstor.org/stable/3307671> (accessed on 3 November 2018).

<sup>34</sup> L.R.5. Ex.1.

<sup>35</sup> Nditi, *Consumer Protection Law and Practices: Its Relevance and Reality in a Developing Economy with Special Reference to Tanzania*, above note 15, at p. 55.

faire, could no longer be justified to exist between a powerful monopoly producer and a weaker consumer.<sup>36</sup>

The previous position which both the state and the judiciary took in order to protect the emerging industries had to change. The consolidation of economic powers in the hands of a few monopolies was deemed not to be economically desirable. In order to balance conflicting interests between the few monopolies and the rest of the population, the state had to come back and use its legislative power to control the situation.<sup>37</sup>

The use of public law to regulate businesses was revived. The revival came in as a means of restricting and controlling the growth of monopoly not to be out of proportion to the detriment of the economy. The control was justified on the ground that monopoly was considered as a deterrent of competition, which was and is still viewed as a backbone of the capitalist economy.

In England, for example, antimonopoly legal principles were developed. These principles were intended to restrict practices such as pernicious monopoly, civil conspiracy and contracts in restraint of trade. However, the principles did not achieve the intended purpose as they were subjected to the test of reasonableness. That is to say, if the alleged practice was proved to be reasonable, the restriction could not apply.<sup>38</sup>

Apart from developing the antimonopoly legal principles, there were other legislative actions which were intended to curb the effects of monopoly capitalism, particularly on consumers. A good

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<sup>36</sup> Id, atp. 58.

<sup>37</sup> Ibid.

<sup>38</sup> Id, at p. 61.

example of such legislation was the Sale of Goods Act.<sup>39</sup> This legislation was a codification of common law principles applying to contracts of sale of goods. It provided the inclusion into any contract of sale of goods warranties such as fitness for a buyer's purpose and merchantable quality. In case of any breach of the implied warranties by a seller, the Act gave the buyer a number of remedies to redress his suffering. However, as it was in the case of the antimonopoly legal principles, the implied warranties were not watertight protection on consumers against unscrupulous sellers. They were easily bypassed by insertion of expressed contractual terms with the effects of excluding the implication of such warranties.

As mentioned earlier, the judiciary, though slowly, also shifted its position. It started to make decisions which were no longer centered on protection of the mercantile class. The pre monopoly capitalism common law principles such as *caveat emptor* and privity of contract started to be interpreted liberally and widely. The sanctity of freedom of contract as propagated by the doctrine of *laissez faire* was already watered down by the rise of powerful monopoly capitalists. The judicial renaissance, as it was in the intervention by the state, was necessary in order to control the rising few monopolies from becoming stronger to the detriment of other classes in the society. It is important to mention here that the inevitability of the judicial intervention became imminent when the emerged monopolies adopted standard form contracts.

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<sup>39</sup> This Act was legislated in 1893 to define rights and duties of contracting parties in the contracting of sale of goods. The defined rights and duties were those which the parties failed to include in their contract.



### 3.1 Standard Form Contract and its Influence on Reviving Consumer Protection Law

A standard form contract is a contract between parties in which its terms are set by one of the parties, and the other party has little or no ability to negotiate the terms. The adoption of the standard form contract arose with the development of monopoly capitalism in which bigger and stronger firms serving a large number of consumers decided to use the readymade terms.<sup>40</sup> The readymade terms were and are still viewed to be economically efficient as they reduce time of negotiating with consumers and make it possible to serve many consumers of the same products within a short time.

Despite the above noted economic efficiency, the advent of standard form contracts is considered to be a major shift from the freedom and equality of contract which was the cornerstone of the doctrine of laissez faire. In a standard form contract, the prefixed contractual terms by the producer annihilate a consumer's room of bargaining, and therefore forcing the consumer to either agree with the terms or not to enter into the contract at all.<sup>41</sup> So long as the consumer is in a weaker position and in dire need of the supply, he faces no option other than accepting the terms, which might be unfavourable to his interests.

The prefixed terms in standard form contracts sometimes exclude the contractual obligation of the maker and shift burden to be

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<sup>40</sup> Nditi, N.N.N., *General Principles of Contract Law in East Africa*(1<sup>st</sup>Edn.), Dar es Salaam: Dar es Salaam University Press, 2009, at p. 221.

<sup>41</sup> Nditi, *Consumer Protection Law and Practice: Its Relevance and Reality in a Developing Economy with Special Reference to Tanzania*, above note 15, at p. 64. Nditi argues that the implied warranties provided by the Sale of Goods Act, 1893 on merchantability, fitness for purpose and title which could be used to protect consumers, were excluded by express terms in standard form contracts.

shouldered by the other party, in this context, the consumer. This is normally done through insertion of exemption clauses. Exemption clauses tend to limit a party's liability from all injuries which the consumer stands to suffer after using products.

When the courts realized the detriments which consumers suffered by the use of exemption clauses, they decided to shift their position and started to look at the plights of consumers. The courts developed a mechanism of controlling the applicability of the exemption clauses. The mechanism embodied requirements such as incorporation of an exemption clause into contract, reasonableness of the clause, clarity of the clause and clause not to be misrepresented or to be invoked in case of fundamental breach.

### **3.2 Contribution of Law of Tort on Consumer Protection**

In tort, the courts also took some liberal initiatives to widen the scope of awarding remedies to consumers who suffered damage as a result of unfair trade practices and defective products. The previous strict legal position of denying remedies to consumers, who were not privy with manufacturers gradually changed. The new approach began to encompass even the ultimate consumers who were not privy with manufacturers, provided they proved to have suffered injuries. This new dimension was elaborated in the Paisley snail case of *Donoghue v. Stevenson*.<sup>42</sup> In this case, the House of Lords imposed an obligation on manufacturers to exercise a duty of care in production in order to avoid harm to ultimate consumers.

Donoghue's case was a major shift in common law towards favouring protection of consumers. Its duty of care principle

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<sup>42</sup> (1932) AC 562.

obliged manufacturers to ensure safety, soundness and merchantability of their products before selling them to consumers. Likewise, the neighbourhood principle, assimilated from biblical context, was also a major innovation. It suggested that consumers, as neighbours of manufacturers, were to be loved by being protected from harmful products. This duty also influenced formulation of the strict liability duty; which became more articulated in the 1940's and 1950's. The strict liability principle allowed consumers injured by defective or unexpected dangerous product to recover compensation from the maker or seller of the product, without showing or proving that the manufacturer or the seller was actually negligent.

In order to succeed in strict liability, the injured consumer was required to prove the following three conditions: First, the product had an unreasonably dangerous defect which injured him. The defect came into existence during designing, manufacturing, packaging, parking or shipment of the product. Second, the defect caused injury to him when it was being used in a way that it was intended to be used. Third, the product was not substantially changed from the condition in which it was originally sold.

Strict liability was adopted because its rationale suited social and economic conditions of the day. The monopoly industries were economically strong to face the consequences of their own malpractices. The need of a state's protection of capitalism was no longer justifiable. At this point in time, insurance companies had developed. This development provided a financial shield to industries in case of financial losses. Assurance of being indemnified became more ideal than the direct protection from the state. The fear that businesses could not withstand financial claims from injured consumers was already taken care of within the capitalist system itself through insurance indemnities.

### **3.3 Development of Consumer Protection Law after Second World War**

After the Second World War, the concept of consumer protection gained momentum in various parts of the world. As technology advanced, advertisements grew through the use of new methods of selling products such as cinema, radio, telephone, television and later on internet. This advancement exposed consumers to new hazards which were not experienced before. In order to protect consumers, the movement of consumerism emerged. This movement emphasized on promoting and protecting consumers' rights through organized movements to fight against dishonest business activities such as shoddy products, exorbitant pricing, unfair contractual terms and bait advertising.<sup>43</sup>

The movement of consumerism influenced states and other institutions to take proactive measures towards consumer protection. In the United Kingdom, for example, Parliament strengthened consumers' contractual rights by passing more consumer protection laws such as the Consumer Credit Act,<sup>44</sup> the Unfair Contract Terms Act,<sup>45</sup> the Sale of Goods Act,<sup>46</sup> the Supply of Goods and Services Act<sup>47</sup> and the Consumer Protection Act.<sup>48</sup>

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<sup>43</sup> Bello, K.B., "Perspectives on Consumerism and Consumer Protection Act in Nigeria", 4(10) *European Journal of Business and Management*, 2012, p. 72, at pp. 72 - 3, available at [https://www.researchgate.net/publication/268436346\\_Perspectives\\_on\\_Consumerism\\_and\\_Consumer\\_Protection\\_Act\\_in\\_Nigeria](https://www.researchgate.net/publication/268436346_Perspectives_on_Consumerism_and_Consumer_Protection_Act_in_Nigeria) (accessed on 17 May 2017).

<sup>44</sup> 1974, Cap 39. It protected consumers by setting out how credit should be marketed and managed.

<sup>45</sup> 1977, Cap 50. It prohibited use of unfair and unreasonable terms to exclude or limit liability of producers.

<sup>46</sup> 1979, Cap 54. It replaced the 1893 Act and consolidated the requirement for description of goods, satisfactory quality and fitness for purposes. It has been replaced by the Consumer Rights Act, 2015.

In the United States of America, on March 15 1962, President John F. Kennedy made a speech to the Congress in defence of consumers by saying that consumers by definition include all of us. They are the largest economic group, affecting and affected by almost every public and private economic decision. Two-thirds of all spending in the economy is by consumers. But they are the only important group in the economies who are not effectively organized, whose views are not often heard.<sup>49</sup>

President Kennedy categorically pointed out that the technological development has made markets to become impersonal; a trend which has made consumer's choice to be influenced by mass advertising utilizing highly developed arts of persuasion. As a result, a consumer is subjected to a dilemma as to whether products meet the required standards of safety, quality and efficacy. In order to shield the consumer against such anomaly, he urged his government to take additional legislative and administrative measures. The measures to be taken were to protect the basic consumers' rights. In that speech, he emphasized on consumers' rights such as right to safety, right to information, right to choose and right to be heard.<sup>50</sup>

At the international level, the need of consumers' protection gained prominence within the United Nations (UN). In 1985, the

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<sup>47</sup> 1982, Cap 29. It required provision of products in a proper standard of workmanship.

<sup>48</sup> 1987, Cap 43. It introduced regime of strict liability for defective products. It has been replaced by the Consumer Rights Act, 2015.

<sup>49</sup> UNCTAD "Consumer Rights are a Cornerstone of Inclusive Development", 2018, available at <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1686> (accessed on 17 October 2018).

<sup>50</sup> Ibid.

UN adopted Guidelines for Consumer Protection.<sup>51</sup> The Guidelines call upon the Member States to take reasonable steps to achieve or maintain adequate protection for their population through consumer protection initiatives in terms of policies, laws, regulations, rules and procedures. The Guidelines have also set principles which are considered as models for protecting consumers when conducting both online and offline commercial transactions. Some of these principles include; fair and equitable treatment, disclosure and transparency, education and awareness, protection of privacy, security of payment systems, security of electronic commerce and adequate dispute resolution.<sup>52</sup>

#### **4. EVOLUTION OF CONSUMER PROTECTION LAW IN TANZANIA**

In Tanzania, the development of consumer protection, like elsewhere, has been influenced by its political and economic history. Before effective colonial rule in 1885, Tanzanian societies were engaged in subsistence production, mainly of foodstuffs with little surplus. What was produced was for immediate consumption. The little surplus obtained was traded for basic items which someone failed to produce for himself. The little trade which existed was in the form of barter system. In it, surplus foodstuffs were exchanged for items such as salt, craft articles and clothes. As the traded surplus goods were of the same quality as those produced and self-consumed, the plight of consumers having bought substandard goods was an uncommon event. Trade, at

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<sup>51</sup> The Guidelines were first adopted by the UN's General Assembly in resolution 39/248 of 16 April 1985, and expanded by the Economic and Social Council in resolution 1999/7 of 26 July 1999. They were revised and adopted by the General Assembly in resolution 70/186 of 22 December 2015.

<sup>52</sup> Part iii(5) of the Guidelines.

that time was based on reciprocity; as such, the need of having a defined mechanism of consumer protection was not necessary.<sup>53</sup>

Tanzania Mainland became a colony in 1885. It was a German colony from 1885 to 1918, and as a UN trust territory under the British administration from 1919 to 1961. During the colonial era, Tanzania's economy started to be integrated into the capitalist economy.<sup>54</sup> The previous subsistence economy was gradually transformed into production of cheap raw materials and a market for industrial goods from Europe. Such transformation led to emergence of the consumer class which consisted of Europeans, Asians and Africans. This fact made the colonial administration to take some initiatives to protect interests of consumers.

The protection of consumers was done through enactment of various pieces of legislation such as the Native Foodstuffs Ordinance,<sup>55</sup> the Prices (Control) Ordinance,<sup>56</sup> the Weights and Measures Ordinance,<sup>57</sup> the Meat Hygiene Ordinance,<sup>58</sup> the Price Control Ordinance<sup>59</sup> and the Sale of Goods Ordinance.<sup>60</sup> It is worth to mention that the Sale of Goods Ordinance which was modeled from the English Sale of Goods Act, 1893<sup>61</sup> included certain implied consumer statutory rights such as fitness for buyer's purpose and merchantable quality.<sup>62</sup> In the mentioned laws, protection of consumers was done through penal sanctions

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<sup>53</sup> Nditi, *Consumer Protection Law and Practice: Its Relevance and Reality in a Developing Economy with Special Reference to Tanzania*, above note 15, at pp. 81 - 3.

<sup>54</sup> *Id.*, at p.90.

<sup>55</sup> 1924.

<sup>56</sup> 1920.

<sup>57</sup> Act No. 16 of 1960.

<sup>58</sup> Cap 432.

<sup>59</sup> 1951.

<sup>60</sup> 1931.

<sup>61</sup> 1893.

<sup>62</sup> Ss. 56 - 7.

and private law remedies found in both contract and tort law. The penal sanctions were in the form of fines or imprisonment, whilst damages were the common private law remedy.

After attaining its political independence in 1961 and followed by union with Zanzibar in 1964, Tanzania, though for a brief period, maintained the capitalist economy inherited from its colonial past.<sup>63</sup> That economy was appended to the foreign capitalist enterprises and dominated by the private sector or through joint venture with the government. The approach towards consumer protection was similar to that of the colonial era.

In 1967, Tanzania decided to follow a socialist path. This mode of economy, with its blue print in the Arusha Declaration, made the country adopt socialism and self-reliance policy.<sup>64</sup> In it, the State had to intervene actively in the economy. The State nationalized all major means of production and became the sole producer and supplier. At that juncture, the state had to perform two simultaneous roles: to produce and supply, and to ensure that consumers' rights were promoted and protected.

In order to achieve the above roles, the state passed pieces of legislation such as the Weights and Measures (Metric System) Act,<sup>65</sup> the Textiles (Price Stability) Act,<sup>66</sup> the Regulation of Prices

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<sup>63</sup>Nditi, *Consumer Protection Law and Practice: Its Relevance and Reality in a Developing Economy with Special Reference to Tanzania*, above note 15, at p. 113.

<sup>64</sup>Toussaint, "The Arusha Declaration: Tanzania New Revolution", 1967, p. 19, at pp. 19 - 24, available at [http://disa.ukzn.ac.za/sites/default/files/pdf\\_files/Acn2967.0001.9976.000.029.1967.4.pdf](http://disa.ukzn.ac.za/sites/default/files/pdf_files/Acn2967.0001.9976.000.029.1967.4.pdf) (accessed on 07 February 2018)

<sup>65</sup> Act No. 46 of 1968.

<sup>66</sup> Act No. 13 of 1970.



Act,<sup>67</sup> the Standards Act,<sup>68</sup> the Regulation of Trade Act<sup>69</sup> and the Weights and Measures Act.<sup>70</sup>

After the Arusha declaration, Tanzania registered some initial success in terms of social, economic and political advancements. However, such glory did not last longer. In mid-1970's the country started to experience economic recession. The downturn was caused by the failure of the nationalized enterprises to produce the demanded products. This was due to lack of competition from other producers, poor management and insufficient capital. The situation became worse in late 1970's and early 1980's when it was compounded by other factors such as the costly war with Uganda, collapse of the East African Community, global oil price crisis and persistent long droughts.<sup>71</sup> In such turmoil, consumers were affected most. They faced trade malpractices such as hoarding, exorbitant prices and short measurements.

The above mentioned economic crisis coupled with other global events such as the fall of socialism in Eastern Europe which was climaxed with the disintegration of the Soviet Union to which Tanzania's political and economic ideology was pegged, influenced the new paradigm in the country. In 1986, the country started to take measures to liberalize its economy and adopt a free market economy. The previous state owned enterprises were privatized.

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<sup>67</sup> Act No. 19 of 1973.

<sup>68</sup> Act No. 3 of 1975.

<sup>69</sup> Act No. 18 of 1980.

<sup>70</sup> Act No. 20 of 1982.

<sup>71</sup> GOODSARIA, "What were the Causes, Responses and Impacts of Economic Crises Which Took Place in Tanzania in the 1970's and 1980's" , 2019, at p. 1, available at <https://goodsaria.blogspot.com/2017/06/what-were-causes-responses-and-impacts.html> (accessed on 15July 2019).

With the establishment of private businesses, protection of consumers which was previously in the hands of the state and its enterprises reverted to the private producers. The State left the private led economy to regulate its own conducts including protection of consumers. Consumers were left to negotiate better terms on their own. The non-interference from the state can be compared with the concept of business self-regulation and inbuilt mechanism during the early stages of capitalism. At that time, the state took deliberate steps not to protect consumers on the justification of protecting freedom of contract. The state feared its involvement in protection of consumers might have killed the capitalist industries which were still in their infancy. In Tanzania, from mid-1980's, the main focus was to create legislative and policy environment to attract private businesses and investments. Presence of stringent legislative intervention to protect consumers could have discouraged new infant private enterprises. It is so argued as no specific legislation was made to protect consumers.

The unregulated free market continued until 1994, when the state passed the Fair Trade Practices Act<sup>72</sup>. The Act aimed at encouraging competition, prohibiting restrictive trade practices and protecting consumers. It also envisaged establishing a special tribunal to hear and determine appeal cases related to unfair trade practices prohibited by the Act.

In 2003, the Fair Trade Practices Act was repealed and replaced by the Fair Competition Act.<sup>73</sup> The new Act purported to enhance competition in businesses, prohibit trade malpractices and protect consumers. In order to regulate and enhance such protection, it has established institutions such as the Fair Competition

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<sup>72</sup> Act No. 4 of 1994.

<sup>73</sup> Act No. 8 of 2003.

Commission (FCC),<sup>74</sup> the Fair Competition Tribunal<sup>75</sup> and the National Consumer Advocacy Council.<sup>76</sup>

Apart from the enactment of the Fair Competition Act, the early 2000's also witnessed the enactment of other pieces of legislation which intend, amongst other things, to deal with consumer rights. Some of these laws include: the Occupational Health and Safety Act,<sup>77</sup> the Environmental Management Act,<sup>78</sup> the Land Transport Regulatory Authority Act,<sup>79</sup> the Energy and Water Utilities Regulatory Authority Act,<sup>80</sup> the Tanzania Communications Regulatory Authority Act,<sup>81</sup> the Tanzania Civil Aviation Authority Act<sup>82</sup> and the Tanzania Food, Drugs and Cosmetics Act.<sup>83</sup> In addition to the institutions under the Fair Competition Act, the named laws have created regulatory bodies which act as consumer protection bodies within the respective sectors.<sup>84</sup>

It is submitted that the legislative efforts deliberately taken from 2000's for purposes of protecting and enhancing consumers' rights in Tanzania echoed the economic, political and social conditions of the day. That is, at that time, the market economy and the associate private businesses reestablished in mid-1980's,

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<sup>74</sup> Id, s. 62.

<sup>75</sup> Id, s. 83.

<sup>76</sup> Id, s. 92.

<sup>77</sup> Act No. 5 of 2003.

<sup>78</sup> Act No. 20 of 2004.

<sup>79</sup> Act No. 3 of 2019.

<sup>80</sup> Act No. 11 of 2001.

<sup>81</sup> Act No. 12 of 2003.

<sup>82</sup> Act No. 10 of 2003.

<sup>83</sup> Act No. 1 of 2003.

<sup>84</sup> Some of these bodies are such as the Land Transport Regulatory Authority (LATRA), the Tanzania Communications Regulatory Authority (TCRA), the Energy and Water Utilities Regulatory Authority (EWURA) and the Tanzania Civil Aviation Authority (TCAA). These bodies have consumer consultative councils to oversee consumers' rights and they do act as consumers' complaints resolution bodies of the first instance.

were considered matured enough to meet, on their own, consumers' claims.

## **5. CONCLUSION**

This article has provided an account on the rise and development of consumer protection law. It has traced how various economic, social and political conditions, in western developed countries and in Tanzania, have influenced the context and contents of legislative measures taken by the state to protect rights of consumers. It is shown that due to dominant position of the producer, use of law has been necessary to protect the consumer from the inevitable trade malpractices.

The historical account given has echoed variations in the adopted legislative measures taken to protect consumers. The subsistence economy of the medieval era was characterized by little surplus and trade. This translated into a fewer trade malpractices against consumers. When trade became prominent, the moral philosophy propagated by the church acted as a deterrent of trade abuses against consumers. The emerging mercantile class in early stages of capitalism needed maximum state's protection to shield the infant businesses. Such protection made consumers' rights to be left under the self-regulation of market forces and freedom of contract. When capitalism evolved into monopoly, the state, through its legislative arm, changed its position and came back to promote and protect consumers' interest.