CHAPTER VI

SOME ALTERNATIVE REMEDIAL MEASURES

It is not surprising that the poor, who need most to borrow, have to pay most for it. But the extent of consumer detriment in borrowing is so great and so pervasive in our society that at times it seems we have accepted it as necessary and almost a matter of public policy that it should be so. Much as the authorities concerned, the public and the writer himself deplore the practices of certain pawnbrokers and moneylenders, yet most of us realise the social need to which these two institutions ministered. Evidence¹ from survey shows that many low income households find it convenient and beneficial to use pawnbroking and moneylending credit, especially the former. Consumer credit properly used, may justifiably be said to facilitate the household budgeting problems of the poorer members of the community.

Therefore, exploitation can be effectively

¹A result of writer's interviews with such patrons of pawnshops and moneylenders and feedback from the Penang and Selangor Consumer Associations during research there.
prevented only by a comprehensive examination of how the law works to the disadvantage of the borrower, especially with particular reference to its loopholes; resolve a need for amendments in these areas of the law; stress the present Pawnbrokers Act 1972 and the Moneylenders Ordinance 1951 needed to be adequately enforced and of equal importance, is the provision of alternative facilities for obtaining consumption loans.2

The quotation of an economist here is also appropriate to lend weight to the above assertion that the moneylending establishment is not altogether without merits:

"Despite their well-known shortcomings, moneylenders are not easily replaced by a better source of finance. It is easier to make them a constructive element in the economy than to replace them entirely. Developing other channels of finance is of course also desirable both in itself and as a means of improving the operations of the moneylenders."3

2 Seminar on "The Law and the Malaysian Consumer" 11th - 13th May, 1981: Federation of Malaysian Consumers Association (The Seminar was officially opened by Mr. Anwar Fazel, President of the International Organization of Consumers Union): Report of the Proceedings pages 22-23

3 Financing the Small Manufacturers in Developing Countries McGraw Hill Publication (1967) page 111: Robert V. Davenport
So the same can be said for the pawnbrokers. Regarding
the pawnbrokers, although there have been calls for
the abolition of the pawnshops, especially from some
politicians, as long as there is no such institution
to fulfil the role of the small credit sector, pawnshops
are here to stay.\(^4\)

It is suggested that there should be a consumer
credit law reform movement to be spearheaded by the
various consumer associations throughout the country
in drawing the attention of the authorities concerned
as well as marshalling public opinion to the inadequacy
of existing laws to regulate the Pawnbrokers Act 1972
and the Moneylenders Ordinance 1951 along the line on
"Report of the Committee on Consumer Credit in 1971"
(Crowther Committee) as in England. This Crowther
Committee later was to precipitate in the United Kingdom
Consumer Credit Act 1974.

Again in Australia for example a report was
compiled in Queensland by a Law Reform Commission on
Moneylending Report on a Bill to Consolidate and Amend

\(^4\)The Development of Small Industry in Malaysia: Dr. Chee
Feng Lim (Economics Lecturer: University of Malaya)
the Law relating to Moneylending 1972.

Both these reports from England and Australia noted an important fact. They recognised the inadequacy of the consumer to negotiate upon equal footing with credit providers.  

As regards the Pawnbrokers Act 1972, the following weaknesses in the Act warrants immediate attention from the authorities:

i) The need for an independent valuation for articles being pawned is essential. Normally, a pawnbroker will only grant a loan for a fraction of the value of the pledge.

ii) At present, no correlation between the amount loaned and value of the article pledged.

iii) The system of auctioning be re-examined. On the whole, it seems that the source for all the present ills in the pawnbroking trade arises from the existing system of high tender cost which ultimately the pawnbroker will pass to the consumer. Thus, the present licensing authority should re-examine the tender system.

5Consumer Protection: Law and Theory Edited by A.J. Duggan P. Darvell page 107
The authorities may incorporate some of the salient features of the Singapore Pawnbrokers Act into any proposed amendments in the Malaysian Act to give a greater measure of protection to pawners. For example, in the Singapore Pawnbrokers Act, any pledge above $50 that is sold by auction, the pawnner has the right to inspect the entry of sale in the pawnbroker's book and claim any excess within four months of the sale, such surplus amount to be paid to the owner. Under this same Act, the pawnbroker must display prominently in a part of the shop's premises so as to be visible to all borrowers, a copy of the lawful rates of interest the pawnbroker can charge. In America, the Consumer Credit Protection Act requires mandatory rate disclosure policy to be adopted by pawnbrokers there. They must publicise such rates of interest in advertisements. Again under the Act in Singapore at the time of pledging, the pawnner may arrange with the pawnbroker for a longer period than six months from the date of pawning as a period for redeeming the article.

The eternal question of moneylenders floating the Moneylenders Ordinance 1951 by charging exorbitant interests than those permitted by the law always surfaces whenever a discussion focuses on the moneylending system. It is difficult to see how individual moneylenders and
financial organizations who lend money to poor consumers can be forced to charge lower rates of interest. To some extent, things may improve when lenders are obliged under legislative measure to display prominently true rates of interest being charged. Borrowers will at least have more information about borrowing costs than they do now. This form of remedial measure may work well in a developed country, say, like England where the literacy rate is high among her population but in a developing country like Malaysia, where a sizeable number of the borrowers are illiterate and hail from the rural areas, the extent of the success of this suggested remedial measure is questionable.

The remedy to this state of affairs also lies in the hands of the legislators to present a general legislation such as the Consumer Credit Act 1974 and the Unfair Contract Terms Act 1977 of the United Kingdom to check the exploitive aspects of pawnbroking and moneylending in this country. For instance, under the former Act, of 1974 once a pledge is sold, a pawnbroker must give pawnor a written statement afterwards as to the amount realized. The pawnor is entitled to any balance by which the sale proceeds in an auction exceeded the loan outstanding, conversely under an obligation, the pawnor is to make up any shortfall if proceeds are insufficient. Under the latter Act, the court is given
power to grant relief in some cases, for example, against terms found to be oppressive. In Australia,\(^6\) a similar provision is also in force. The basis of the Unfair Contract Terms Act is the concept of inequality of bargaining power and unconscionability. In general, the consumer is far weaker than the supplier, economically speaking.

Another alternative solution lies in the setting-up of a Bureau of Consumer Credit whose duties include \textit{inter alia}, licensing and inspecting of pawnbrokers and moneylenders and drawing up a Code of Ethics or Practice for these two establishments. Under the Fair Trading Act 1974 section 124 of England, the Director of Fair Trading has a duty to encourage relevant associations there to prepare codes of practice for guidance in safeguarding and promoting the interests of consumers and set out guidelines which determine what is good trading practice. Similarly, the Bureau being suggested here can also follow the same line as that being practised in England.

Although, this Code being proposed has no legal force, the Code of Practice can be effective as the Bureau can enforce the code itself and look into complaints.
promptly. The Code can provide for conciliation of complaints at no expense to the consumer. It can also be argued that the Code is deemed to set reasonable standards of conduct for the entire trade. Thus, a judge when hearing a court action may tend to regard non-compliance with the Code as evidence that the pawnbroker or moneylender has acted unfairly.

The provision of alternative facilities for obtaining consumption loans will open both the pawnbroking and moneylending systems to keener competition. Ultimately, the system which is efficient and clean will inevitably flourish at the expense of its counterpart which is just the opposite. Advisory services and assistance directed towards informing the public of alternative sources through the mass media may also intensify competitions, standardise and stabilise interest rates.\(^7\)

A possible alternative source for consumption loans may be through the formation of credit unions as existing now in England. A credit union is a sort of a loan club run as a cooperative based on a mutual bond between members, such as in a place of work or in a social club. Those who save with a credit union can

\(^7\)Ibid as in note 9 page 113
borrow from its funds at a reasonable rate of interest and under other less stringent terms. The credit union is to run by members themselves. They elect their own office-bearers and decide the rate of interest to be levied on loans granted to lenders.  

The basic idea of greater availability of credit through other sources is to enable borrowers to "shop around" for credit on most favourable terms. This is so because an undesirable social consequence of an inadequately competitive market for credit is that it increases the danger that low income borrowers will be overpersuaded to enter into unduly burdensome credit contracts. However, it is admitted that the presence of more choices may benefit the educated borrowers who are in the minority rather than the majority. The majority of the borrowers who are illiterate or less-educated may not be able or unwilling to do so. As a result these less-educated and lower/members of the community through their ignorance both of the credit market and of the protection provided by existing legislation and unable or unwilling to shop around are frequently in the position of paying higher interest rates than is justified by their relative credit-worthiness. Therefore, this group is in a peculiarly vulnerable position if they want to borrow, not only

8 "Why the Poor Pay More?" Edited by Frances Williams (National Consumer Council, London)
because they are necessarily often a bad credit risk but because of not knowing their way round the credit market. Thus information, advisory services and assistance informing especially this section of the public on the alternative sources may help to remedy this situation to a certain extent.

Next the question is posed: Whether the banking system is a cure to the ills of pawnbroking and moneylending systems? The commercial banks which constitute a respository of financial resources together with their relatively wide network of offices, experienced staff and business experience are well equipped for the role of providing an alternate or if not, at least, an additional source of credit mainly for consumption loans rather than for working capital for the said borrowers here. The merits innate in the banking system must be utilised to the full so that its capacity to mobilise resources and cope up with credit needs will expand.

The Bank Negara Report 1975 stated:

"In 1975, the commercial banks continued to direct a substantial propor-

9 Market Research Ltd. Consumer Credit Surveys paragraph 21 (viii) Part I Section 1
tion of their loans and advanced to finance, manufacturing activities and building construction and property development including a steady flow of loans to individuals for the purchase or construction of houses. They also responded satisfactorily to the varied demands for credit facilities by the bumiputra community and small borrowers."

Although reading from this report, bank credit is available for small borrowers, nevertheless this practice is only on a small scale. Generally, such banks will only grant loans to their regular customers. The idea that consumption loans represent a form of social service in the community perhaps may spur the commercial banks on to enlarge this branch of their activity.

The United Asian Bank now grants loans to its customers on the security of gold jewellery. An independent expert appraiser determines the value of the jewellery according to its current market price and the bank lends the owner up to eighty per cent of it. The borrower has to pay two dollars fee for the appraisal. This transaction normally takes only half an hour to process unlike other conventional loans which requires a few days to approve. The range of the loans from fifty dollars to five thousand dollars has been determined to benefit the lower income groups. The loan is repayable in monthly instalments over a maximum period of two years
with an interest rate of one per cent per month on a diminishing balance basis. The interest rate is the same for all loans lent under the scheme and does not fluctuate with the amount loaned as is the case with pawnshop loans. The pledges are insured at the bank's expense. The advantage of the scheme is its low interest rate and instalment repayment arrangement whereby the borrower can settle his debt gradually without having to pay in one large sum. A borrower can always negotiate with the bank to extend the repayment period. A defaulter who does not heed the bank's three reminder notices on payments due will result in his or her jewellery being auctioned off to satisfy the loan borrowed. Any surplus is given back to the borrower. However most borrowers do not default in payments. The only flaw in the scheme is that only gold jewellery is accepted as collateral, thus tending to limit the categories of borrowers.

The above scheme nevertheless shows that the commercial bank has the potentiality to cater to the needs of petty borrowers. Therefore, the Banking Act 1973 and Cooperative Societies Act 1948 should be amended to permit certain authorised banks to enter into pawnbroking transactions.

A merit of the banking system is the fact the commercial banks are controllable. Supervision of
banking practices is carried out by Bank Negara through regular inspections, surveillance and close monitoring of the bank's operations. In contrast, the controls exerted over the pawnbroking and moneylending systems are inadequate and ineffective. The greed for quick wealth often results in the fleecing of ignorant and desperate borrowers.

Although the banking system may not be able to cater to every petty and varied credit need, yet it can provide healthy competition to the monopoly now enjoyed by pawnbrokers and moneylenders over small borrowers. The country is still developing and the banking system will also develop correspondingly and promises great potentiality as an efficient and dynamic source of consumer credit.

There has also been a suggestion to set up public or government-sponsored pawnshops like those in Indonesia and Mexico in order to lessen the hold of the private pawnshops on the petty borrowers. In line with this idea, Islamic pawnshops known as Al-Mahan are proposed to be set up by the government first in the Federal Territory, Selangor and in Trengganu. This was

\[\text{Part VI Banking Act 1973 (Act 102) Sections 33-45}\]
announced by Encik Anwar Ibrahim, then Deputy Minister in the Prime Ministers Department. The underlying basis for setting up Islamic pawnshops is to free Muslims from the existing pawnbroking system. Although Al-Rahan will be profitmaking, these Islamic pawnshops are not to be oppressive. It is contemplated that a Corporation will be established to run the Al-Rahan. A fund for this purpose will derive its capital from time to time from the Majlis Ugama Islam Wilayah Persekutuan (Islamic Religious Council of the Federal Territory) and from money earned by the Corporation in all its authorised business transactions. Loans to be granted to Muslim pledgers will be interest-free but given on the security of pledges. The period of redemption may be extended and an unredeemed articles shall be sold to obtain the best possible price with any surplus being returned to the borrower. These are but only some of the contemplated basic features of Al-Rahan or the Islamic pawnshop.

In such establishments like the idea of the Islamic pawnshop or even a public pawnshop being proposed, the problem arises, how in the absence of a strong profit motive, the institution is to be safeguarded against losses arising from overvaluing of pledges or

12 Straits Times. 31st January, 1983. Column 4 page 4
default by borrowers. Although it is supposed to be profitmaking, yet it may be arguable that it can never really be profit-motivated in the strict sense of the word since it is more of a charitable organization. It may further be argued that there may be a tendency to overvalue pledges since such an institution is set up with an altruistic aim. It must also be borne in mind that the charges in an establishment of this type are normally in the form of interest-free or of limited interest or fees levied merely with a view to covering costs only. Ultimately, there is a possibility that all these may lead to a premature exhaustion of funds. Therefore, it is also to be aware however much a pawnshop of this kind embodied a modern concept of social service, it may enjoy only a comparatively short existence; its moderate charges may not cover the risks incurred in this type of business. A classic example of such a victim was the Montes Pietatis formed by the Francis can monks of Italy during the middle ages. It was established out of charitable funds obtained from gifts or bequests to grant interest-free loans, secured by pledges, to the poor, basically as a provision of social services from the church. Later, the Montes Pietatis were frustrated by economic difficulties and saw themselves compelled to charge interest and auction forfeited pledges. This therefore seems to conflict with the charitable intentions of the founders. Notwithstanding
the deficiency in such a scheme, the concept may still be feasible provided, the administrators concerned must safeguard against losses from overvaluation of pledges, strictly check against abuses or default by borrowers, levy a form of small "service charge" to cover basic overhead costs and last but not least, from time to time try to solicit gifts or bequests from the well-to-do section of the public to swell its funds. Efficient officers should administer that part of the funds which are to be channelled into authorised business transactions in order to ensure potential profits and not mess up the limited available funds in bad investments.

The remedial measures suggested here are geared to reduce the present defects in both the pawnbroking and moneylending systems in order to enable the small borrower to have a better deal.