Higher Education Financing in Lesotho: Regulation to Realize Its Sustainability and Increase Inclusiveness

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Abstract

Higher education plays a central role in countries' realization of their socio-economic development and in establishing a competitive, skilled workforce globally. The need for a skilled workforce, combined with scarcity in financial resources pertaining to higher education, has resulted in governments resolving to finance higher education. This article seeks to encourage adequate regulation to realize the sustainability of higher education financing in Lesotho, to achieve greater inclusiveness in institutions of higher learning. Through the National Manpower Power Development Council Act 8 of 1978,the Lesotho government established the National Manpower Development Council, which is aimed at facilitating the granting of loan bursaries from a fund administered by the National Manpower Development Secretariat. However, these efforts have faced challenges due to the increased cost of financing higher education. Poor management of the loan recovery function, increasing default by graduates on their repayment obligations and a lack of concerted efforts between the respective government departments threaten its sustainability.

Keywords

Higher education, government higher education financing, revolving fund, inclusiveness, poor management, sustainability

INTRODUCTION

It is well-acknowledged that higher education is a lubricant for economic growth; however, a lack of consensus on how governments should go about financing higher education remains a challenge.[1]The significant and admirable role played by higher education in the socio-economic development of developing countries cannot be underplayed. As Johnstone points out, the early 21st century has seen increased demand for higher

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[1] NV Long "Financing higher education in an imperfect world" (2018) *Economics of Education Review* 1 at 1.

education.[2] He further notes that education is not only for the purpose of improving individual students and their families' occupational and social status or even for them to obtain greater earnings, but it is also demanded by governments for the public good in respect of the overall cultural, political, social and economic well-being of a nation.[3] The successful participation of developing countries in the global knowledge-based economy has, however, over the years been compromised due to a lack of a skilled workforce that has completed higher education.[4] In its 2008 analysis of the benefits of higher education, the World Bank urged for more knowledge-intensive growth in Africa, achievable through higher education, which serves as a very useful tool in achieving the necessary socio-economic development of Africa in pursuit of the Millennium Development Goals.[5]

In sub-Saharan Africa, growth in average tertiary education levels is credited with annual gross domestic product growth.[6] Furthermore, stimulated innovation, promotion of the diversification of products and services, and maximization of returns from readily available resources through efficient allocation and management, could be realized through improved higher education.[7]

Financing higher education has primarily become the responsibility of government.[8]This is because the increasing cost of higher education is a burden for vulnerable and poorer individuals in underdeveloped economies.[9] Therefore, in order to ensure that the substantial cost implications associated with higher education do not present a significant burden or a bar for individuals to attain higher education, certain financial aid programmes have been introduced.[10] While public funds are allocated to finance higher education, achieving this in practice has turned out to be alarmingly difficult. This is due to insufficient funding, as a result of substantial increases in tuition fees, increases in student enrolment at institutions of higher learning and, more significantly, declining government support for higher education due to reduced government expenditure on higher learning financing because of a decrease in government revenues.[11]

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[2] DB Johnstone "Higher education finance and accessibility: Tuition fees and student loans in sub-Saharan Africa" (2004) 2/2 *Journal of Higher Education in Africa* 11 at 12. See also JW Goodell "Do for-profit universities induce bad student loans" (2016) 61 *The Quarterly Review of Economics and Finance* 173 at 174.

[3] Johnstone, ibid.

[4] Human Development Department, Vietnam Country Management Unit *Programme Document for the Higher Education Development Policy Programme: First Operation*" (HEDPP01, report no 47492-VN prepared for the World Bank, 2009) at 8; S Altbach "One-third of the globe: The future of higher education in China and India" (2009) 39/1 *Prospects* 11 at 20; ES George "Positioning higher education for the knowledge based economy" (2006) 52/4 *Higher Education* 589 at 595.

[5] *Accelerating Catch-Up: Tertiary Education for Growth in Sub-Saharan Africa* (2009, the World Bank) at 6, available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/2589/462750Revised017808213773830Revised.pdf?sequence=1&isAllowed=y> (last accessed 4 November 2020).

[6] "On the edge: Securing a sustainable future for higher education: Challenges for policymakers and institutions"(announcement of an international conference organized by the Higher Education Funding Council for England and the OECD Programme on Institutional Management in Higher Education, Paris, 8–9 January 2004), available at:<http://www.oecd.org/education/imhe/19637287.PDF>(last accessed 4 November 2020); *Accelerating Catch-Up*, id at xxi.

[7] *Accelerating Catch-Up*, id at 19; DB Johnstone "The financing and management of higher education: A status report on worldwide reforms" (paper prepared for the World Bank, 1998).

[8] G Wangenge-Ouma "Globalisation and higher education funding policy shifts in Kenya" (2008) 30/3 *Journal of Higher Education Policy and Management* 215 at 215.

[9] PG Altbach et al *Trends in Global Higher Education: Tracking an Academic Revolution* (report prepared for the UNESCO 2009 World Conference on Higher Education,2009) at 67; A Chubrik et al *The Impact of the Global Financial Crisis on Public Expenditures on Education and Health in the Economies of the Former Soviet Union* (CASE Network report, 2011) at 100.

[10] World Bank "Mexico: Higher education financing" (2007), available at: < (last accessed 4 November 2020); Johnstone "Higher education finance", above at note 2.

[11] PN Marcucci and DB Johnstone "Tuition fee policies in a comparative perspective: Theoretical and political rationales" (2009) 29/1 *Journal of Higher Education Policy and Management* 25 at 25; J Salmi "Student loans in an international perspective: The World Bank experience" (World Bank working paper, January 2003) at 12; BS Han et al "Student loan and credit risk in Korea" (2015) 135 *Economics Letters* 121 at 121.

This unfortunate situation has led to parents and students being compelled to cover some of the costs of higher education themselves, in addition to relying on financing from taxpayers and the government.[12] These parents and students are obliged to engage in student loan programmes, which not only are complex, controversial and frequently misunderstood as sources of higher education financing, but also lead to the exclusion of potential students due to recovery costs.[13] Not only have recovery problems presented a challenge for higher education financing, but, as Lochner and Monge-Naranjo remark, the increase in aggregate student borrowing and increasing debt levels indicate that a growing number of students enrolling in institutions of higher learning are excluded from government financial assistance.[14]These issues demonstrate that the de facto economic models of globalization and neo-liberalism have impacted negatively on higher education financing policies.[15]

The commitment of countries like Lesotho to ensuring that their citizens are afforded an opportunity at higher education is incontestable. It is apt to point out at this stage that there is a dearth of literature on higher education financing by the Lesotho government, hence presenting some limitations to the discussion that follows. It is, nevertheless, worth pointing out that Lesotho has not ignored the need for higher education financing. It has enunciated its incorporation of higher education provisions in the country's constitution, which provides: "Lesotho shall endeavour to make education available to all and shall adopt policies aimed at securing that higher education is made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular, by the progressive introduction of free education."[16]

This article aims to investigate how adequate regulation of higher education financing in Lesotho can be achieved, with the ultimate goal of making recommendations to ensure the sustainability of higher education financing to increase inclusiveness for potential students at institutions of higher education. As pointed out, there is no substantial literature dealing with higher education financing in Lesotho. This article endeavours to analyse the existing regulatory frameworks and address the situation based on the author's first-hand knowledge as the legal adviser in the National Manpower Development Secretariat (NMDS) in the years 2010–12. The challenges that could be presented by the obsolete regulatory frameworks that fail to accommodate the current problems associated with higher education financing are also considered.

BACKGROUND OF HIGHER EDUCATION FINANCING IN LESOTHO

In 1978, the government of the Kingdom of Lesotho enacted the National Manpower Development Council Act (NMDC Act),[17]and the consequent Loan Bursary Fund Regulations (LBFR),[18] aimed at establishing and administering the Loan Bursary Fund (LBF) intended to finance higher education for Basotho people, either locally or internationally. The purpose of the NMDC Act is to "provide for the establishment of the National

[12] DB Johnstone and P Shrooff-Mehta "Higher education finance and accessibility: An international comparative examination of tuition and finance assistance policies" in H Eggins (ed) *Globalization and Reform in Higher Education* (2003, Open University Press) 32 at 33-34.

[13]DB Johnstone "Students loans in international perspective: Promises and failures, myths and partial truths" (2011), available at: <https://www.researchgate.net/publication/247662572> (last accessed 4 November 2020).

[14] LJ Lochner and A Monge-Naranjo "Students loans and repayment: Theory, evidence and policy" (CIBC Centre for Human Capital and Productivity working papers, 2014–15) at 8.

[15] CA Toress and D Schugurensky "The political economy of higher education in the era of neo-liberal globalisation: Latin America in comparative perspective" (2002) 43/4 *Higher Education* 429 at 429.

[16] The Constitution of Lesotho 1993, art 28(d).

[17] Act No 8 of 1978, Supplement No3 to Gazette No31 of 25 August 1978.

[18] Loan Bursary Fund Regulations 20 of 1978: Legal Notice No20 of 1978, Supplement No1 to Gazette No29 of 11August 1978.

Manpower Development Council (NMDC); for the co-operation and centralization of manpower training and development; and for connected purposes”.[19] The LBFR provide for the establishment of the LBF as a special fund whose “purpose is to provide a revolving Fund from which assistance can be given to Basotho to further their education on a repayment or partial repayment basis”.[20]

Due to the LBF’s operating requirements, the NMDC must comprise individuals of distinguishable acumen, with the minister responsible for education as chairman, the NMDS director as secretary and 13other members appointed by the minister responsible for manpower development. All these persons should have attributes regarded as adequate to ensure the effective execution of the coordination and centralization of manpower training and development as provided in the NMDC Act.[21]

Functions of the NMDC

Under section 5 of the NMDC Act, the mandate of the NMDC is to advise the minister responsible for manpower development on all matters relating to manpower training and development. Accordingly, the NMDC is mandated to make recommendations to the minister on the following non-exhaustive list of issues: policies and procedures relating to manpower training and development; the determination of conditions governing manpower training and development in both the public and private sectors; Lesotho’s manpower training requirements; and, through the Selection Committee, successful candidates for bursaries.

The NMDC Act further deals with the NMDS, which is staffed with public officers and headed by the director, whose main responsibility is the administration of the act.[22] Higher education is financed through the granting of a “loan bursary”, and both the NMDC Act and the LBFR define a bursary to mean “payment by the Government of University, College, post-secondary institution, or hostel fees or allowances to, or, on behalf of a student undergoing an educational course and any other disbursements and expenditure for or on behalf of a student in connection with that course, and includes donor-funded bursaries channelled through Government”.[23]

The NMDS is entrusted with: implementing the minister’s decision in respect of manpower training and development;[24] drawing up short and long term plans relating to manpower training and development for consideration by the NMDC;[25] administering training and bursary matters;[26] negotiating with other appropriate government ministries and departments, bursaries and aid for training;[27] and ensuring, in consultation with employing agencies, that trained manpower is fully utilized.[28]

[19]NMDC Act, preamble.
[20] LBFR, reg 3(1) and (3).
[21] NMDC Act, sec 3.
[22] Id, sec 10.
[23] Id, sec 2.
[24] Id, sec 10(2)(a).
[25] Id, sec 10(2)(b).
[26] Id, sec 10(2)(c).
[27] Id, sec 10(2)(d).
[28] Id, sec 10(2)(f).

Receipts into and disbursements from the LBF

The LBF comprises any sums appropriated to the fund, repayments of bursaries awarded to students, donations or grants made for the purpose of the fund and other receipts connected with its purpose.[29]Appropriate allocation of finances to the LBF is crucial for the fund to fulfil the purpose for which it was established and to ensure that the intended recipients benefit from it. The LBF is meant to cover the subsistence allowance and travelling expenses of the borrowers and ensure that borrowers' food allowances, academic tuition fees, book allowances and residential expenses are catered for.[30]

Proper utilization of these funds ensures that prospective students are not excluded from institutions of higher learning due to financial constraints. As indicated in regulation 6, funding is intended for bursaries[31] for Lesotho citizens, and this is meant to cover relevant expenditure by the minister responsible for education in consultation with the minister responsible for finance.

Conclusion of a bursary agreement

The awarding of a bursary loan by the NMDC is determined on the priorities reflected in Lesotho's national development plans.[32]The awarding of financial assistance should be legalized through the conclusion of a valid loan bursary agreement between the government and the student.[33]Under the concluded loan bursary agreement, it is mandatory that the student successfully completes her or his studies.[34]A borrower is further obliged to serve the government for a minimum of five years after completing his or her studies, and within the period that the borrower is gainfully employed he or she is obliged to repay 50 per cent of the overall amount of money spent on the borrower for his or her higher education.[35] However, for students who under take their studies abroad, borrowers are given two options: to return and serve the government or to repay the entire loan bursary advanced.[36]

The government's financial assistance advanced to borrowers should cover items such as the borrower's subsistence allowance and return travelling expenses if the training is undertaken in a foreign jurisdiction.[37] The bursary should cover the borrower's food allowance, as well as accommodation expenses either in an institution or private residence,[38]tuition fees, other academic fees, costs of research, as well as a book allowance.[39]While it is well known that higher education obtained from foreign institutions is extremely costly compared to education obtained from local institutions of higher learning, the NMDC Act provides that the amounts

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[29] LBFR, reg 5(a)–(d).

[30] Loan bursary agreement, clause 3(a), (b), (c) and (d).

[31]As the government of Lesotho provides higher education financing in a form of loan bursaries, these concepts must be explained. Under section 2 of the MNDC Act, a "bursary" is defined as a "payment by Government of University, College, post-secondary institutions, or hostel fees or allowances to, or on behalf of a student undergoing an educational course and any other disbursements and expenditure for or on behalf of a student in connection with that course, and includes donor funded bursaries channelled through Government". A student "loan" on the other hand consists of money that a student borrows to cover the costs associated with higher education expenses that needs to be repaid with interest upon the completion of the student's education. This type of financial assistance can be granted either by government or some financial institutions. See also SH Cho, Y Xu and DE Kiss "Understanding student loan decision: A literature review" (2015) 43/3 *Journal of Family and Consumer Science* 229 at 233.

[32] Loan Bursary Agreement, clause 1.

[33] LBFR, reg 7(3). The parties conclude what is called a loan bursary agreement.

[34] Loan bursary agreement, clause 2 (a)–(f).

[35] Id, clause 2(g).

[36] Id, clause 2(h).

[37] Id, clause 3(a).

[38] Id, clause 3(b) and(c)(i)and(ii).

[39] Id, clause 3(d)–(f).

endorsed in the beneficiaries' loan bursary agreements should be the notional cost of the beneficiary's educational course for each academic year.[40] In effect this means that the government has in many instances subsidized education costs for students studying in foreign countries, but is only able, under the loan bursary agreement, to recover such costs up to the amount that would have been spent in local training. Accordingly, in those instances where Basotho citizens undertake their studies at institutions located beyond the borders of Lesotho, there is a shortfall on the actual amount subsidized by the government.

Repayment obligations

As indicated above, the types of financial assistance agreements concluded between the government and students are two-fold in nature: the loan part and the bursary part, hence the title "loan bursary". However, before dealing with repayment obligations under the loan part of the agreement, it is necessary to understand the administration of the loan aspect in respect of this particular form of higher education financial assistance. To facilitate repayment by the borrower, it is mandatory that the NMDC is aware of the borrower's progress with her studies, which requests reporting to take place immediately upon completion of the borrower's studies.[41] This reporting obligation further extends to reporting to the NMDC in the event that the borrower secures employment.[42] The rationale for reporting when the borrower secures employment is to ascertain the amount owed to the government, as repayment of the cost of financial assistance falls into three categories as outlined below.

The expectation is that borrowers whose higher education is undertaken outside the country should return to Lesotho upon completion of their studies to take up work in the government, failing which the graduate is obliged to repay the full cost of the loan bursary.[43] In case the borrower decides to work in Lesotho but not for the government but rather in the private sector or for a parastatal organization, they have to repay 65 per cent of the amount endorsed in the loan bursary agreement.[44] If within the repayment period a borrower who is in government employment decides to terminate his or her employment with the government and joins either the private sector or a parastatal organization, his or her repayment is then adjusted in proportion to the period served and the period remaining.[45]

Repayment patterns

Some higher education financing programmes provide for loan repayment to increase in line with a borrower's salary, with such a repayment option basically extended to low and intermediate income levels.[46] However, the Lesotho government's higher education funding does not peg its repayment criteria to the amount of the borrower's salary. Instead, every loan has to be repaid within a period of five years in equal monthly instalments, with repayments commencing in the first month of a borrower's employment after having

[40] LBFR, reg 11(3).
[41] Id, reg 8(1).
[42] Ibid.
[43] Id, reg 8(2) and loan bursary agreement, clause 9(i).
[44] LBFR, reg 8(4) and (5) and loan bursary agreement, clause 9(ii) and (iii).
[45] LBFR, reg 8(6).
[46] Long "Financing higher education", above at note 1 at 6.

completed his or her studies.[47] Despite the obligation to repay in equal monthly instalments, borrowers have the freedom to accelerate their loan repayments.[48] If there are compelling reasons to deviate from repayment in equal monthly instalments, the NMDC Act allows the NMDC, with the approval of the minister responsible for education, to provide for repayment at intervals other than on a monthly basis, to extend the period of repayment and to suspend all or part of the repayment during periods of unemployment or illness or in circumstances where repayments would cause undue hardship to the borrower.[49]

ANALYSIS OF THE REGULATION OF HIGHER EDUCATION FINANCING WITH SPECIAL REFERENCETO LESOTHO

Chapman and Liu remark that ineffective higher education financing policies often thwart efforts to expand higher education and access to it, despite rising demand.[50] Although policies should address the issues of assisting students at higher learning institutions with tuition and living costs, they should also ensure that repayment obligations are fulfilled, hence the need for repayment systems that do not result in financial hardship to graduates.[51] Borrowers' default rates and consumption difficulties should, therefore, be adequately investigated and addressed to ensure the success of higher education financing programmes.[52]

As observed by Chapman and Lounkaew, the policies in place for addressing higher education financing are designed to ensure that neither the government as financier nor students as beneficiaries face adverse consequences, due to the design of the higher education financing programme. Therefore, the applicable loan should, inter alia, ensure that it specifies the period over which graduates should service their debt obligations.[53] It is pointed out that the repayment of higher education financing in developing counties encounters many challenges, including: graduates living in relatively poor regions find it hard to fulfil their obligations with ease and often incur repayment burdens that may translate to 40 percent of their income;[54] and due to lower incomes in poor countries, graduates find it extremely difficult to service their debts (although, surprisingly, even those earning higher incomes seem to have followed this pattern of defaulting).[55]This could be an indication that in some instances the issues are about individual attitudes to servicing debt, as opposed to the actual repayment burden, hence a need for effective legislation and stronger enforcement efforts aimed at higher education financing beneficiaries fulfilling their contractual obligations.

However, not only does the repayment burden affect graduates in poor countries, but graduates in relatively rich countries have also endured financial difficulties in servicing their higher education financial obligations. Chapman and Sinning indicate that, in places like the eastern part of modern Germany, women are singled out

47 LBFR, reg 9(1).
48 Id, reg 9(2).
49 Id, reg 9(2)(a)–(c).
50 B Chapman and AYC Liu "Repayment burdens of student loans in Vietnamese higher education" (2013) 37 *Economics of Education Review* 298 at 298.
51 Ibid.
52 Ibid.
53 B Chapman and K Lounkaew "Income contingent student loans for Thailand: Alternatives compared" (2010) 29/5 *Economics of Education Review* 695 at 696.
54 B Chapman and D Suryadarma "Financing higher education: The viability of a commercial student loan scheme in Indonesia" in D Suryadarma and GW Jones (eds) *Education in Indonesia* (2013, ISEAS Publishing) 203 at 210.
55 Chapman and Liu "Repayment burdens", above at note 49 at 300.

as among the highest defaulters, with figures ranging from 60–70 per cent.[56] Lawyers in the USA working in the public sector also are reported to have encountered repayment burdens in fulfilling their higher education financial repayment obligations.[57]

For any loan advanced, the expectation is that the beneficiary will repay their debt in order to be able to top-up the government funds available for the purposes of advancing further financial assistance to future beneficiaries who wish to pursue studies at institutions of higher learning. Although financing higher education provides students with expanded access to higher education, beneficiaries' failure to fulfil their repayment obligations hinders this noble attempt to address the socio-economic needs of citizens in the countries concerned.

Accessing public finances for the purpose of students' pursuit of higher education is observed to have financial costs that students are unable to meet. Hence the call that governments should intervene and finance such higher education, with intervention being either in the form of a taxpayer funded system and/or government-backed student loans.[58]As Ziderman indicates, almost 50 countries around the world have government-sponsored student loan schemes with objectives including, but not limited to, a chance for the poor to participate in higher education, expansion of the university system, equity or access for the poor (that is, easing students' higher education financial burdens) and manpower needs.[59] However, close examination of these schemes indicates that, due to their variation from country to country, it has become very difficult to come up with what could be identified as either common or best practices for financing higher education.[60]

It is imperative to take all these factors into consideration to comprehend the financing of higher education in Lesotho. The government serves as the main, if not absolute, financier of higher education through a highly subsidized loan bursary scheme with very generous repayment conditions. To establish the relationship between the parties (that is, financier and students), it was noted above that a loan bursary agreement is concluded with respective obligations between the parties. Due to the loan part of the agreement, it is mandatory that, upon completion of their studies, graduates are expected to perform their respective duties, repaying their loans based on the sector of their employment, at rates varying between 50, 65 and 100 per cent of the amount endorsed in their loan bursary agreements. Although higher education financing aims to ensure that there is an expansion of higher education to promote socio-economic benefits for the nation, the graduates are the paramount beneficiaries. It is, therefore, essential for higher education financing beneficiaries to ensure that they fulfil their contractual obligations, not only to fulfil their obligations as borrowers, but also to contribute to the LBF, to ensure its sustainability and ensure that future generations benefit.

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[56] B Chapman "Income contingent loans in higher education financing" (2016) IZA World of Labor, available at: <https://wol.iza.org/uploads/articles/227/pdfs/income-contingent-loans-in-higher-education-financing.pdf> (last accessed 20 November 2020).

[57] B Chapman and K Lounkaew "The effects of different loan schemes for higher education tuition: An analysis of rates of return and tuition revenue in Thailand" (2011) 34/20 *Higher Education in Europe* 211 at 215.

[58]B Chapman and A Doris "Modelling higher education financing reform for Ireland" (2019) 71 *Economics of Education Review* 109, available at: <https://www.sciencedirect.com/science/article/abs/pii/S0272775717301760> (last accessed 4 November 2020).

[59] A Ziderman "Alternative objectives of national student loans schemes: Implications for design, evaluation and policy" (2002) 11/1 *The Welsh Journal of Education* 37 at 37.

[60] Ibid.

Repayment challenges

The repayment and collection stages of loan bursary funding for higher education pose a challenge for the Lesotho government, inter alia because the department entrusted with administering the LBF is inadequately staffed with a dedicated, skilled and sufficient workforce to execute this mandate effectively. Furthermore, the department does not have complete data in respect of the borrowers who have completed their studies in specific years. Meanwhile, in some cases data in the department's possession are unreliable, perhaps due to the fact that, for a certain year or years, there was a failure to endorse students' information in the financier's copy of the contract, meaning that it cannot be ascertained whether a student has completed her or his studies unless the borrower voluntarily reports his or her progress. Accordingly, follow-up on performance of the borrower's contractual obligations is frustrated. Although there is no captured information pointing to these problems, the author has had first-hand experience of these problems, having worked as a legal officer at the NMDS, and also by virtue of being a former borrower whose contractual amount for a particular academic year was only endorsed in her copy of the loan bursary agreement as a borrower and not in the financier's copy.

A notable feature of these loans is that they are interest-free, so, regardless of how long the graduates fail to perform their contractual obligations, no interest accrues on the outstanding amount. Consequently, there are no measures in place to deter such defaulting conduct. Due to unreliable data and lack of enforcement, graduates with no intention to further their studies either from diploma to degree or from degree to postgraduate level could freely default on their repayment obligations. It is only when these borrowers indicate their intention to pursue higher education, either from undergraduate level to postgraduate level or diploma level to degree level that, in the new financing application, they are required to have repaid their existing higher education debt in fulfilment of their contractual obligations. To qualify for further financial assistance, these applicants merely repay the outstanding debt in a lump sum to obtain further financial assistance for their studies. As the applicable law does not provide for a specific time period during which the graduate is supposed to wait before seeking further financial assistance after repaying her or his loan, this legal loophole has long been exploited by borrowers. This defeats the rationale for establishing this revolving fund to ensure greater inclusiveness or its ability to sustain itself, hence the fund's constant dependence on financial injections through parliamentary appropriation.

The current literature on higher education financing indicates that the repayment burden is often a reason for high default rates. This is especially so for graduates who work in the low-paying public sector, hence the resolve by some jurisdictions such as Australia, New Zealand, Chile, South Africa, the United Kingdom and Thailand to opt for income-contingent loan repayment as a tool to safeguard against financial difficulties as a result of repayment obligations.[61]However, it must be pointed out that the high default rates in Lesotho cannot be attributed to financial difficulties met by graduates; instead they are due to graduates' tendency to dishonour their financial obligations, especially when they are aware that enforcement is weak and that there are no implications of defaulting on their obligations.

[61] E Field "Educational debt burden and career choice: Evidence from a financial aid experiment at NYU Law School" (2009) 1/1 *American Economic Journal: Applied Economics* 1 at 4.

Recovery and debt collection challenges

The loan bursary agreement concluded between the government and a student has a single clause dealing with provisions concerning repayment obligations; it specifies:

> "The borrower irrevocably authorizes the Government to recover the Loan granted to him/her under this agreement, from an employer of the Borrower during the period when he/she is gainfully employed. The Borrower irrevocably binds himself/herself and authorizes his employer to make monthly deductions from the emoluments due to him/her and to remit the same to the Government until the debt secured by this agreement is liquidated in full."[62]

Although under this clause the borrower unequivocally and without hindrance authorizes the government to recover the money loaned to finance the borrower's higher education, due to the challenges facing the NMDS indicated above, the government through the NMDS has failed dismally to execute this mandate properly. Only sporadic success on recovery has been achieved regarding repayment by government-employed graduates. There is dismal failure of recovery against those employed in the private sector and in foreign jurisdictions. Recovery has only been achieved from beneficiaries who pay voluntarily, given that there have never been any legal efforts to recover the debts in foreign jurisdictions other than through media appeals.

A breach of contract constitutes a single cause of action.[63]As a matter of established legal principles, when a contract is breached and a party suffers loss or damage as a result of a breach, it is trite law that the aggrieved party is entitled to seek damages from the defaulting party.[64] In credit contracts, late payments result in the creditor suffering damages due to delay in availability of the money it lent out, therefore entitling the creditor to *mora* interest[65] on the advanced amount for the duration of the non-performance.[66] The parties can agree on the *mora* interest rate or it can be determined by either trade usage or legislation.[67] It is necessary to appreciate that regulation of the applicable debt collection practices benefits borrowers who often complain of unfair collection practices. Therefore, the ability to execute the debt collection mandate efficiently and effectively is crucial for the economy, as it ensures that defaulters fulfil their contractual obligations, which in turn provides further finances for higher education.[68]

The default cases, however, often result in lenders being forced to track delinquent borrowers and getting them to pay.[69]As Burnham pointed out, as restrictions on granting loans are eased, lenders find themselves dealing with an increasing number of defaulters, with the resultant engagement of debt collection agencies; this has led to debt collection being very big business.[70] It is, therefore, necessary that debt collection agencies

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[62] Loan bursary agreement, clause 3(i).
[63] D Bhana et al *Student's Guide to the Law of Contract* (3rd ed, 2013, Juta Legal & Academic Publishers) at 305.
[64] SR Iyer *Everybody's Book of Law* (2nd ed, 1961, Asia Publishing house) at 195.
[65] *Mora* interest is interest accrued on an overdue amount. As stated in Land Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd and Others [2013] 4 All SA 385 (SCA) para 13, mora interest is a form of damages for breach of contract. The party that suffered the breach should be placed in the position that he/she should have been had the contract been performed.
[66] Bhana et al *Student's Guide*, above at note 63 at 353.
[67] Ibid.
[68] TJ Zywicki "The law and economics of consumer debt collection and its regulation" (Mercatus Centre working paper, September 2015) at 2.
[69] Id at 3.
[70] SJ Burnham "What attorneys should know about the Fair Debt Collection Practices Act, or, the 2 dos and the 200 don'ts of debt collection" (1998) 59/2 *Montana Law Review* 179 at 180.

attempt to make transaction costs as low as possible, so as to ensure that lenders are fully compensated, while also ensuring that, in motivating borrowers to pay, there is no excessive financial burden on the defaulters, hence the prohibition of quick, costly and dirty means of collection.[71] Engaging the services of a debt collection agency entails purchasing third party services, with financial implications for the lenders.[72]A borrower, therefore, now has a collection fee to pay, in addition to the original debt, adding to their existing repayment burden.[73]

Higher education financing in Lesotho takes a dual form, with one part being a bursary and the other part being a loan for students in local institutions of higher learning. Students studying in foreign jurisdictions, such as South Africa, have 80 per cent as a bursary and 20 per cent as a loan. It is incontestable that the Lesotho government offers higher education financing on very generous terms and conditions, in relation to both the amount lent and the extended period of repayment.

Despite the generous repayment terms and conditions, as pointed out above, defaulting tendencies appear to be entrenched among Basotho higher education graduates, as very few fulfil their contractual obligations, unless they are pursued to do so or are in need of further financial assistance. This situation is exacerbated by the fact that, despite cases of default, there are no extra charges, either in the form of interest or collection fees, in the event a debt collection agency is engaged. Neither the NMDC Act nor the LBFR provide for any penalty in the event of default. The loan bursary agreement concluded between the parties is also silent on interest or collection fees.

Which party then bears the brunt of collection fees when the government has decided to engage the services of a debt collection agency? Clearly, the government itself has to pay for those services, given the absence of a clause allocating liability for collection fees to borrowers. Unlike some money-lending agreements, which have particular clauses regarding extra charges in the event that a debt collection agency is engaged and passing these costs onto the borrower, these loan bursary agreements are silent.

The effect of this lacuna was severe in 2012, when the government of Lesotho, realizing the increasing default rates and the NMDS's limited ability to realize noticeable recovery rates, decided to engage the services of a debt collection agency.[74] Service fees were charged at 15 per cent of the amount collected in a given month. As neither the legal frameworks nor the signed loan bursary agreements provided for these fees, the service fees were to be deducted from the collected amount. This meant that, in the case of graduates who were government employees, the government only managed to recover 35 per cent of the repayment, not the expected 50 per cent. For those in the private sector or parastatal employment, 50 per cent of the repayment was recovered, as opposed to the expected 65 percent as outlined in the loan bursary agreement. The LBF's sustainability and the

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[71] Id at 179.

[72] J Jalonen and T Takala "Debtors' ethical perceptions of the debt collection process" (2018) 23/1 *Electronic Journal of Business Ethics and Organization Studies* 14 at 16.

[73] Id at 18.

[74] N Koeshe "NMDS introduces online registration" (29 March 2018) *Lesotho Times*, available at: <http://lestimes.com/nmds-introduces-online-registration/> (last assessed 4 November 2020). A debt collection agency called Jamali Holdings was engaged on a five-year contract to collect overdue debts, which ran into millions of Maluti as a result of defaults in higher education financing repayments. This contract was open to review after three years, at which point satisfactory performance would confirm the continuation of the contract, whereas unsatisfactory performance would result in the termination of the debt collector's services. The determining factor regarding performance was the amount collected on a monthly basis. However, upon review in 2015, it was concluded that the collector failed to meet this term of the contract but no reasons were advanced for the unsatisfactory performance. As a result, the contract was terminated for non-performance. Since 2015, no collection agency has been engaged.

aim of greater inclusiveness in higher education have, therefore, been compromised, as significantly smaller amounts than those lent out, have been recovered for the revolving fund.

The reduction in higher education financing as a result of the poor recovery rate in respect of existing loans, coupled with a decrease in government revenue, which resulted in decreased government expenditure on higher education, are responsible for excluding deserving students from pursuing studies at institutions of higher learning. For those coming from poor backgrounds, their desire to change the enduring legacy of their poverty is defeated; instead, the prevailing state of poverty becomes entrenched. This is happening despite the Lesotho government's commitment to promote equality of opportunity for disadvantaged groups in society, to enable them to participate fully in all spheres of public life as provided in section26(2) of the Constitution of Lesotho 1993. It is, therefore, clear that higher education funding in Lesotho will remain severely compromised for future generations, unless there is an effective regulatory framework to ensure appropriate enforcement of the contractual obligations of government loan bursary borrowers, as well as to instil a sense of responsibility in these higher education graduates to fulfil their obligations to repay their bursary loans.

SUSTAINABILITY OF HIGHER EDUCATION REPAYMENT FINANCING

In order to ensure that the revolving LBF is sustainable, it is submitted that consistent and higher repayment rates should be observed by the graduates who are obliged to repay these loan bursaries. A study in the Republic of South Africa, dating back to 2002, has led to the conclusion that the South African National Student Financial Assistance Scheme was and still remains sustainable. This sustainability is due to satisfactory recovery of the loan portion of the award from graduates and the reutilization of these recovered funds to provide financial assistance to future generations who wish to pursue studies in institutions of higher learning.[75] It is thus evident that the lack of an adequate legal framework addressing the recovery of loan bursaries advanced to students threatens the sustainability of higher education financing and severely impedes attempts to finance further demands for higher education.[76]Administering a viable revolving fund is, therefore, essential, as the likelihood of substantial returns would mean that there would be money available that could be advanced to cover the higher education needs of future students. This would ease the pressure on the government to continue financing the applicable higher education fund, as the fund could be sustained exclusively through the recovery of students' loans.[77]

While the recovery rate plays a significant role in ensuring that financial assistance is sustainable, Omari points out that attention also needs to be paid to establishing a sound institutional structure that ensures the smooth management and administration of loans.[78] Consequently, sufficient legal recovery of loans and strengthened legal enforcement require that an effective regulatory framework is in place.[79] Such a framework will ensure that taxpayers' money is given sufficient protection and that there is also a partnership between the

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[75] R Jackson "The National Student Financial Aid Scheme of South Africa (NSFAS): How and why it works" (2002) 11/1 *The Welsh Journal of Education* 82 at 82 and 93.
[76] VR Nyahende "The success of students' loans in financing higher education in Tanzania" (2013) 3/3 *Higher Education Studies* 47 at 51.
[77] DB Johnstone *Financing Higher Education: Cost-Sharing in International Perspective* (2006, Sense Publishers) at 7.
[78] IM Omari *Higher Education at Crossroads in Africa* (1991, IM Omari) at 46 and 47.
[79] Ibid.

government and the private sector in respect of the recovery of loan repayments and minimization of default rates.[80]

COST SHARING IN HIGHER EDUCATION FINANCING: ITS ROLE IN ATTAINING SUSTAINABILITY AND INCLUSIVENESS

Reliance on government as a sole financier of higher education currently results in the majority of needy yet deserving students in Lesotho being excluded from enrolling in institutions of higher learning. The weak recovery and high defaults rates compromise the intended inclusiveness of these higher education funding initiatives.[81] Cost-sharing has now become a worldwide phenomenon, in which government or taxpayers are relieved from the sole burden of being higher education financiers as this role is no longer viable, hence the shift from reliance on government funds and increased reliance on parents and/or students to finance their higher education either fully or partly.[82]

Higher education does not solely benefit countries' economies, hence governments' exclusive responsibility as sole financiers of higher education should be eased. Given that students are the greatest beneficiaries as they are given an opportunity for personal development, social participation and economic productivity, which ultimately grants them financial freedom as a result of better salaries when they gain employment, they should also contribute to funding higher education.[83]

It is submitted that these shared responsibilities can only be achieved when there is a clear policy framework that gives guidance on how parties could execute their respective responsibilities for the purpose of realizing higher education. Cost-sharing is still a new phenomenon in Africa, with at least 26 African countries practising it (as per the most recent statistics in 2009). A few Francophone countries such as Côte d'Ivoire and the Democratic Republic of Congo, which were famous for free education, have adopted and implemented the phenomenon, although proper legislative measures are needed outlining the procedures for its successful adoption and implementation.[84]

The cost-sharing phenomenon has been resorted to as a means of financing higher education due to declining government revenues. However, it is submitted that its successful implementation in Lesotho will result in a excluding large numbers of students from enrolling in an institute of higher learning unless there are clear legislative measures governing its implementation to achieve optimal results. This is because, due to the prevailing poor backgrounds of most Basotho students, parents are unable to secure private loans to cover their children's higher education expenses. Consequently, these students are denied a chance to participate in higher education and, later, in the country's economy. Although the government intended to address this situation, at its

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[80] "BRD has made great progress in better student loan management" (17 April 2017) *Hope Magazine*, available at: <http://hope-mag.com/index.php?com=news&option=read&ca=6&a=2969> (last accessed 4 November 2020). In compliance with Law No 44/2015 of 14 September 2015, the Ministry of Education and the Rwanda Development Bank (BRD) governing student loans and bursaries formed an alliance in an effort to facilitate better and more efficient recovery of loans, having experienced a higher rate of defaults and a low recovery rate. The law imposed a duty on employers whose staff benefited from the student loans scheme to inform the BRD in writing about those beneficiaries.

[81] DB Johnstone "The economics and politics of cost sharing in higher education: Comparative perspectives" (2004) 23 *Economics of Education Review* 403 at 405.

[82] BC Sanyal and M Martin "Financing higher education: International perspectives" 2006 *Higher Education in the World* 2 at 9.

[83] M Walker and F Mkhwanazi "Challenges in accessing higher education: A case study of marginalised young people in one South African informal settlement" (2015) 40 *International Journal of Educational Development* 40 at 47; DB Johnstone "The applicability of income contingent loans in developing and transitional countries" (2004) 18/2 *Journal of Educational Planning and Administration* 159 at 160.

[84] *Financing Higher Education in Africa* (2010, World Bank) at 56–57.

conception stage in the years 2011–12 it was abruptly abandoned for no reason or, if there were reasons, they were not made public. The proposal had been to employ the means-tested mode of financing, [85]which would ensure that students from poor backgrounds become the main beneficiaries of higher education financing, funded exclusively by the government due to their parents' inability to cover any costs of their higher education. Meanwhile, other students would have their higher education financial obligations shared between the government and parents.

The assumption is that the reason this proposed means of financing higher education was abandoned at its initial stage could be due to the realization that the current legal framework does not provide for this type of financial assistance. Therefore, there would be no enabling legislation to justify its adoption and implementation if it were legally challenged. It is only once an enabling legislative framework is in place that the government could realize cost-sharing as a viable means of financing higher education.

The application of the NMDC Act, coupled with decreased funds appropriated for higher education financing, does not only limit the numbers of beneficiaries of higher education financing. This act and the decreased funds further thwart attempts to implement cost-sharing as a viable means of financing higher education, which has the ability to achieve greater inclusiveness. This has prompted views questioning the Lesotho government's intention to ensure greater inclusiveness in institutions of higher learning, as the one viable means of ensuring inclusiveness was abandoned without any grounds advanced.

Although the LBF, as a revolving fund, has to sustain itself through recovery of the loans advanced to graduates, while also receiving some form of financial assistance from parliamentary appropriation, the low recovery and high default rates have compromised the fund's sustainability. Hence, there is persistent reliance on government expenditure on higher education. This exclusive reliance on the Lesotho government as a singular funder of higher education is contrary to calls for countries to rely on other sources to finance higher education. It is realized that the increasing costs per student and increasing tertiary participation have resulted in increasingly inadequate government financial support, which falls short of accommodating all students.

Graduates' attitude towards the fulfilment of their contractual obligations is regrettable; eminent consideration must be given to ensuring that they fulfil their contractual obligations. In cases of failure to do so, adequate measures should be employed to enable the government to enforce the contracts and recover the money loaned. In this way, the LBF could have the resources to sustain itself, even though it may still need financial support from the government due to the small amounts currently recovered. The availability of sufficient finances to assist needy students with their higher education costs, does not only rectify the past injustice perpetrated against students from low to middle-income backgrounds. This assistance also helps students who struggled to access the resources that would enable them to acquire higher education, but also addresses the inequality that prevails in different segments of society.

While a number of scholars consider income contingent loans to be another means of ensuring that graduates are given a chance to repay their loans without any financial burden, a considerable number of Basotho students, have taken on too much credit in order to support their studies at higher education institutions. Given rising

[85] Means-tested means "a form of subsidy targeting, [which] attempts to distribute at least some higher education subsidies on the basis of need or estimated ability to pay": AA Tekleselassie and DB Johnstone "Means-testing: The dilemma of targeting subsidies in African higher education" (2004) 2/2 *Journal of Higher Education in Africa* 135 at 135.

labour market uncertainties, graduates are unable to pay their debts.[86] The author wishes to point out that, considering the generous amounts Basotho graduates payback in fulfilment of their contractual obligations, contingent loans are unnecessary. Instead, there is a need for public advocacy in Lesotho regarding fulfilment of contractual obligations, aimed at instilling an appropriate repayment culture and commitment to ensure that higher education financing is sustainable; this can be aided further by adequate education-based government policies.

RECOMMENDATIONS FOR SUSTAINABILITY OF HIGHER EDUCATION FUNDING IN LESOTHO

Quite a number of issues have been identified that compromise the sustainability of higher education financing in Lesotho. These issues range from an obsolete legal framework, inadequate recovery rates, graduates' lack of commitment or negative attitudes towards the repayment of their contractual obligations, lack of concerted efforts between the government and private sector in recovery efforts, and the lack of participation from the private sector in financing higher education. It is recommended that the government should address this unsatisfactory situation through the following measures to ensure the sustainability of higher education financing in order to attain greater inclusiveness.

Both the NMDC Act and the LBFR should be repealed, and an appropriate legal framework that affords the government the powers to restructure the existing higher education financing scheme should be enacted. The proposed law should ensure that there is significant restructuring within the government department administering the LBF as it needs to have a skilled workforce that is knowledgeable in loan administration logistics.

Currently, the government issues interest-free loans, which area luxury considering the high cost of higher education financing. Lesotho, as a developing country riddled with poverty and inequality, cannot afford to continue to provide interest-free loans if it intends to increase the participation of future students in institutions of higher learning. Therefore, the law should prescribe interest rate caps to be incorporated in the loan bursary agreements concluded between the government and students. It is economically rational that the recovery amounts are reasonably close to the amount lent to ensure that the LBF is sustainable, unlike the current discounted rate of 80 per cent for those who study in foreign universities and 50 per cent for those who attend local institutions of higher learning.

Graduates need to be educated on the importance of repaying their dues once they have the financial means. This would correct borrowers' entitlement attitudes, and could possibly aid in cultivating an attitude towards repayment and address their lack of commitment despite having benefitted from the financial assistance that they fail to repay.

Collection of payment is critical in cases of default and, for such a purpose, it is necessary that reliable data are in place, updated on a quarterly basis to assist collectors in executing their mandate. The legislation and the subsequently concluded agreements should provide, in cases of default, for payment of collectors' fees by beneficiaries, not by the government. This would serve as a deterrent for those who, despite being gainfully employed, breach their contractual obligations by failing to repay their bursary loans.

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[86] L Lochner and A Monge-Naranjo "Credit constraints in education" (working paper 2011-036, October 2011) at 29–30; Johnstone *Financing Higher Education*, above at note 76; R Shireman "Learn now, pay later: A history of income contingent student loans in the United States" (2017) *The Annals of the American Academy of Political and Social Science* 184 at 195.

Further on the issue of collection, the legislation should provide for collaboration between the NMDS, the Ministry of Education, Ministry of Health, the Ministry of Public Service, the Ministry of Foreign Affairs, large employers and professional bodies to ensure that their employees and members who benefitted from the LBF fulfil their contractual obligations.

Due to the alarming default rates in Lesotho, there should be legislation providing that, upon successful completion of the loan bursary students' higher education, defaults on such loans should be reported to a recognized credit bureau within a year from the date that the repayment should have commenced. This will prevent LBF beneficiaries from securing further loans from financial institutions, while defaulting on repaying their higher education loans as this will curb repayment default.

While individuals have the right to work anywhere around the globe, Lesotho loan bursary borrowers in foreign jurisdictions have an unbecoming propensity to default, as they are out of reach of the local authorities for enforcement purposes. It is, therefore, essential that a memorandum of understanding be signed between Lesotho's Ministry of Foreign Affairs on behalf of the government of Lesotho and the diplomatic missions in Lesotho issuing work permits for Basotho citizens to register those permits with Lesotho's Ministry of Foreign Affairs. This will assist in assessing whether the individuals concerned benefitted from the LBF and could then also assist in tracking the respective beneficiaries in foreign countries in the event they default on their repayment obligations.

The cost-sharing approach to higher education costs should be adopted in Lesotho, and the enabling legislation should provide guidelines for ascertaining which students need full financial assistance and which should only be afforded partial assistance. This would ensure that the neediest students are not excluded, while financing students whose parents are able to cover a portion of their higher education costs. Not only would this help in ensuring that more students are included, but it would also alleviate repayment obligations for those students who require only partial financial assistance.

The regulatory framework should allow for a hibernation period before a former beneficiary of higher education financing can be considered for financial assistance in advancing their higher education to the next level. This would serve as a safeguard to ensure that former beneficiaries do not only repay their debts when they need further financial assistance. This would temper the self-sponsoring tendencies of graduates who decide to repay their student loans only when they decide to pursue advanced degrees (as it is a current condition that students pay a certain percentage of their debt before being afforded further financial assistance).

These recommendations should be considered carefully as they are meant to steer higher education financing in Lesotho in the right direction, but will require significant commitment, appreciation and understanding from relevant stakeholders. They are, however, the necessary means by which higher education financing for greater inclusiveness could be attained in Lesotho. Unless the current situation is rectified, the sustainability of the LBF is threatened, as is the chance of greater numbers of future generations to have access to higher education. Unless Lesotho, as a developing country, deals adequately with the threat to the sustainability of higher education financing, her efforts for progressive free education will not be realized. It is, therefore, imperative that inadequacies in the current legal framework for higher education funding are appropriately addressed.

CONCLUSION

Considering the importance of higher education in human development, socio-economic growth and the development of nations, Lesotho should ensure that the sustainability of the LBF established to cater for higher education is not jeopardized. The problems identified in this article are a threat to such sustainability or inclusiveness. The first step is to repeal the laws that have been in place for four decades as they hinder any innovation measures that could be adopted for the successful administration of the LBF. These laws need to be reformed comprehensively in order to address all the recommendations made above to ensure the sustainability of the LBF.

Despite the lack of scholarly literature addressing the situation of higher education financing in Lesotho, extensive literature from different jurisdictions in both developed and developing countries indicates that there is a link between the proper administration of higher education financing schemes and their sustainability. It is, therefore, necessary that countries strive for schemes with affordable repayment terms, as an increase in repayments rates is instrumental for a fund like the LBF to revolve and to be in a position to assist future students. While governments are expected to finance citizens' higher education needs, it is clear that cost-sharing is the suitable model going forward in Lesotho, taking into consideration declining government revenues, which led to a reduction in government expenditure in higher education financing. Sustainability of higher education financing is an absolute necessity as a measure through which greater inclusiveness is realized and the successful participation of developing nations in the global knowledge-based economy is achieved.

CONFLICTS OF INTEREST

None