CHAPTER IV

DEFECTS IN THE PAWN BROKING
AND MONEY LENDING SYSTEMS

A. General Observations: Pawnbroking

Malpractices by the unscrupulous pawnbrokers in the pawnbroking trade is public knowledge having been highlighted by the consumer movement, the news media, especially the various newspapers, the feedback to the Ministry of Housing and Local Government\(^1\) whose Ministry is also in charge of this institution among its other manifold functions, and the grievances of the exploited victims themselves. In 1979, the Ministry had received more than one hundred complaints of such malpractices being committed by the pawnbrokers throughout the country.\(^2\)

Such a state of situation has been recognised in a paper presented to ECAFE which read:\(^3\)

"A majority of private pawnbrokers unscrupulously exploit the borrower."

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\(^1\)Ministry of Housing and Local Government notes on pawnbroking obtained during interview. 3rd March, 1983.
\(^2\)New Straits Times. 3rd August, 1979.
\(^3\)As Aziz, "Some Aspects of the Malayan Rural Economy Related to Measures for Mobilising Rural Savings". E/CE 11/1 and T/WP 1/1 18:1951.
They are not interested in the redemption of the pawn. They would rather the interest went on accumulating and that they retained the pawn after some sort of fictitious sale, thereby appropriating to themselves the surplus of the sole value of the pawn over the principal and interest. They discriminate between rich and poor borrowers. Their valuation of the pawns may be arbitrary and the pawns may not be properly taken care of during their custody. They may charge exorbitant rates of interest, for any limiting rates by private pawnbrokers or moneylender is most difficult to enforce."

Such exposure may only be the tip of an iceberg if bearing in mind that the majority of the pawners who hail from the rural areas as well as those from the urban areas are normally illiterate, ignorant and gullible and thus are not mindful of such exploitation being committed upon them. Therefore, what about such unreported cases of malpractices?

Assuming that a few hundreds official complaints regarding such abuses surface up a year the pawnbroker may well argue that out of the four million pawnshop customers in the country in 1979, by the law of averages, this modest figure relating to the malpractices in question is only a tiny figure and hence negligible. It is true if taken at face value. However, the writer is contending that this paper is only solely concerned
with the very moral issue of the topic and not with the number of strayed pawnbrokers although such a number is also relevant to reflect the truth of the situation. Moral issue cannot be equated with the question of quantity because even a very single and isolated act of malpractice is still a moral wrong to be censured by any right-thinking man in society. Therefore, the contention of the pawnbroker here should not confound the shadow with the substance and juggling with statistics to oust the plain facts of the situation.

Victims fleeced by the unethical pawnbrokers both in Penang and Kuala Lumpur and having so being interviewed by the writer tend to lend weight to the truth of the above accusation. The files of complaints of such a nature at the Consumer Association of Penang also do verify the truth.\footnote{Research done at Consumer Association of Penang on 15th March 1983 and information gathered from Mr. Edmund Gnamuthu, CAP Research Officer during interview.} One such victim being so exploited is a low-ranking government servant who was compelled to pawn the gold chain of his wife in order to pay for his overdue room rent. On redeeming it later, his sharp eyes had discovered that the pledge had been tampered with minus two links!\footnote{Interview with a pawnner in Penang on 20th March, 1983.} Another
victim, a woman went to pawn her gold bracelet estimated to cost around $800.00 but it was only valued at $500.00 by the pawnbroker. Since she needed the money urgently to send her daughter to a local university, she had no choice but to accept it. An old illiterate hawker was charged 3 per cent for a loan of $100.00 on pawning his gold ring contrary to the law which prescribes 1½ per cent for loans above $50.00. Here the writer does not wish to bore the reader with complaints from all his interviews which obviously is common knowledge to the enlightened section of the public. However, the general impression gathered from the writer's interviews with the Consumer Associations of Penang and Selangor show that the usual forms of malpractices are charging excessive interests than that permitted by the law, tampering with pledges, undervaluation of articles and auctioning off pledges worth more than $100.00 without even attempting to inform the owners at all.

In short, this question is posed: Why is that the operations of the pawnbrokers have caused grievances

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6 Informal interview with a pawnner on 20th March, 1983
7 Informal interview with pawnner in a squatter area (Bumi Hijau) in Setapak, in Kuala Lumpur on 4th April, 1983
8 Result of interview with Secretary of Selangor Consumer Association on 31st May, 1983
and evoked much publicized criticisms? It appears that the answer may be attributed mainly to the weaknesses of the Pawnbrokers Act 1972; ineffective administration and enforcement and the lack of alternative sources for consumer credit available.

B. **Main Weaknesses of the Pawnbrokers Act 1972**

It seems that the shortcomings in the pawnbroking system in the country can be traced to the present Pawnbrokers Act of 1972 which is not comprehensive enough to envisage the forms of malpractices presently being committed by the unscrupulous pawnbrokers. Section 10(1) of the Act provides that

"The Minister may by notification in the Gazette fix for a period not exceeding three years the number of licences to be granted in any specified areas in each State and call for tenders in the prescribed form for the right to receive such licences."

The tender system that is now being practised in the pawnbroking institution requires a pawnbroker to pay high tender or licence fees averaging about $2,000.00

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9(a) Notes on Pawnbroking obtained from Ministry of Housing and Local Government
(b) "Loopholes in Pawnbrokers Act" Enck Hamdan Secretary General of FOMCA and President Selangor Consumers Association in "Berita Fomca" June 1982 Vol. 3: No. 2


11 Pawnbrokers Act 1972
a month. Some even pay $4,000.00 a month, especially in the affluent area of Petaling Jaya, although this varies from place to place.

The high initial costs borne by the pawnbrokers are usually passed on to the consumers by charging excessive interest rates. Thus it is a harsh reality to know that the eventual victim of this system of high charges is the pawnner himself! This fact is recognized by Encik Hamdan Adnan, Secretary General of PONCA and President of the Selangor Consumers Association in his article, "Loopholes in the Pawnbrokers Act"12 as well as by a retired pawnbroker himself.13 The latter told the "Star" newspaper that due to the high licence fees, some strayed pawnbrokers resort to questionable practices and charge excessive interest rates to make ends meet. At the other extreme end, this high tender fees had also led to some pawnshops closing down.14

Under the tender system in accordance with section 10 of the Pawnbrokers Act 1972 the Minister fixes the number of licences to be granted under the

12Berita PONCA. June 1982 Vol. 3 No. 2 page 9
13Star. 2nd February, 1981
14Star. 5th January, 1975
Act usually for a period of two years and seven months in any specified area in each State. This results in a particular pawnshop or a few pawnshops operating in that stipulated area. Consequently, such a situation gives rise to the presence of monopoly, that lone pawnshop operating there faces no competitor at all or the mere handful of pawnshops there do not actually creating real competition among themselves in the same trade. They more value their kinships and being in the same field they will not try to oust each other out of the trade. To them the piece of cake is big enough for everyone to have his bite. Monopoly inevitably leads to exploitation of the needy pawners who often have no other alternative sources to turn to for urgent consumption loans. This very fact is well aware by the unscrupulous pawnbroker who naturally takes advantage of the situation.

An overall examination of the Act of 1972 pinpoints to certain provisions which tend to work to the disadvantage of the pawner Section 14 of the Act states that:

"Every licensee on taking any article in pawn shall enter in a book the

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Acknowledged by Ministry of Housing and Local Government in its Notes on Pawnbroking.
particulars of the transaction to to be prescribed by regulations and deliver to the pawner a pawn ticket in the prescribed form.

Hitherto, the authorities concerned have not taken steps to issue a set of guidelines to the pawnbrokers on what prescribed form, the pawn ticket should be. As a result, there are now in existence pawn tickets with different formats, most of them do not lay down sufficient information as required by the pawnbroker's regulations 1972 6(1). The law requires the pawn ticket to supply details of the transaction although in real practice, the pawnbrokers do not comply with the law. For example, regulation 6(2) states that pawn tickets and entries recorded shall be in Bahasa Malaysia, yet many pawnbrokers throughout the country still write in Mandarin. Hence, the pawner who cannot read Mandarin is put in a disadvantageous position. He is thus prevented from ascertaining that the details of the transaction are correctly and fully written out on the pawn ticket.  

Section 18 of the same Act provides that

76 Pawnbrokers ct 1972;  
17 Berita PNP in June 1982 Vol. 3 No. 2 page 6
"...... and shall upon demand give to that person a receipt for all such monies received from him and shall record the particulars of that person in the licensee's book." 18

Most of the pawnshop patrons do not know of this provision since they usually belong to the lower socio-economic group and thus are illiterate and ignorant. Therefore, such category of customer never asks for the official receipt. But even the knowledgeable one who asks for such a receipt are frequently met with different evasive answers on the part of the pawnbroker. The most common one is that the receipt books are out of stock and if he is really still keen to have one, then call upon the shop some other time. 19

The reluctance of the pawnbrokers to issue a receipt is too obvious. Hence, the pawnbrokers actually manipulate the loophole in this provision to their advantage. They can always charge more interests than those allowed by the law. Knowing too well that there will be an absence of documentary evidence against them apart from their own purported recorded transaction in any accusation of foul play on their

18 Pawnbrokers Act 1972
19 Result of writer's interviews with pawners and his interview with Consumer Associations of Penang and Selangor.
part. After all, a person conversant with the law of contract knows too well that oral evidence is usually hard to prove.\textsuperscript{20} A survey by the Ministry of Housing and Local Government confirmed this undesirable state of existing affairs.\textsuperscript{21}

Section 25(1) (b) states that,

\textbf{".......... the pledge if pawned for a sum exceeding one hundred dollars shall when disposed of by the licensee be disposed of by sale by auction to be conducted by a licensed auctioneer."}\textsuperscript{22}

There is much abuse regarding the auction of unredeemed articles. In 1972, the Secretary-General of the then Ministry of Local Government and Federal Territory attacked such abuse in the press,

\textbf{"Unredeemed goods are not properly auctioned resulting in the additional sum raised from the auction of the goods going into the pockets of the pawnbrokers and not to those who pawned them."}\textsuperscript{22}

This section does not provide to regulate the

\begin{itemize}
\item[20] Section 32 Evidence Act 1950
\item[21] recognised by Ministry of Housing and Local Government notes on pawnbroking
\item[22] Pawnbrokers Act 1972
\item[23] Malay Mail. 22nd March, 1978 page 1
\end{itemize}
manner of these auction sales. Hence the Auction Sales
Enactment is really the appropriate law to govern such
public auctions. Only licensed auctioneers are allowed
to conduct the auction.

The Auction Sales Enactment insists on the
auctioneer to give public notice before holding each
public auction. Such notices are always inserted in
the newspapers but these advertisements are always in
small print and occupy a very small portion of space
so as not to be conspicuous to the public. As a result
hardly any member of the public attend these auctions.
neither the said Enactment and the Pawnbrokers
Regulations provide for the display of articles to be
auctioned. This lacuna enables the pawnbrokers to get
off scott free with several irregularities in the
disposal of their pledges.24 The absence of controls
or proper regulations on the auctioning of articles
for loans of over $100.00 unredeemed within the time
limit results in such auctions being conducted merely
as a facade to cover up the irregularities.

The shortcoming also lies in the fact that
the Act permits the pawnbroker to buy the unredeemed

24 Project Paper 1978/1979 Pledge Transaction An
Inquiry into the Working of Pawnbrokers Act 1972
in Kuala Lumpur: Gerald Ferara page 145
goods and they do this for the minimum price so that no remainder to be paid to the borrower. This situation is confirmed by Dr. K.B. Rohatgi, Professor of Comparative Law of the Faculty of Law, University of Malaya in Kuala Lumpur who claimed that such auctions were mere eye-wash. They were attended by the pawnbrokers themselves and the particular pawnbroker would bid for the purchase of the article but generally would not advance beyond 50 to 60 per cent of the value at a price sufficient to cover the loan and interest with no surplus left for the borrower.25

As there is no provision in the Pawnbrokers Act or its Regulations to give prior notice to the borrowers affected by the auctions, many such owners of pledges not redeemed within time do not know when, where is the proposed auction and by whom. The Ministry of Housing and Local Government has received many complaints on such practices.26

Although the law does not provide for this requirement, by virtue of the Contracts Act 1950

26 Gathered from interview with Ministry's official during interview
(Revised 1974) pawnbroking is a contractual transaction, and being so, section 129 of it may be utilized to compel the pawnshop to give such notice. Section 129 of the Act 1950 states that

"If the pawnee makes default in payment of the debt, or performance, at the stipulated time, of the promise in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor, upon the debt or promise and retain the goods pledged as a collateral security or he may sell the thing pledged on giving the pawnor reasonable notice of the sale." 28

In the Indian case of HARIDAS MUNDRA v NATIONAL and GRINDIAYS BANK LTD, 29 the Indian Court of Appeal discussed Section 176 of the Indian Contracts Act which is in pari materia with its Malaysian counterpart of section 129. In that case, the appellant or plaintiff appealed against a decree of the lower Court dismissing his suit. He claimed an injunction restraining the respondent/defendant banking company from selling the shares pledged by him with the defendant to secure an overdraft. The appellant had a current overdraft account with the defendant and

27 Authority from Ministry of Housing and Local Government notes on pawnbroking
28 Contracts Act 1950 (Revised 1974)
29 AIR 1963 Calcutta 132 (V50 C30)
had also executed a letter of lien empowering the defendant to sell and dispose of the shares on default of payment of the moneys due on demand. Later, the plaintiff was indebted to the defendant for a large sum. The defendant then instituted a suit against the plaintiff to recover its dues. During pendency of the suit in the lower court then, the defendant served a notice on the plaintiff demanding payment of its dues and stating in default of payment before a certain given time, the pledged shares would be sold and the nett proceeds would be applied in reduction of plaintiff's indebtedness. The plaintiff then contended _inter alia_ that in view of the pending of the suit instituted by the defendant, the latter had no right to sell or dispose of any of the shares and that the notice given was not reasonable notice of the sale and or was in contravention of S. 176 of the Contracts Act. Although the primary issue in that case touches on whether the pawnee's right to sue and right to sell are concurrent or alternative, yet the Indian Court of Appeal there observed that section 76 requires notice of the intended sale.

Sir Laik J said that there is some difference between a notice giving mere intention to sell and a notice of the intended sale. A mere intention without giving specific particulars will not be enough and such
notice will be unreasonable.

In *Nischand Baboo v Jagabundhu Ghosh*, *Mahalinga Nadan v Ganapathi Subbien* and *Cooperative Hindusthan Bank Ltd. v Surendranath Dey*, the courts in all three cases also observed that under section 176, the pawns is entitled to sue or to sell the pledges but only upon giving reasonable notice of the sale.

Another weakness in the law seems to be found in the Pawnbrokers Regulations 1972 in regulations 5 (1) (iii), 6 (1) (ii) and 7 (1) which all use the word "description" relating to pawned articles. As no further details accompany this word, the 222 licensed pawnbrokers in the country again manipulate this shortcoming in the law to their advantage. They interpret the word "description" in a broad sense and consequently for example, the type of gold, its weight and length of a gold chain or bracelet pawned are not stated. Even an expensive Rolex watch being pledged is merely described as a watch on the pawnticket and a host of other such articles. As a result, the sneaky pawnbrokers tampered with such pledges. Hence complaints of redeemed

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30 *IR 22 Cal. 21 at 24*
31 *IR 27 Mad. 528 at 531*
32 *IR 59 Cal. 667 at 685*
gold chains with missing links, diamond-studded rings substituted with false diamond stones and the expensive inside mechanism of a Rolex watch being replaced instead with Seiko parts now and then arise,\textsuperscript{33} for example.

The Act also does not lay down the criterion for appraising the value of pledges and one of the stinging criticisms levelled against the institution is that pawnbrokers grossly undervalue pledges, sometimes as much as fifty per cent. There is no legal ratio to be observed between the value of the article and the amount of the loan paid thereon.\textsuperscript{34} Normally, the pawnner has no say in the valuation which is done by the licensees or their employees. The psychological factor in such a situation is too clear because the pawnbroker has the upper hand of such a situation in dictating whatever price he thinks is advantageous to him to the needy and desperate pawnner who usually has no other sources to turn to.

Under valuation can bring about adverse effects.\textsuperscript{35} First, the loan given does not reflect the true value of the pledge. The pawnner ought to be entitled to obtain a loan which while maintaining a

\textsuperscript{33}\textit{Ministry of Housing and Local Government notes on pawnbroking}

\textsuperscript{34}\textit{See Note 14 at page 137}

\textsuperscript{35}\textit{supra in note 24}
ratio for the licensee's protection is nearer to the articles true value.

Secondly, the pawner may have to dish out a higher rate of interest where he is given a loan for a smaller amount, due to the fact that the rates of interest chargeable is inversely proportional to the amount of the loan.

Thirdly, by virtue of the operation of Section 23 of the Act of 1972, if the pawner fails to redeem his pledge in time, he will suffer. Assuming the pledge is grossly undervalued and is pawned for one hundred dollars or less and is not redeemed in time, it becomes the licensee's absolute property. The sum of loan which the pawner receives on the pledge in such a case can hardly be treated as sufficient compensation for the pawner's loss. Therefore a lack of criterion in the law to appraise the value of pledges can promote injustice. It even encourages unequal bargaining power between the strong and the weak and this fact is abhorred by the prominent Lord Denning and Lord Diplock in the English law of contract.\textsuperscript{36}

\textsuperscript{36}\textit{See} Lord Diplock in Schroeder Music Publishing Co. Ltd. v Macaulay (1974) 9 ALR C76 at page 624
Although there are now provisions in the Act to safeguard against the pawning of stolen articles, yet there is none for any reference at the time of pawning. Therefore, the pawning of articles valued at more than $2,000 should not be accepted by a pawnshop without a reference from a respectable or responsible person and the law should provide for this. The age limit prohibiting a person pawning an article be raised from 16 years to 18 years. There are now a number of juvenile delinquents, especially drug addicts who take articles from their homes without permission to pawn. All these will help to deter the pawning of stolen articles, because normally a pawnbroker will never ask his customer from where the pledges come from.

C. Ineffective Administration and Enforcement

Another major factor which seems to contribute to the present defects in the pawnbroking institution in the country today can be traced to the weakness in the administration and enforcement. The Ministry of

\[37^{\text{Part IV Prevention of Unlawful Dealings Pawnbroker's Act 1972}}\]
\[38^{\text{Ibid in 25}}\]
Housing and Local Government itself acknowledges this fact. As the revenue accruing from the issue of pawnshop licences has been assigned to the State Governments by the Federal Constitution, the daily administration and enforcement of the Pawnbrokers Act 1972 has been left to each respective state government and in the Federal Territory, to the Dewan Bandaraya, Kuala Lumpur. The Minister concerned appoints a licensing officer and inspector of pawnbrokers in every state. Usually the respective State Secretary is appointed the licensing officer and other senior officers like the District Officers and the Assistant District officers as inspectors of pawnbrokers.

In practice a senior officer assisted by a clerk run the daily administration on pawnshop matters but only as an additional duty apart from the official designated duties. Inevitably, administrative matters with regard to the pawnshops in each State are given low priority since the officers concerned have other more important duties to attend to. Thus, they cannot devote much time and attention to the

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39 Ministry's notes on Pawnbroking
40 Federal Constitution of Malaysia
10th Schedule L111-3
41 Result of interview with Ministry of Housing and Local Government official
subject. So is the same for the District Officer or the Assistant District Officer appointed as inspectors of pawnshops. These senior officers, being liaison officers for the government are always busy with a variety of duties which need more attention so that in the end the pawnbroking institution is often neglected. Consequently, ordinary checks, let alone surprise checks, have never been carried out to examine the pawnbrokers' books and most far-reaching to attend the auction sales to ensure that they are properly conducted. Without proper administration and enforcement, the authorities concerned may not know the problems besetting the pawnbroking system in each respective state. Without enforcement of the law the unscrupulous pawnbrokers are bound to flout the law and exploit the desperate pawnner. 42

D. Lack of Alternative Sources of Credit

On analysis, it appears that the lack of alternative sources of credit on pawns is also another major factor which encourages malpractices by the

42 Malpractices in the Pawnbrokers Trade. A Memorandum (Submitted by Consumer Association of Penang to the Ministry of Housing and Local Government on 19th April, 1970
pawbrokers. Being well aware that such sources are quite limited, they inevitably exploit the situation. The other credit channels like the commercial bank and the finance company are normally beyond the reach of the petty borrower.

5. General Observations: Moneylending

Moneylenders are the largest group of non-institutionalised providers of credit. They are commonly associated with the provision of small unsecured loans to low income earners at exorbitant rates of interest in the towns where they provide consumer credit. Like their counterpart, the pawbrokers, the moneylenders comprise one of the informal sources of credit. Moneylenders also lend to peasants engaged in traditional agriculture. They became amongst the biggest landlords of padi land before the enactment of the Malay Reservation legislation. In spite of the advent of formal credit institutions in rural areas,

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44 *Journal of Malaysian and Comparative Law 1978 (December)* "Credit Law in Malaysia": Nik Abdul Rashid
moneylenders remain an important source of credit. They also provide credit to the small and medium-scale businessmen but these loans are always almost short-term. Therefore, the moneylending institution does contribute to development finance too.⁴⁵

Although the economy stands to gain from the moneylending establishment, yet their modes of operation have brought about much misgivings and evoked stinging criticism from the enlightened members of the society. The general sentiment among the educated members of the public is that the moneylenders are no more than social parasites capitalizing from the misery of poor and desperate borrowers. They are normally equated with excessive interest rates and fraudulent practices. Loans granted to relieve a borrower's predicament become in reality his doom.

Why are there such defects in the moneylending institution? An overall analysis of the subject narrows down to the existence of three main factors which seem

⁴⁵Credit and Security in West Malaysia. The Legal Problems of Development Finance. Joginder Singh, David Allan, Mary Hiscock, Derek Roebuch at page 107
to bring about the present state of deplorable affairs in the establishment. First the presence of an ineffective administration and enforcement. Secondly, it can be attributed to the loopholes in the Moneylenders Ordinance 1951.\textsuperscript{46} Thirdly, the limitations in the lending methods and policies of the country's financial system have contributed to the perpetuation of flaws in the moneylending business.\textsuperscript{47} In short, basically this category of informal lender has often been associated mainly with charging exorbitant and exploitative interest rates as well as indulging in a wide range of malpractices, including making it difficult for loan repayment in order to exercise monopoly power.\textsuperscript{48}

\textbf{F. Ineffective Administration and Enforcement}

A chief reason for the present defects in the moneylending establishment can be attributed to the absence of an effective administration and enforcement which in turn is primarily caused by a shortage of staffs.\textsuperscript{49}

The Ministry of Housing and Local Government has now

\textsuperscript{46}Moneylending Malpractices and the Law. Consumer Association of Penang

\textsuperscript{47}Project Paper 1978/79: Moneylending : Mahani bt Abdul Hamid. page 94

\textsuperscript{48}See R.J.G. Wells "The Informal Credit Market in Peninsular Malaysia" F.I.A. mimeograph September 1980 for a more current analysis.

\textsuperscript{49}Information gathered from interview with Ministry's official.
taken over the task of licensing moneylenders from the
Senior Assistant Registrars of High Court. However,
the Ministry's jurisdiction covers only Peninsular
Malaysia. The Ministry now authorises the State
Secretaries of each respective state and the Datuk
Bandar of Kuala Lumpur as Assistant Registrar for the
licensing of moneylending operations in their areas.
The Ministry's Secretary-General is the Registrar of
the Moneylending Licensing Authority.

Thus, the various State Secretaries and the
Datuk Bandar are empowered to receive, process and
approve application for licences in their areas as the
revenue from the trade has to go to the State
Governments. Unsuccessful applicants can appeal to
the Minister whose decision is final and unchallengeable.
A centralised enforcement unit has also been formed to
look into the trade. But in actual practice, a junior
officer assisted by a clerk are usually appointed to
screen potential applicants for such licences. The
person is required to submit a clean police record with
his application. Normally, the application process
is but a mere formality. Due to the acute shortage of
administrative staff here, the actual background of the
applicant is not really checked into, hence, sometimes
an applicant with questionable character has his

50 Article 108 (4B) Federal Constitution
application approved easily.51

Due to the presence of an ineffective administration, both latent and patent problems in the institution have gone unsolved all this while. Even if there have been attempts, they were mere feeble attempts. Feedbacks to the administration about malpractices in the moneylending institution from the public have been met with little or no response due to the lack of manpower to tackle such complaints.

The question of the enforcement unit which has not made its presence felt so far is also more of a liability than an asset to the system. On official records, up to now, there have been no surprised checks being carried out on the moneylenders by the enforcement. In fact, a confusion is still reigning in the City Hall's administration on the question of whether who has the real mandate to carry out such sudden checks - the City Hall or the Ministry itself.52 It is indeed a lamentable fact to know the enforcement machinery exists

51a) Information from interview with licensing officer of moneylenders at City Hall Kuala Lumpur on 9th May, 1983
b) See Section 9 (1) Moneylenders Ordinance 1951: Grounds for refusing licence

52 Ibid in 51
and yet the unscrupulous moneylenders have frequently flouted the provisions of the Moneylenders' Ordinance. In Kuala Lumpur the following number of cases had been reported to the Legal Aid Bureau regarding such abuses in the system: one in 1980, 3 in 1982 and 3 in 1983.  

In Penang's Legal Aid Bureau, one in 1980 and one in 1982.  

If the enforcement machinery really swings into full action, it may be argued that the Legal Aid Bureau may receive a higher number of such complaints. It must also be borne in mind that many of the borrowers who come from the lower socio-economic group do not know the existence of provisions in the Ordinance aimed at controlling strayed moneylenders. If they know the law, meritably the figure of complaints will soar too.  

An illustration of such a passive enforcement machinery in the moneylending system can be seen in Penang where the State Secretary had not prosecuted a single case of violation of the Moneylenders Ordinance 1951. Neither was any complaint recorded in that period.  

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53 Based on interview with the Kuala Lumpur Legal Aid Bureau  
54 See supra.  
55 See Section 10 (1) Suspension and forfeiture of moneylenders licence: Moneylenders Ordinance 1951  
56 New Straits Times. 22nd November, 1982
Section 17 (1) of the Ordinance\textsuperscript{57} which states that the payment of compound interest or for the rate of interest to be increased by reason of any default in the payment of sums due under the contract (leaving aside the proviso) shall be illegal. This is one major form of malpractice in the trade, yet there is a failure of enforcement by the law with regard to this abuse. Moneylenders also often violate section 22 (1)\textsuperscript{58} of the same Ordinance which provides that interest above 12 per cent per annum for a secured loan or 18 per centum per annum for an unsecured loan shall be presumed to be excessive still up to today, the enforcement machinery has not prosecuted any such violators. Again section 30\textsuperscript{59} lays down that any moneylender on his agent who harasses or intimidates his debtor or the debtor's family at the latter's residence, place of business or employment \ldots\ldots\ldots\ldots shall be guilty of an offence \ldots\ldots\ldots\ldots This kind of illegal act is frequently committed by the unethical moneylender to resort to getting back their money instead of proceeding through legal means, yet the enforcement due to an acute shortage of manpower cannot help much to contain this common form of malpractice.\textsuperscript{60}

\textsuperscript{57}Moneylenders Ordinance 1951
\textsuperscript{58}Ibid in note 57
\textsuperscript{59}Ibid in note 57
\textsuperscript{60}See New Straits Times 11th August, 1982, Star. 2nd August, 1980 on actual examples of such incidents.
Thus, it can be seen that one of the primary reasons accounting for the presence of the defects in the moneylending system in Penang and Kuala Lumpur as well as in the rest of the country can be attributed to an ineffective administration and enforcement. 61

G. Loopholes in the Moneylender's Ordinance 1951

It is a known subtle fact to the knowledgeable public that shrewd moneylenders but without scruple, have consistently manipulated certain loopholes in the Moneylender's Ordinance of 1951 to their advantage in any moneylending transaction. Therefore it cannot be denied that the inadequacy of the Ordinance has to some extent contributed to the flaws in the moneylending system.

An example of such loophole can be found in Section 16 (1) of the said Ordinance 62 which provides for the note or memorandum of a moneylender's contract to be given to the borrower. ........ Authentication requires not merely that a signed copy of the memorandum

61 Moneylending: Malpractices and the Law
Edmund Gnanamuthu. Research Officer CAP at page 11
62 See Section 16 (1) Moneylender's Ordinance 1951
should be delivered to the borrower but that the lender should endorse upon it something in the nature of a certificate confirming that what the borrower receives is a copy of the original memorandum. The requirement of authentication by the lender contemplates the possibility that the lender, in the absence of authentication, might allege that the copy in the possession of the borrower is not the copy which is delivered to him. In practice, however, this has worked to the disadvantage of the borrower because the borrower is made to sign an acknowledgement of having received an authenticated copy even where none has been given to him.\(^6\)

Another criticism directed at this provision is that there is no prescribed form of authentication. Therefore, it will be for the court to say in the particular circumstance of a case of this kind coming before it whether or not the form of authentication adopted in that particular case is sufficient.\(^7\)

\(^6\) In *Kamasamy v Suppiah*,\(^6\) the plaintiff, a

\(^7\) The Law of Consumer Credit; Unsecured Transactions: Advances of Money. *Moneylenders Act* Cap 220 at page 57: Dr. Lee Chin Yen


\(^6\) (1969) 2 MLJ 187
licensed moneylender sued for repayment of a sum of $500.00 alleged to be lent by him to the defendant. The defendant alleged that he was not given a copy of the I.C.U. chit or the said memorandum since he did not understand the English Language. The court held *inter alia*, on the facts, the defendant had not rebutted the presumption contained in the acknowledgement in the memorandum authenticated by the plaintiff. As regards to the burden of proof in cases of this nature, there is no statutory presumption that moneylenders have complied with section 16, in fact, the burden lies on the moneylender to show that the requirements of the section have been fulfilled as seen in the case of *Overseas Union Finance Corporation Ltd v Lim Joo Chong.*

However, in practice, the shrewd moneylenders manipulate the law to shift the onus of proof to the borrower by the simple device of a printed acknowledgement in the note or memorandum to the effect that there has been compliance with the provisions of the moneylenders Act. This on the whole, work extremely well. It cannot be denied that in situations of this type, the borrower, being desperate for money, can be easily coerced by the ruthless moneylender into signing such an acknowledgement. He normally will confine this particular aspect

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66 (1971) 2 MJ 124
67 Supra in note 65
of the transaction between himself and the borrower only because the presence of any witnesses may jeopardize his cause of action in a court suit later on.

Again in the question where there has been an acknowledgement by the borrower of authentication the burden of proving that an authenticated copy has not been delivered lay on the borrower. 68 This cannot be rebutted by a mere denial on the part of the borrower.

Therefore in deciding such cases on their facts, the court should also bear in mind the doctrine of Unequal Bargaining Power as advocated favourably by the eminent Lord Denning and Lord Diplock. 69

Section 17 (1) of the Ordinance provides that the payment of compound interest, i.e. interest upon unpaid interest whether directly or indirectly charged for a loan of money by a moneylender shall be illegal. It is important to determine the true effect of the agreement when considering if compound interest has in fact been charged contrary to this provision. In

68 Associated Finance Corporation v Foomani (1971) 1 MLJ 117
69 Poor Singh v Abdul Majeed (1967) 1 MLJ 16
69 Law of Contract: Cheshire and Fifoot at page 289
Lancashire Loans Ltd. v Black,\textsuperscript{70} the court held that a moneyminder who received a bonus payment of $40 for the renewal of a loan that was not in fact due yet was obtaining interest upon interest which was prohibited by the (English) Moneymenders Act of 1927. However, Dr. Lee Chin Yen, in her book "The Law of Consumer Credit"\textsuperscript{71} has submitted that the arrears of interest on a loan may be capitalized and the loan "rolled over" and renewed on the due date without infringing section 17 (1). The interest charged on the new capital sum is not technically "interest charged on interest" because it is interest charged on a new and district loan made to pay off the old liability. A contract is only illegal in so far as it provides for compound interest.

However in Re Securitibank Ltd.,\textsuperscript{72} Barker J, held that in relation to a "roll-over" acceptance credit facility, the discount on the new bill which bore the face value of the original bill (earlier discounted) plus acceptance fees and other charges clearly involved compound interest." But in the final analysis, it is

\textsuperscript{70}(1934) 1 K.B. 380
\textsuperscript{71}(i) At page 47: The Law of Consumer Credit. Dr. Lee Chin Yen
(ii) See also Humphreys J in Dunn Trust Ltd v Asprey (1934) 78 So 1 Jo 767
\textsuperscript{72}(1978) N.Z.I.R. 97
up to the court here to decide, although the writer submits that the former case seems to be more relevant in Malaysia, rather than the latter which is a New Zealand case.

Another loophole in the Ordinance can be located in s. 27 (1) which lays down the requirement for attestation of certain promissory notes taken as security for any loan only if the borrower does not understand the written language on such note. However, since this section does not provide a mandatory procedure for attestation regardless to whether the borrowers understand the written language or not, the moneylenders usually coerce the borrowers into signing blank promissory notes or amounts which are not the real sums borrowed. Again the psychological factor in a situation of this type is too clear where the moneylender has got the upper hand of the situation and the desperate borrower who needs on urgent loan will often comply into giving his signature. Transactions of this type are usually between the two parties alone without any mediator or neutral witnesses.

Apart from this, unlike a memorandum or note under section 16, there is no legal requirement in the Moneylenders Ordinance that a copy of the promissory note supplied by the lender to the borrower is to be
authenticated. The court held that this was so in *Ishah bt. Ahmad v Poh Kim Doi.*\(^7\) Therefore, moneylenders cash in on this lacuna in the law to their advantage. 

*Nasih Singh v Jamilah\(^7\) illustrates one form of malpractice of the moneylenders. In that case a woman borrowed $500 from a moneylender and was made to sign a promissory note for $1,500 together with interest charged at the rate of 10 per cent per month. However, the court held that the contract was void as the moneylender did not keep proper accounts as required by the law. In another case, G.K.O. *Othman Chettiar v Ang Gee Bok\(^7\) a person who borrowed only $1,400 was made to sign a promissory note for $4,000. In *Sundralingam v Ramanathan Chettiar,\(^7\) it appears that the Federal Court takes a strict view of non-compliance with this section. In that case the Federal Court even went to the extent to view that even though the borrower was aware of the terms and contents of a promissory note due to previous dealings between the parties, since the borrower did not understand the written language on it, it ought to be attested in accordance with the law.

\(^7\) \((1967)\) 2 MLJ 111  
\(^7\) \((1972)\) 1 MLJ 255  
\(^7\) \((1971)\) 1 MLJ 97  
\(^7\) \((1967)\) 2 MLJ 211
However, the writer does not want to appear to be bias in this topic, therefore conversely, some cases which the courts had found judgements for the moneylenders will be illustrated here. Nevertheless, the writer still clings on to his view that malpractices in the trade on the whole, are still rampant.

In Narayanan v Alagep, the appellant appealed against the decision of the magistrate in giving judgement to the respondent in the sum of $1,000 and costs. One of the grounds of appeal was that the respondent, a moneylender had not complied with section 27 of the Ordinance 1951 in that the appellant did not understand or write English, there was no attestation as required in the promissory note. The court held inter alia, that section 27 merely provides that the terms of the promissory note are to be explained to the borrower if he does not understand the written language on such promissory note and if the borrower understands the terms and contents of the note, it is unnecessary to have an attester even if the borrower does not understand the language in which the note is written that either in English or Malay.

In Natha Singh v Syed Abdul Rahman and Anor the court there held that a promissory note written in

77(1956) MJ 23
78(1962) MJ 265
the English language and not attested by the persons specified in section 27 of the Moneylenders Ordinance 1951 is legal on the face of it. It would only be illegal if the respondents did not understand the English language.

In Sohan Singh v Gardener and anor, the issues which arose to be considered by the court were as to what was the real contract between the parties and whether it was truly and fully set out in the promissory notes, whether copies of notes were given to the defendants and whether the notes had been discharged by payment in full. The defendant pleaded fraud and alleged that the promissory notes themselves did not correctly set out either the agreement reached, the amounts of the loans or the interest payable. The court held that the defendants by their signature to the promissory notes and the acknowledgement attached to them had acknowledged receipt jointly of the monies lent and the onus was thus upon them to show that these did not set out the terms of the real contract. Furthermore, they had alleged fraud which must not only be pleaded with utmost particularly but must be clearly and distinctly proved. This the defendants had failed to do.

79 (1962) MJ 415
In Gulwant Singh v Abdul Khalik, the plaintiff a moneylender sought the recovery of money due on a promissory note executed by the defendant in the plaintiff's favour for $2,500 with interest. The copy of the memorandum of contrast was not duly authenticated by the plaintiff before it was delivered but the copy of the promissory note was. The court held that a promissory note which contained all the terms of the contract and was countersigned by the lender was in itself a sufficient memorandum of the contract for the purpose of section 16 of the Ordinance and thus, the plaintiff was not precluded from enforcing the contract.

Under Section 19, if a reasonable demand in writing is made by the borrower on payment of 50 cents for expenses, the moneylender is bound to supply to the borrower or his agent a statement of account in English figures duly signed by the moneylender or his agent showing:

a) date of loan, principal and rate of interest

b) any payment of loan, interest with dates

c) amount of principal and interest due and dates when

\(\text{(1964) MLJ 286}\)
due

(d) outstanding amount when due.

A further demand by the borrower on payment of one dollar, the moneylender must supply a copy of any document relating to a loan or a security therefore the moneylender must meet the above demands within one month of request if not he cannot sue for principal and interest/cannot be charged for the period he is in default in meeting the above demand. A moneylender shall on receiving payment on demand by the payer give a duly stamped receipt. It should be noted that issue of receipt is on demand and not otherwise. Since the law does not stipulate that issue of receipts of this kind is mandatory but only on demand, thus moneylenders can always inflate any figure of sum paid by the borrowers under the contract Section 19 (4). Even if the borrower exercises his right to demand for a receipt of this kind, it is doubtful whether in actual practice, the moneylender will comply with the law.

The Ordinance also does not equate the type of security to be taken by a moneylender in relation to the amount loaned. As a result, all forms of collaterals are demanded including issue document of title and television. Sometimes the particular kind of security
taken does not commensurate with the value of the loan given. The end result is that on default of payment of the principal sum together with interest due, the goods are forfeited as the borrower will usually give a written consent to this effect.81

Hence these are some of the major loopholes in the Moneylender's Ordinance 1951 which the unethical moneylenders have taken advantage of to commit malpractices in the trade.

II. Lack of Alternative Sources of Credit

It seems that the limitations in the lending methods and policies of the country's financial system have also contributed to the perpetuation of flaws in the moneylending business. Apart from the pawnbrokers, which themselves are the subject of much malpractices, the moneylenders in general are monopolising the credit market which provide for consumption loans.82 It thus cannot be denied that monopoly inevitably tends to lead to exploitation in that particular trade.

81Moneylending: Malpractices and the Law. Research officer CAR at page 10