Fiji's Money Lending Legislation: An Analysis[1]

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Abstract

Money lending in Fiji precedes the establishment of commercial banks in the country. Money lending business has been a vital part of the financial sector in the country. However, so far not much attention has been given to this segment of the Finance Sector. This paper examines the Moneylenders Act, and compares the provisions in this legislation with those in legislation that provide for monetary borrowing and lending by other institutions than those defined as 'Money Lenders'. The analysis finds that the laws create a highly uneven playing field for entities which engage in similar, if not the same type of, financial transactions.

Introduction

Money lending in Fiji began before any commercial bank was established in the country. In 1938, the colonial government brought in the Moneylenders Act to regulate this industry. This legislation has remained in place in Fiji till now. Despite the establishment of a number of financial institutions, banks and credit unions in particular, money lending business continues unabated.

A number of concerns are occasionally raised on the burdensome nature of money lending on consumers of this product. The Consumer Council of Fiji has articulated some of the concerns and there has been some advocacy work in 2007. However, the 1938 law remains unrevised, and the industry continues functioning as earlier. One major issue facing

[1] This paper relies heavily on a larger study on moneylending in Fiji done for the Consumer Council of Fiji (Chand, 2007).

consumer advocacy groups was the lack of any data on money lending. Another concerned the sufficiency of the legislation. A third concerned the role and overall relevance of money lending business in the country. This paper examines one of these aspects: that of the regulatory environment for the 'money lending' industry.

The Context

> By law - s2, *Moneylenders Act 1938* - a 'moneylender' includes every person whose business is that of money lending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business a principal or as an agent but does not include

banks, insurance companies, pawnbrokers, those who operate under provisions of any other law, and those who are exempted from the provisions of this law.

The Moneylenders Act is an old legislation. It was adopted in Fiji when the reach of commercial banking was extremely limited, both in geographical scope as well as in income strata range. During the 1930s to early 1970's, moneylenders had played a major role in lubricating the agricultural economy. Their role within the ethnic Indian society of Fiji was well recognized by both the community itself as well as the colonial regime. The *Mahajan* – the moneylender – had a social role, and a social presence within the ethnic Indian society in Fiji. It was the activities of the *Mahajans* that the Moneylending Act was designed to regulate.

Since independence, however, the significance as well as the utility of *mahajans* has declined within the ethnic Indian society. This decline has corresponded directly with the rise of commercial and retail banking in the country and the increasing monetizing of the ethnic Indian rural economy.

Commensurately, but unrelated to the commercial and social transition within the ethnic Indian community in Fiji, has been occurring a major transition within the indigenous Fijian society. This transition is more recent, commencing rapidly from the late 1960's when the native administration regulations were relaxed. The transition from a purely tradition-based society to a market-based society has placed significant demands on cash. In the absence of collateral holding by a large segment of the indigenous urban and peri-urban society, and the relative deprivation in

terms of means or abilities to seek funds from commercial and retail financial institutions, moneylenders and the informal money market began to provide a much needed source of funds to sustain household economic and social activities.

In context, therefore, while the size of the money lending business is not large, it is still an important source of credit for individuals and households in Fiji.

The Legislation: Moneylenders Act, 1938

To make provisions for the control and regulation of money-lending in the country, the colonial government put in place the *Moneylenders Act* in 1938. Since then, notwithstanding minor amendments to the legislation, the Act remains as the sole legislation controlling the money-lending industry in the country. There are three key features of the legislation. First, it declares money-lending as a legitimate business. It states: 'any person who lends a sum of money in consideration of a larger sum being repaid is presumed to be a money-lender'. Second, it provides for the registration of moneylenders. Any person involved in the business of money-lending is required to be registered annually by the Registrar of Moneylenders. The Registrar of Money Lenders is the person who is normally deemed to hold the position of the Administrator-General in the country. Moneylending licenses are normally given only to residents of Fiji. Third, it requires the publication of a list of moneylenders. Each January, the Registrar is required to publish a full list of all licensed moneylenders in the Gazette; any person not on the list is deemed to be not a moneylender (or not to be legally recognized as a registered money lender as required by the Moneylenders Act).

Money lending as a Business

The Moneylenders Act (MLA) recognizes money lending as a legitimate business in the country. This business involves lending a sum of money in consideration of a larger sum being repaid. This business, however, is separate from the business of banking. The separation between money lending as a business and banking is effected through numerous provisions. First, by definition of moneylenders (s2), the following are excluded from being recognized as moneylenders:

- Any corporate body incorporated or empowered by any written law to lend money in accordance with such law;
- Any person bona fide carrying on the business of banking or insurance, or any person bona fide carrying on any business not having for its primary object the lending of money and where he lends at an interest not exceeding 10% per annum;
- Any pawnbroker licensed under the provision of Second hand Dealers Act, and
- Any body corporate for the time being exempt by the Minister from the provisions of this Act.[2]

By 1985, under s2(d), the Minister had specifically exempted from the Act's scope all commercial banks operating at that time. Subsequently, some institutions closed operations while new ones entered the market. No new exemption notices have been issued. However, since all the financial institutions are covered by separate legislations empowering them to lend money, for example, the Banking Act for Banks, the Insurance Act for insurance companies, and the Consumer Credit Act for retail credit providers, these institutions are lawfully exempted from the MLA. The excluded institutions/persons could carry out the business of lending sums of monies in consideration of a larger sum being repaid, but their businesses would not be regulated by the MLA; instead their businesses would be regulated by other laws (like the Insurance Act, Banking Act, and Second Hand Dealers Act).

Secondly, money-lending is specifically separated from the business of advancing credit. Thus, a retailer who sells goods on credit is not covered by the MLA. Businesses advancing credit are covered by the Consumer Credit Act. A retailer, however, could advance money to an individual with which the latter could, as a separate transaction, pay for goods purchased from the retailer. If this were the case, then the retailer would be in effect, doing the business of lending money.

The law allows both, individuals and body corporates to carry out

[2] Institutions exempted by the Minister at various times include: Bank of Baroda, Bank of New Zealand, Commercial Bank of Australia Limited, the Commonwealth Trading Bank of Australia, Continental Illinois Limited, Continental Illinois National Bank and Trust Company of Chicago, Grindlays Dao Heng Bank Limited, International Westminster Bank Limited, Kuwait Pacific Finance Company Limited, Midland Bank Limited,, National Bank of Australia Limited, the Tokai Asia Limited, Tokyo Finance (Asia) Limited, Mercantile Securities (Hong Kong) Ltd., Commonwealth Development Corporation, Wardley (Vila) Limited, Wardley International Bank Limited, UDC Finance Limited, Westpac Banking Corporation, Barclays Bank International Limited, National Westminster Bank Limited, Nordic Bank Limited, Orion Caribbean Limited, Fiji Development Company Limited, International Finance Corporation, and the European Investment Bank.

the business of money-lending. The Act does not prevent a corporate body involved in one business (like retailing) from also carrying out the business of money-lending, or an individual carrying out any other business individually or as a sole trader or as a company director, from also carrying out the business of money lending. The only requirement is that any person involved in money lending business ought to be registered as a moneylender under the MA.

Registration of moneylenders is to be done annually. Registration of a moneylender is by each address at which a person carries out the business of money lending. Thus, a person could have multiple money lending licenses for corresponding multiple addresses.

Licenses are obtained by applications to the Registrar of Moneylenders. Applications are to be made giving responses to 11 specific questions that are listed in regulations made under the Act. The regulation provides that the Registrar may require the applicant to 'produce evidence of … good character' of the individual applicant. If a company is the applicant, then character references of the persons responsible for the management of the company 'to the satisfaction of the Registrar' are required. Licenses are specific to the name under which the application is made, and for the specific address for which the application is made. Each address from which money lending business is to be carried out needs a separate license. Licenses are not normally refused; grounds for refusal to grant a license include lack of evidence provided by the applicant of his/her good character, or of evidence with the Registrar of the applicant being not a fit and proper person to hold a license, or breach of the MLA, or evidences of lending money to a minor.

The Registrar is required to publish a list of licensed moneylenders each January in the Gazette. Unless the contrary is shown, an absence of a name from this list is presumed to be evidence that the person/organization is not licensed. Those involved in the business of money-lending without a valid license are guilty of an offence (s8b). This is a strict liability offence, which carries the penalty of a fine or imprisonment. While untested in recent years, the specific wording of the clause seems to provide the Registrar the power to levy fines.

The MLA requires that a moneylender 'affix' in a 'conspicuous position outside his authorized address', a board bearing the words "Licensed Moneylender" distinctly printed 'in letters not less than two inches high' (s14). Non-compliance with this requirement attracts a fine not exceeding 10 dollars.

Moneylenders Forbidden to Advertise or Induce Borrowing

The MLA makes provisions forbidding moneylenders from advertising their businesses. Under s13, no person shall knowingly send or deliver or cause to be sent or delivered to any person except in response to his written request any circular or other document advertising the name, address or telephone number of a moneylender or containing an invitation (a) to borrow money from a moneylender; (b) to enter into any transaction involving the borrowing of money from a moneylender; or (c) to apply to any place with a view to obtaining information or advice as to borrowing any money from a moneylender.

Likewise, ' no person shall publish or cause to be published in any newspaper or other printed paper issued periodically for public circulation or by means of any poster or placard an advertisement advertising' the money lending business.

S14, however requires a plate 'Licensed Moneylender' distinctly printed not less than 2 inches high. If a person were to print this on a 8'x4' board and erect it at the place of business, it is not clear whether the requirement on non-advertising would be breached.

The restriction extends to employment of agents and canvassers 'for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender' (s13(3)).

The restriction on advertising was intended to limit any likely competition posed by money lenders to the business of commercial banking. This objective would be outdated were money lending to be recognized as a business in modern economies. S12 clearly states that no circular can be issued by a money lender that implies that he is in the 'banking business': 'If a moneylender for the purpose of his business as such issues or publishes or causes to be issued or published any advertisement, circular or document of any kind whatsoever containing expressions which might reasonably be held to imply that he carries on the business of banking he shall be liable to a fine...' (s12)

Furthermore, it is illegal for a moneylender, or any manager, agent or clerk of a moneylender to fraudulently induce or attempt to induce any person to borrow money, or to agree to the terms on which money is to be borrowed (s28). Matters listed as fraudulent are false, misleading or deceptive statement, presentation or promise, and dishonest concealment of material facts.

Lending Contract Necessary

The MLA (s17) requires that before any money is lent, there be made a written note or memorandum (i.e. a contract) between the lender and the borrower duly signed. Any money lent before a contract is made, or before a contract is signed, can not be enforceable. The note/memorandum, which must be in English, must contain at least the date of the loan, the principal amount loaned/borrowed, and the rate of interest. The rate of interest should be either the rate per annum, or in terms of the amount of such interest.

Interest Rate

The law disallows payment of compound interest. It also disallows the interest amount or rate to be increased for reasons of any default in payment. For default, the only provision made is the charging of simple interest on the sum defaulted from the date of the default to the date of payment at a rate not exceeding the rate payable in respect of the principal.

Disallowing compound interest can function both in as well as against the interest of the consumer. For loan periods longer than one year, if repayment was done periodically, disallowing compound interest would hurt the borrower. If, however, the repayment was in one lumpsum, for periods longer than one year, disallowing compound interest would save borrowers on additional interest expense.

Record Keeping

The MLA requires each moneylender to keep a book of accounts of each loan made in plain words and in English numerals. The record book should be bound in such a manner that it is not amenable to elimination of pages or interpolation or substitution of pages (s18).

Account Statement

The moneylender is obliged to supply the borrower or any person specified by a demand from the borrower, a statement of account in English of the records of the loan (s19).

The records so to be supplied are:

- the date on which the loan was made

- the amount of the principal of the loan and the rate per cent per annum or the amount of interest charged;
- the amount of any payment already received by the moneylender in respect of the loan and the date on which it was made;
- the amount of all sums due to the moneylender for principal but unpaid, the dates upon which they became due, and the amount of interest due and unpaid in respect of each such sum; and
- the amount of every sum not yet due which remains outstanding and the date upon which it will become due.

The only requirement of the borrower is that the borrower pay the lender a sum of ten cents for expenses, and provide a demand in writing.

A money lender is also obliged to provide the borrower or any other person requested so by the borrower in a written demand, upon the payment of a fee of 25 cents, copies of all documents relating to the loan (s19)(2)).

If a moneylender does not provide the statement of account, or the documents so requested by a borrower within one month of the demand, he loses the entitlement to sue for or recover any sum due of either the principal or interest.

Repayment

A moneylender is required to provide the borrower a duly stamped receipt for any money paid and for which the borrower demands a receipt (s19(4)).

Bankruptcy of Borrower

For any debt due to a borrower under bankruptcy proceedings under the Bankruptcy Act, the maximum interest rate allowed is 8% per annum. Only if all the debts of the estate are paid in full, can the lender claim a higher rate of interest.

Excessive Interest Rate or Harsh Transaction

If on evidence the court is satisfied that the interest charged for money lent is excessive and that the transaction is harsh and unconscionable or substantially unfair, the court may reopen the transaction. In doing

so, it may take an account between the moneylender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create new obligations, reopen any account already taken between them and relieve the person sued from payment (s21). The court may also revise or alter any security given or agreement made.

Interest Rate

S22 of the MLA sets the maximum interest chargeable by a moneylender at 12% per annum. An interest over 12% per annum is regarded as 'excessive' and the transaction as 'harsh and unconscionable or substantially unfair'. The court, however, maintains the power to declare any interest even lower than 12% per annum as excessive. In no circumstance, except upon court's orders, can a moneylender recover any interest that is over the amount of principal due at the time.

Where the interest charged on a loan is not expressed in terms of a rate per cent per annum, or where the contract provides for payment of equal instalments of principal and interest at equal intervals of time, the MLA provides for the calculation of the rate of interest per cent per annum (s24). However, the formula provided is unintelligible.[3]

Fees and Charges

Moneylenders are prohibited from charging any fees or charges other than stamp duties or fees payable by law, or any legal costs incidental to or relating to the negotiations for or the granting of the loan or proposed loan. Any agreement between a moneylender and a borrower on a payment by the borrower to the lender comprising any sum constituting the costs, charges or expenses (other than for stamp duties, fees payable by law and legal costs relating to the negotiations for or the granting of

[3] It goes as follows:

> The several amounts taken to be outstanding by way of principal during the several periods ending on the dates on which payments are made is to be multiplied in each case by the number of calendar months during which these amounts are taken to be respectively outstanding and there shall be ascertained the amount of the sum so produced. The total amount of the interest shall be divided by one-twelfth part of the aggregate amount mentioned above and the quotient, multiplied by one hundred, shall be taken to be the rate of interest per cent per annum (Second Schedule).

the loan) is regarded as being illegal (s23). If any such prohibited fee or charge has been paid, it is recoverable by the borrower.

Principal, Interests, Fee, Charges, Repayment to be decided in advance of loan

It is illegal to leave the space in the contract for filling the amount of principal blank. Any moneylender who takes as security for any loan a promissory note or other contract for the repayment of money lent in which the principal is not truly stated or is left blank and if this undertaking is within the knowledge of the lender, then the lender is guilty of an offence (s27).

Exclusions

The MLA lists types of loans to which the MLA does not apply. In essence, these loans are those that are secured by a registered mortgage of freehold or leasehold land; loans for which the interest charged does-not exceed 12 % per annum, and the loan is not subject to any agreement for the payment by the borrower of any of the specifically listed costs, charges or expenses. The excluded costs are those *other than* what are properly incurred in connection with the negotiations for or the granting of the loan or any necessary documents incidental to it, or in connection with protecting, maintaining, preserving, varying, discharging, renewing, realizing any security for the loan, or making good any default by or discharging any outgoing payable by the borrower, or those incurred by the lender on the request of the borrower, and interests on these costs at no more than 12%.

In essence, then, for provision excludes loans made by commercial banks and credit institutions from the purview of the Act.

Gaps and Consumer Protection Issues

The MLA is a specific legislation that regulates a small part of the entire credit market in Fiji. There are numerous other laws that regulate other aspects of the credit market; these include:

- Banking Act, which regulates commercial banks,
- Insurance Act, which regulates insurance industry),
- Second Hand Dealers Act, which regulates pawnbrokers,
- Credit Union Act, which regulates credit unions), and

- Consumer Credit Act, which regulates retail credit market.

Institutions or activities that are covered by these other Acts, even though they may involve lending money, are excluded from the provisions of the MLA.

The MLA is a very old piece of legislation in Fiji. However, as the discussion of the legislation given above shows, other than for the cumbersome provisions on calculating annual interest rates for loans, the legislation has numerous provisions that provide protection to borrowers. The law makes certain types of conduct by money lenders illegal, and provides for penalties to be imposed on them for such acts. By creating specific offences, the legislation indicates seriousness in terms of borrower protection.

Indeed, borrowers have adequate protection in the legislation. Maximum interest rates are prescribed, limits are placed on fees and charges, record keeping is provided for, and accessibility of the borrower and/or persons nominated by the borrower to full information are provided for in the legislation. The legislation also clearly provides that a transaction can only be legal if it is preceded by the construction and finalisation of a valid contract between the lender and the borrower. All in all, the legislation is strong in terms of the protection of the rights and interests of the borrowers.

The problem with the legislation, therefore, is generally not with the content of the legislation; rather the problems are two fold: borrower (and lender) ignorance of the law itself, and second, with enforcement of the legislation.

Breaches of the law are numerous. Breaches that can be easily detected are those relating to interest rates, business license, recordkeeping, and other forms of illegalities. However, a perusal of court records confirms that not a single case of a breach of the MLA was filed by the regulatory authority (Registrar of Moneylenders) during the past 3 decades.

Multiple Standards in Same Business?

The stringent provisions in the Moneylending Act stand in sharp contract to the provisions in other legislation that effectively deals with deal in other people's money, more specifically the Banking Act, and the Consumer Credit Act.

All these legislation deal with the effective activity of credit. Banks are engaged in two types of credit transactions: they borrow other peoples money ('depositors') and pay them interest. They also lend money to others and charge them interest (and fees and charges). Organisations covered by the Consumer Credit Act provide credit to consumers and charge them an interest. Moneylenders lend money to borrowers and charge them an interest.

While the nature of the business of individuals or entities covered by the three legislation are the same, the treatment given to both, the borrower and the lender, are substantially different. The laws regulating banks and consumer credit providers do not prescribe any specific interest rate or on application of interest rate. In contrast, specific interest rate is provided for in the Money Lenders Act; no money lender can lend at an interest rate of above 12% per annum.

Likewise, the Banking Act and the Consumer Credit Act do not provide for banning of any specific fee or charge or commission, while the Money lenders Act has specific provisions effectively barring fees, charges or levies. Moneylenders are specifically prohibited from charging any fees or charges other than stamp duties or fees payable by law, or any legal costs incidental to or relating to the negotiations for or the granting of the loan or proposed loan. Banks and consumer credit institutions, however, can levy any charge, fee or commission on transactions that they wish to.

Third the Money lending Act uses terms like 'unconscionable', ‘harsh', and 'unfair' in relation to transactions between lenders and borrowers. The Consumer credit Act also uses terms like 'unjust', 'harsh', 'oppressive', and 'unconscionable', in relation to transactions. The Banking Act, however, makes no reference to such conduct between a lender and a borrower. Indeed, the Banking Act has no provision for protection of consumers. The long title of the Act is:

> To provide for the regulation of the business of banking; providing for the licensing and supervision of financial institutions carrying on banking business, in the interests of the soundness of the financial system and to *minimise detriment* to the *interests of depositors and creditors* of financial institutions and for purposes connected therewith. (Italics added for emphasis.)

Yet, there is not a word on the matter of protection of the interests of depositors and creditors in the law. It is, then, small wonder that the behaviour of both the Banks, nor the regulator is, nonchalant when it comes to consumer protection.

In fact other than for transactions that lead to mortgages, bank customers - depositors and borrowers - do not have any legislative provision for the protection of their interests. This is despite the hundreds of mil-

lions of dollars of transactions involving such customers and banks. For moneylender, on the other hand, there is a legal obligation to supply a borrower or any person specified by a borrower, a statement of account of the records of the loan with specific details (s19). The records so to be supplied include all aspects of the loan.

Fourth, while the Moneylenders Act prohibits money lenders form advertising, or canvassing for business, there is no such restriction on banks and credit providers. The marketing and advertising expenditures of banks and credit institutions run into several million dollars annually; our estimate is that this expenditure alone is more than the entire business of the moneylenders.

Finally, the Moneylenders Act does not allow, through the restrictions placed on moneylenders, to compete with banks and other providers of credit.

Over the past two decades, Fiji moved away from regulation of interest rates from banks. The recent emergence of consumer credit by retail outlets, without any upper interest rate cap of 12% per annum, is another context within which the money lending business ought to be examined.

The continued presence of a statutory maximum for moneylenders, therefore, can be seen as an anomaly. A related issue is that while by law, moneylenders cannot compete with banks, at different periods, banks have been charging interest rates higher than the 12% maximum that the moneylenders can charge. This raises the issue of the extent to which market forces ought to be allowed to determine the operation of the financial market.

Fiji's Constitution (1997) disallows discrimination on any ground other than those provided for in the Constitution and statutes. The Moneylenders Act is not an Act that was designed specifically or generally for allowing discrimination in the credit market. Furthermore, provisions in the Fair Trading Decree disallow restrictions on competition. Both these major laws of the land reinforce the view that prescribing a maximum interest rate for moneylenders, while not prescribing any such upper limit to interest on credit from other institutions, is discriminatory and anti-competition. They may also tend to lead to breach of the law, and an underground economy.

Price regulation assumes that the subject of the regulation is a 'public good'. The issue in relation to money lending is whether the money lending activity is also a public good.

The density of a market for loan-funds determines to a significant extent economic activities in the area. A loan funds market provides lubrication to the engine called the 'economy'. In Fiji, while there is a far greater reach of the loan funds market now, this was not the case when the Moneylending Act was put in place.

During much of the pre-colonial days, the only major source of loanable funds for the majority of Fiji's rural dwellers and poorer people was the moneylender. In this context, money lending could have been clearly regarded as a public good. For the present, what is known is that there still is a sizeable section of the population outside the scope of the banking sector. But even if individuals did have bank accounts, their effective access to credit is severely constrained on account of a number of factors including lack of collateral, and/or ability to repay as assessed by commercial banks, and/or the documentary requirements for borrowing from banks. Whether this state calls for treating loans for the rural and poorer sectors of Fiji as a public good needs to be re-visited.

Conclusion

The *Moneylenders Act 1938*, has ample provisions for adequate protection of borrower interests. The problems relating to consumer interests do not lie with the legislation itself. While there may be cases where the Moneylending Act has been or continues to be breached, there is no evidence that the regulatory agencies monitor the money lending business or carry records of breaches. At least over the past 30 years, there has not been a single incidence of the regulatory authority causing prosecution of a moneylender for breach of the Act. Compliance monitoring by the regulatory agency or its agents is non-existent.

A matter of policy significance concerns the creation of uneven playing field in the market for loanable funds. The money lending segment is very strictly controlled in law, while those segments which engage in money lending business under other umbrellas, like banks and consumer credit providers, are treated far less rigidly. While the Money-Lenders Act has substantial provisions protecting the interests of borrowers, the Banking Act has no such provision.

A number of other areas which lead to discrimination have been listed in this paper - these include the treatment of interest rate by different participants in the loanable funds market, the treatment of fees, charges and commissions, and the treatment of sales and marketing by different participants. These anomalies need to be addressed.

Money lending had been a thriving business in Fiji. Whether it continues to remain significant depends to a large extent on the regulatory framework. The larger policy issue is whether policy makers - the legisla-

tors - wish to retain money lending as a legitimate business in the country. If they do, then the playing field needs to be levelled. For this, a review of the legislation is necessary.

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