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Course Code: LAWS 7180A Course Name: RESEARCH REPORT (LLM ALS)

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Research assignment/Essay Topic: RESEARCH REPORT

THE ROLE OF FINANCIAL EDUCATION OF MEMBERS OF THE PUBLIC IN THE LEGAL MANDATE OF THE CENTRAL BANK OF LESOTHO.

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DEDICATION

I dedicate this dissertation to:

my wife ‘Mareitumetse and my daughter Reitumetse for their ever-lasting support, love, encouragement and their patience during my research;

my mother, brothers and sisters for the confidence they forever had in me and always inspiring me to accomplish the mission.

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I portray my gratitude to God and Christ, the Saviour for giving me the passion and ability to strive for better things.

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THE ROLE OF FINANCIAL EDUCATION OF MEMBERS OF THE PUBLIC IN THE LEGAL MANDATE OF THE CENTRAL BANK OF LESOTHO

ABSTRACT

This paper examines whether there is any role for financial education of the members of the public in the legal mandate of the Central Bank of Lesotho. The traditional functions of the central banks have been discussed to see first whether Central Bank of Lesotho performs functions similar to those of its sister banks. All the statutes that enshrine the functions of the central bank are analysed and interpreted in order to conclude whether and how financial education of the members of public forms part of the legal mandate. Conclusions and recommendations on how best to address financial education in Lesotho are made at the end of this report.

1 INTRODUCTION

It is one's understanding that construction of an organisation to undertake certain functions should involve spelling out those functions clearly and unambiguously. Central banks as statutory bodies are mandated, inter alia, with the achievement and maintenance of price stability in the interest of balanced and sustainable economic growth.[1] In recent times they are seen playing a role in the financial education process as one of the ways through which they achieve their statutory mandate.

The fact that most people, especially in the southern part of Africa, appear to be financially illiterate has become a critical issue that should be addressed in order to curb the risks associated with it.[2] If people become financially educated they are more likely to save money as well as challenge financial service providers to develop products that truly respond to their needs.[3] Over the past few years, many educational initiatives have been launched across the globe to strengthen the public's financial competence and knowledge.[4] Various institutions have put in

[1] Walter V Essential guide to payments: An overview of the services, regulation and inner workings of the South African national payment system (2015) 290.

[2] OECD 'Improving financial literacy: Analysis of issues of policies (2005) available at http://www.sourceoecd.org/finance/9264012567 accessed on 12 February 2017; also available at http://www.sourceoecd.org/education/9264012567.

[3] Organisation for Economic Co-operation and Development Policy Brief 2006 available at https://www.oecd.org>finance>financial.edu accessed on 29 January 2017.

[4] Expert Panel 'Economic education – The role of the central banks' available at https://www.bundesbank.de>TCBC accessed on 31 January 2017.

considerable effort in a number of jurisdictions to equip and enhance the public's understanding of financial issues. These include central banks as regulatory and supervisory bodies within the financial sector.[5]

The implications of financial illiteracy on the economy are profound, and this includes the financial system in Lesotho.[6] In light of the Central Bank of Lesotho's mandate, enshrined in the Central Bank Act[7], it is seen to be reactive rather than proactive in the context of financial education. This might be as a result of the fact that its express mandate does not contain any particular mention of the bank's engagement in financial education.[8] It may be skeptical to act ultra vires of its mandate but at the same time, by not doing something actively, the bank is causing the public's funds to be invested into risky platforms due to their lack of information on legally recognised financial instruments. This has a negative impact on the economy as a whole.[9]

The Organisation on Economic Cooperation and Development (OECD) suggests that:

> 'it is proper for the central banks to have the role in financial education as was the case in the United States where the Reserve Banks were seen collaborating with the financial institutions and the community groups to highlight the importance of financial education and to increase consumer awareness of the local financial educational opportunities.'[10]

Contrary to above, is the view that the role of financial education must be performed by the financial intermediaries who, in addition to providing financial information, have to make sure consumers are aware of the financial services available to them, and how to access them.[11]

This research will therefore look into whether financial education forms part of the mandate of the Central Bank of Lesotho. This will be undertaken first by looking into the traditional functions of the central banks as discussed by various authors, and there will be reference to the Southern African Development Community (SADC) Central Bank Model Law as the cornerstone in the SADC region in that regard. The legal mandate of the Central Bank of Lesotho as contained in various statutes, will thereafter come under the spotlight, with the Central Bank of Lesotho Act being the point of departure. The said mandate will be analysed

[5] Ibid.
[6] There are campaigns, among other things, which are employed to have the message relayed to the public on salient financial issues and financial decision making.
[7] s 6 Central Bank of Lesotho Act 2 of 2000.
[8] ibid s 6 thereof provides for the functions of the Bank.
[9] A good example of this happening has been when a number of people invest their monies in pyramid schemes in the hope that they will earn the alarming interests promised.
[10] Note 2 above.
[11] Financial intermediaries are seen as instrumental weapons which are even licensed and regulated in most jurisdictions in order to ensure their integrity.

with the aim of determining whether there is scope for the financial education of members of the public. There will also be a discussion of the case law to see how courts have ruled in relation to the mandate of the Central Bank of Lesotho. The analysis of the sources will then lead to a final conclusion as to where the duty of financial education lies; recommendations based on the discussions and conclusions will also be made.

2 THE TRADITIONAL FUNCTIONS OF A CENTRAL BANK

It is the expectation within the SADC region that central bank laws will be shaped in a manner that reflects the contents of the Model Law, with appropriate modifications to meet the needs of a particular country.[12] As enunciated under section 6 of the Model Law, the central bank shall among other things act as banker, adviser and fiscal agent of government, it shall act as banker to the commercial banks, it is responsible for licensing and supervision of the financial institutions and also to regulate their activities.[13] The central banks further assist the commercial banks in cases of financial difficulties.[14]

The above functions as reflected in the Model Law will form the crux of this section as the inherent and traditional functions of central banks. It is worth noting that the Model Law appears to be a form of template to be customised by various countries, with necessary modifications as the case may be.

2.1 Licensing and supervision

Central banks have the role of issuing licences to market players and thereafter supervising their activities to ensure that they are acting in line with their licence conditions. The authority to license is coupled with the power of setting out the criteria and rejecting applications of any establishment that does not meet the criteria.[15] Essentially, licensing is granting authority or

approval by the central bank to an applicant to conduct financial services business depending on

[12] Explanatory note to SADC Central Bank Model Law. Available at https://www.sadcbankers.org/Lists/News%20and%20Publications/Attachments/118/Model_Law(English2009)_SADC%20Central%20Bank%20Model%20Law.pdf accessed on the 30 March 2017.
[13] Ibid s 6.
[14] Ibid s 6(2)(m).
[15] Basle core principles on banking supervision 2012 available at http://www.bis.org/publ/bcbs230.pdf accessed on 12 August 2017.

the activity applied for and upon satisfying minimum requirements prescribed in the relevant statute.[16]

In order to qualify for the licence issued by central banks, there are minimum requirements which have to be met and they normally depend on the nature of the business applied for, for instance, whether it is for insurance business, banking or money lending, as other central banks regulate the whole financial sector.[17] It is upon the prospective licensee to lodge an application for a licence before commencing the operations and the central bank shall satisfy itself of, among other things, the capital adequacy, competence of the proposed management and most importantly, whether it will be in the interests of the public to grant a licence.[18]

It is in the licence that the activities that an institution is allowed to do are set out and it is a point of reference during the performance of the supervisory role. The licences are essentially reference points in times of supervision as they normally set out the conditions, the list of activities that can be done pursuant to it, the authority to revoke it, as well as the relations between the licensees and the consumers or the industry.[19] Licensing as one of the functions of a central bank is the key step in the supervisory process as it acts as the catalyst or filter for a safe and sound financial system.[20]

Central banks are generally entrusted with, among other roles, the supervisory power with the aim of attaining sound and efficient financial system in the interest of the consumers and the economy as a whole.[21] Central banks are further mandated to perform ongoing monitoring of the health of the financial system through an array of instruments, ranging from on-site and off-site examinations to reporting and auditing.[22] The supervisory role of the central banks is equated to the peculiarity of the financial institutions in the payment system, the financial system and the

[16] For instance s 11 of the South African Banks Act 94 of 1990 provides that it is an offence for a person in South Africa to conduct a banking business without registration from the Registrar of Banks.
[17] An example of such central banks would be the central bank of Lesotho whose functions will be discussed in the next section but for the purposes of this part, section 6(e) makes it mandatory to license or register every financial institution pursuant to various statutes.
[18] The Kenyan Banking Act of 2015 provides an example in laying out what the licensing function of the central bank entails. Even principle 5 of the Basle Core Principles on Banking Supervision are instructive on the criteria that has to be followed and the purpose for that criteria. Most jurisdictions have fit and proper guidelines for the key employees of the financial institutions in order to test the credibility of whoever will be on the driving seat of the establishment.
[19] R Lastra Legal Foundations of International Monetary Stability (2006) 86.
[20] ibid.
[21] C Wille S Keetse & J Mathee et al Principles of Financial Law (2007) 152. See also Johann de Jager 'Three Rivers District Council v Governor & Company of the Bank of England: A red flag or red herring for bank supervisors in South Africa?' (2001) SA Merc LJ 531 at 532.
[22] Lastra (note 19 above) 87.

national economy and as such they have to be involved in supervisory matters.[23] These institutions therefore oversee financial behaviour to monitor and control the risks facing both the financial institutions and the consumers of the financial services[24] and thus ensuring that organisations and activities are conducted in a safe, sound and law-abiding manner.[25]

It is through supervision that a central bank would know that financial institutions are in a sound financial condition and that they are conducting business in line with the terms of their licence. The supervisor then bears the responsibility to develop and maintain a forward- looking assessment of the risk profile proportionate to its systemic importance and, if the need arises, intervenes and resolves the licensee's financial problems before they become catastrophic.[26]

In their article, Bekink and Botha[27] state that:

> 'The central bank is one of the most important institutions created to manage economic growth and fiscal stability in a country. It is customary for most states in the world to create and empower a specific institution to manage and oversee certain financial powers and functions.'[28]

The above view buttresses the idea that central banks should have a supervisory role that achieves their common objective of ensuring stable financial conditions within their countries. They have influence and perhaps control over the conduct of affairs of the entire financial sector through the licensing and supervisory role[29] as the financial systems are prone to periods of instability, necessitating more effective supervision.[30] It is therefore clear that in every economy, the financial institutions have a critical role to play and central banks assume supervisory roles to alleviate the risks to which public funds are exposed.[31] The other closely related function to supervision is regulation, as discussed below.

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[23] C Goodhart The Evolution of Central Banks (1985) 8.
[24] Lastra (note 19 above) 85. See also R Sharrock C Hugo & V Lawack et al The Law of Banking and Payment in South Africa (2016) 64 – 65.
[25] G J Benston, R A Eisenbeis, & E J Kane et al Perspectives on Safe and Sound Banking: Past, Present and Future (1986) 245.
[26] Principle 8 of the Basle Core Principles on Effective Banking Supervision, although it talks to banks only, it gives the idea of how supervision has to be approached in order to yield good results.
[27] B Bekink & C Botha 'The role of a modern central bank in managing consumer bankruptcies and corporate failures: A South African public-law angle of incidence' (2009) SA Merc LJ 74.
[28] Ibid at 75.
[29] R S Sayers Central Banking after Bagehot (1957) 115.
[30] H Falkena, R Bamber & D Llewellyn et al Financial Regulation in South Africa 2 ed (2001) 11.
[31] Johann de Jager 'Comments on the effects of section 40 of the Banks Amendment Act 19 of 2003 on the section 60 of the Banks Act 94 0f 1990' (2005) SA Merc LJ 170. It could well be argued that jurisdictions which have not faced the financial crisis have well-functioning central banks.

2.2 Regulation

In order to attain an effective and proper functioning financial system for economic growth, central banks over and above their supervisory role, regulate the affairs within the financial sector. While supervision has to do with oversight and examinations? for the supervisors to obtain information,[32] regulation relates to making rules which have to be adhered to for a proper functioning of the financial system,[33] but they both have the chief purpose of protecting the safety of deposits and supporting the monetary objectives of the authorities.[34]

Regulation, according to Lastra, refers to 'the establishment of rules, the process of rule making and includes legislative acts and statutory instruments issued by competent authorities.'[35] It is through this mechanism that central banks are able to enforce penalties for wrongdoing, as spelt out in the relevant piece of legislation, and the severity depends on the nature of default.[36]

This function begins where a central bank is ensuring that financial services providers are properly licensed[37] and goes to the extent of prosecuting cases of misconduct endangering safety and soundness.[38] It is however important to note that regulators are given power to inspect where they reasonably suspect that the business that is conducted by any person is one that warrants permission, as was confirmed by the supreme court of appeal, where it was agreed that indeed the power extends to approaching the court for prohibition of such business.[39]

It is through regulation that central banks are able to alleviate the risks associated with cross-border transactions in the financial sector as they are able to set standards and manage domestic financial systems. Such standards must be applicable to everyone in the industry. The result of alleviation of the risks will be a high degree of economic efficiency and consumer protection.[40] De Jager states that 'central banks are important tools or safeguards countering the risk commensurate with cross-border investments.'[41] The nature of this function would then

[32] Benston et al (note 25 above) 245.
[33] Lastra (note 19 above) 87.
[34] De Jager (note 21 above) 532.
[35] Lastra (note 19 above) 89.
[36] Ibid.
[37] Sharrock (note 24 above) 64 – 65.
[38] The results of unsound financial conditions were seen during the global financial crisis that they have far reaching consequences.
[39] Corpclo 2290 CC t/a U – Care & Another v Registrar of Banks [2013] 1 All SA 127.
[40] Falkena (note 30 above) 1.
[41] Johann de Jager 'Safeguarding the crown jewels: Immunities of foreign central banks and South African Reserve Bank in South Africa' (2009) SA Merc LJ 145 at 146.

enable central banks as regulators to legally reject applications from foreign entities which are not subject to regulation in their home jurisdiction.[42]

Regulation is one of the weapons employed by central banks as the regulatory apparatus[43] in the world of central banking to ensure that there is stability in the financial system and as such, it plays a pivotal role in a particular local economy.[44] Capital adequacy, for instance, is prescribed by central banks based on prevailing circumstances of a particular economy they regulate and in line with Basel accord II. The financial institutions having met the minimum licensing requirements discussed under 2.1 above should maintain their financial soundness through engagement in proper lending for instance, so that their credit exposure is manageable.[45] It is only through proper regulatory frameworks established by authorities like central banks that the conduct of financial institutions can be curtailed to remain within the purviews of the law[46] and also within the permissible activities.[47]

In the event that the central bank finds that any licensed institution is not acting within the permissible activities, it has the regulatory authority to revoke the licence in order to protect the interests of the public and avoid the risks coupled with illegal conduct of business.[48] It is not enough that central banks regulate the financial sector, they also have some obligations to their government, as shown below.

[42] The standard has been set in the Insurance Core Principles under the heading foreign operations available at http://www.iaisweb.org/page/supervisory-material/insurance-core-principles//file/58067/insurance-core-principles-updated-november-2015 accessed on the 12 August 2017. It has even been acknowledged that sometimes there could collaboration with other supervisors, locally or in other jurisdictions to on issues such as information sharing to know actual conditions of a financial institution.

[43] R Wagner 'Central Banking and the Fed: A Public Choice Perspective' (1986 – 1987) 6 Cato J 519 at 527.

[44] Bekink and Botha (note 27 above) 74. Also W Berenson 'Current legal issues affecting central banking' (1995 – 1996) 29 Geo Wash J Int'l Law & Econ 337 at 355.

[45] The good example of the impact of good regulatory function could be traced back to the financial crisis where it has been established that there were lot of gaps in regulation of the financial institutions at either the Federal or State level.

[46] Task Force on the causes of the financial crisis pointed out that the Federal Reserve did not fully exercise its authority to regulate the abusive lending that was prevalent in the market as part of its mandate as was directed by the Congress in 1994. T the report is available at https://apps.americanbar.org/buslaw/committees/CL130055pub/materials/201001/causes-report.pdf accessed on 10 February 2017, specifically p 18.

[47] If central banks as the regulators do not properly carry out this function, it could lead to financial crisis, hence the need for substantial regulation of the activities.

[48] Normally the law would require that the central bank give a hearing before embarking on this kind action in order to satisfy the rules of natural justice as provided for instance under section 6 of the Kenyan Banking Act 2015.

2.3 Adviser to government

All government accounts and reserves, either locally or abroad, are within the custody of the central banks and that is done as a result of their being bankers, advisers and fiscal agents of government. According to De Jager, 'central banks usually constitute monetary authorities capable of determining monetary policy within their respective jurisdictions and are normally responsible for maintenance, management and control of the reserves of their respective countries.'[49]

Unlike the commercial banks, which interface with the general public, the central bank has a direct relationship with government as it is created to manage economic growth and fiscal stability in a country.[50] This attests that the central bank should deal chiefly with government as banker and adviser and should not be in competition with other financial institutions in the business they conduct with the public.[51] In this respect, commercial banks can seek available and proper remedy against central banks that exceed their mandate and as such they only remain government's bank and source of expert information, independent and disinterested advice.[52]

The function of banker to government is carried out by central banks in a plethora of ways which will not be enumerated in this piece of work, save to say that central banks conduct the banking accounts of the government departments[53] and make temporary advances to government, as well as carrying out government's transactions involving purchase or sale of foreign currencies.[54] This precipitates into central banks being agents through which the government's financial operations at home and abroad are concluded.[55]

The services are, notably, receiving and making payments; advising and assisting in the operation of the accounts[56] and even lending to government when there is a desperate need for credit.[57]

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[49] De Jager (note 41 above) 145.
[50] Bekink and Botha (note 27 above) 75.
[51] All central banks actually perform functions of the commercial banks to their customers as they accept deposits from government institutions and transfer funds on government's behalf.
[52] According to Charles Goodhart, they have a privileged legal position as bankers to government.
[53] H Crawford 'The central banking system of Columbia' (1955) 24 University of Cincinnati Law Review 331 at 336
[54] MH De Cock Central Banking (1974) 34.
[55] Sayers (note 29 above) 109, see also on the role as banker and agent, Johann de Jager 'The South African Reserve Bank: An evaluation of the origin, evolution and status of the central bank' (part 1) (2006) SA Merc LJ 159 at 162.
[56] R Cranston Principles of Banking Law (2002) 112.
[57] Selmer D 'Focus: The politics of central banking' (1994) 3 E Eur Const Review 48 at 50.

In the ordinary parlance then it could be argued that the relationship of a central bank and government is that of bank-customer, resulting in the contractual obligations of a debtor to the creditor. As a result of that relationship, the central bank undertakes to receive money and collect the bills on behalf of government as its customer.[58] The mandate goes further into discharging the payment obligations of government on clear instructions from the authorised signatories so that it could be held accountable for not fulfilling that mandate.[59] In addition to central banks advising their government, they act as bankers to commercial banks and the content of that function is ruminated below.

2.4 Banker to the banks

One of the functions of a central bank that is closely related to that of being banker or adviser to government is that a central bank, because of its nature, acts as a banker to other banks. It is traditional for a central bank to act as a custodian of the cash reserves of commercial banks, thus being in a position to be a bank of clearance, settlement and transfer.[60] It is therefore convenient for a central bank to net[61] the accounts between the banks most easily and conveniently.[62] Interbank settlements are done through the operation of a clearing house by the central bank[63] and as payment systems are central to the financial system, most of them are regulated by the central bank.[64]

The services offered by commercial banks to their customers are exactly those that are effected by the central bank by affording them the same facilities;[65] this results from the very fact that their liquidity is centralised at the central bank.[66] Banks need to have operational accounts with the central bank to enable it to settle their obligations in a similar fashion to how the general public or ordinary customers use their banks.[67]

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[58] Joachimson v Swiss Bank Corporation [1921] 3 KB 110 (CA).
[59] Malan et al Bills of Exchange, Cheques and Promissory Notes in South African Law 2ed (2009) ch 17.
[60] De Cock (note 54 above) 57 & 107.
[61] Netting as defined under section 2 of Lesotho Payment System Act 11 of 2014 means determination of the net payment obligations between two or more settlement system participants within a payment clearing house or within the payment and settlement system.
[62] De Cock (note 54 above) 109. See also T Padoa-Schioppa 'Central banks and financial stability: Exploring a land in between' available at https://www.ecb.europa.eu/events/pdf/conferences/tps.pdf accessed on 19 June 2017.
[63] G O'Driscoll 'Rethinking central banking' (2017) 37 Cato J 287.
[64] Walter (note 1 above) 263.
[65] It means therefore that a commercial bank can sue a central bank in the unlikely event that its settlement was not properly effected in the clearing house as the central bank is acting as an intermediary for interbank settlements.
[66] TM Humphrey & RE Keleher 'The lender of last of resort: A historical perspective' (1984) 4 Cato J 275 at 276.
[67] Cranston (note 56 above) 111.

It is therefore clear that, because of the nature of a central bank, it is capable of keeping in custody the accounts of other banks. This enables it to properly facilitate the settlement of interbank payments, thus speeding up the transactions.[68] It is not enough that central banks are bankers to commercial banks but they should also be able to rescue them during liquidity problems by acting as a lender of last resort. An in-depth discussion of that function follows immediately.

2.5 Lender of last resort

It is common that everyone in the profit-making business faces a risk of failure that might ultimately lead to closure. Financial institutions are not an exception to those risks, however their risk is critical as it is likely to affect the economy and the public in general. In order to mitigate the risks associated with financial institutions failing, central banks carry out the role of lender of last resort.[69] The function has been characterised as emergency liquidity assistance by central banks to commercial banks in distress. This is made possible by the supervisory[70] and regulatory role, as central banks help to assess and evaluate the extent of the solvency and liquidity of an assisted institution.[71]

In exceptional cases, the central bank acts as the lender of last resort and rescues where a particular institution faces difficulties.[72] However, it has been argued that this function is the primary justification for the existence of the central banking system, which has to play a pivotal role during the period of economic crisis.[73]

The central bank's role as lender of last resort is aimed at preventing illiquid institutions from failing, although the role remains discretionary as evidenced when the Federal Reserve backed the government of the United States in arranging the rescue of Bear Stearns bank in

[68] This enables a holder of a First National Bank debit card to withdraw cash from an automated teller machine (ATM) of any other commercial bank without the machine declining or rejecting the card because the process of settling those accounts takes place in the clearing house.
[69] Lastra (note 19 above). See also A Burns 'The anguish of central banking' (1987) 73 Fed Res Bull 687 at 695.
[70] J Rossouw, V Padayachee & B Bordiss 'Central banks and fractional reserve banking: Money creation out of nothing?' (2015) 7 African Review of Economics and Finance 105.
[71] E Rosengren 'Bank supervision and central banking: Understanding credit during a time of financial turmoil' (2008 – 2009) 28 Banking & Financial Law Review 221 at 231.
[72] Cranston (note 56 above) 110.
[73] B O'Neil 'The lender of last resort: A comparative analysis of central banking and fractional-reserve free banking' (2013) Libertarian Papers 163.

March 2008.[74] Central banks should consider all reasonable demands for assistance with liquidity[75] to maintain the confidence of the public in the financial system.[76] 'Since the development of modern banking, the first line of defence against the widespread financial crises has fallen to the lender of last resort.'[77] The role of the lender of last resort, which has the aspect of bank rescue[78] at national level is comparable to the role performed by the International Monetary Fund at international level[79] as it is meant for injecting capital in the financial markets in order to hedge the financial sector.[80] It is further upon the central bank to act as the lender of last resort in cases of a 'flight to cash', where there is a shock to the financial system as a whole and cash is withdrawn from the range of banks but not redeposited with other banks.[81]

The principle underlying the assumption of the lender of last resort therefore postulates that 'central banks should lend freely during a period of financial distress to the solvent bank suffering liquidity problems to prevent their demise, but only at interest rates that are significantly high to dissuade the banks suffering difficulty from borrowing….'[82]

In terms of the above quote, it is important to note that while central banks should not encourage financial crisis within the financial system, it remains their function to assist in the event that financial distress occurs. The challenge however is that the role is said to be a discretion, so it could lead to bias and moral hazard, as was seen during the 2007 – 2009 financial crisis when the Federal Reserve decided to selectively assist the financial institutions which were facing liquidity problems.

As important as they appear, the above functions depend on the regulatory structure adopted in a particular jurisdiction for their proper implementation. Regulatory structures differ substantially across the world and there is no accepted best practice on the ideal structure as each

[74] There was a decision not to rescue Lehman Brothers later in mid-September the very same year, hence strengthening the point that such is a discretionary role. See report on Financial Crisis of 2007 – 2009: Causes and Contributing Circumstances, September 2009 available at https://apps.americanbar.org/buslaw/committees/ CL130055pub/ materials/201001/causes-report.pdf accessed on the 12 August 2017. Even G Selgin 'The futility of central banking' (2010) 3 Cato J 465 at 467 where the author emphasized that central banks are inherently discretionary institutions and cannot resist exercising discretion.
[75] Lastra (note 19 ab0ve) 114.
[76] De Cock (note 54 above) 92.
[77] Benston et al (note 25 above) 109. See also Humphreys and Keheler (note 66 above) 275. Again M Kagade 'Bank rescue policies – a comparative analysis' (2009) 126 Banking LJ 552.
[78] Cranston (note 56 above) 110.
[79] Lastra (note 19 above).
[80] J London 'A century of central banking: What have we learned?' (2014) 34 Cato J 213 at 225.
[81] Cranston (note 56 above) 110.
[82] Rossouw et al (note 70 above) at 121.

system is considered to have both strengths and weaknesses.[83] There are four most possible structures, the first being institutional approach in terms of which a firm's legal status identifies which regulator is tasked with supervising its activities and the scope of such entity's permissible business activities.[84] The second approach is the functional approach where, for instance in countries like Spain, Italy and France, supervisory oversight is determined by the type of business that is being transacted by the entity without regard to its legal status and each business may have its functional regulator.[85] The third approach is the twin-peaks, according to which regulatory functions are separated between at least two regulators.[86] Between the two regulators, for instance, one is entrusted with prudential supervision and the other focuses on the business or market conduct regulation, as provided in the preamble to the South African Financial Sector Regulation Act. It alludes that the 'Act is to establish a system of financial regulation by establishing the prudential authority and the financial sector conduct authority, and conferring powers on these entities….'[87] The prudential authority regulates the prudential aspects of banks and all non-bank financial institutions while the financial sector conduct authority regulates market conduct. The last regulatory approach is a single regulator, which is sometimes known as the integrated approach. In Germany and Lesotho, for example, the regulator is mandated with conducting both prudential oversight and business conduct regulation for all financial services.[88] The regulatory agencies in this structure are vested with primary supervisory responsibility for more than one traditional sector.[89]

In light of the above discussion relating to the functions which are regarded as traditional to all the central banks and the regulatory structures available, it could be fertile that the legal mandate of the Central Bank of Lesotho be scrutinised. The next section will delve into the legal

[83] 'A safer financial sector to serve South Africa better' (2011) National Treasury Policy Document available at http://www.treasury.gov.za/documents/national%20budget/2011/A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf accessed on 25 July 2017.

[84] China, Mexico and Hong Kong are the known examples of the jurisdictions practising the institutional approach to financial sector regulation and supervision.

[85] Note 83 above.

[86] South Africa has just enacted the Financial Sector Regulation Act 9 of 2017 to provide for the twin-peaks model of regulation. Australia, Canada and the Netherlands have been known to use the model for some time now.

[87] Ibid, note the preamble to the Act for a detailed purpose of having the twin-peaks.

[88] Note 83 above. The legislation discussed under part 3 below prove that Lesotho has adopted a single regulator approach.

[89] HM Schooner 'A comparative analysis of consolidated and functional regulation: super regulator: The role of central banks in the bank supervision in the United States and the United Kingdom' (2003) Brooklyn Journal of International Law 411

mandate of the Central Bank of Lesotho as provided for in various pieces of legislation in order to determine the role of the financial education of the members of public.

3 THE LEGAL MANDATE OF THE CENTRAL BANK OF LESOTHO

The legal mandate of central banks has proved capable of varying in line with the regulatory approach adopted in a particular territory. The Central Bank of Lesotho derives its mandate from a number of statutes which will be analysed in order to establish whether there is any role for financial education of members of the public. The regulatory structure of financial services in Lesotho has a great influence on the functions that a central bank can perform and as such financial education will also be looked at with that idea at the back of the mind in order to note whether there is any link between the legal mandate and financial education.

3.1 The Central Bank Act

Lesotho is not an exception to other sovereign states with their own central banks although the difference lies in the manner in which such banks are created. These banks are either provided for as some of the state institutions, with an enabling provision in the constitution, or they are created by specific statute. Examples of the latter can be found in the South African Reserve Bank, which was first established under the Currency and Banking Act,[90] and the Namibian Central Bank, which was established in line with the constitution.[91] The Lesotho Monetary Authority as established in terms of Lesotho Monetary Authority Act[92] was changed to the Central Bank of Lesotho per Lesotho Monetary Authority (Amendment).[93] The existing statute then repealed the Lesotho Monetary Authority Act and remained as Act to continue the existence of the Central Bank of Lesotho.[94]

It is the objective of the central bank to achieve and maintain price stability in Lesotho.[95] The need to achieve the objective has been coupled with various functions as the bank shall:

> 'foster the liquidity, solvency and proper functioning of a stable market-based financial system; issue, manage and redeem the currency of Lesotho; formulate, adopt and execute the monetary policy of Lesotho; to

[90] Act 31 of 1920.
[91] The Constitution of the Republic of Namibia, Government Gazette 21 March 1990, article 128(1) thereof instructs that the central bank of Namibia be established by an Act of parliament to control the money supply, the currency and the institutions of finance and to perform all other functions ordinarily performed by a central bank.
[92] s 3 (1), Lesotho Monetary Authority Act 13 of 1978.
[93] Act 2 of 1982.
[94] Preamble to the Central Bank Act 2 of 2000.
[95] Note 7 above s 5.

> formulate, adopt and execute the foreign exchange policy of Lesotho; license or register and supervise institutions pursuant to the Financial Institutions Act..., the Money Lenders Act…, the Building Finance Institutions Act and the Insurance Act; own, hold and manage its official international reserves; to act as banker and adviser to, and as fiscal agent of the Government of Lesotho; promote the efficient operation of the payments system; promote the safe and sound development of the financial system; and monitor and regulate the capital market.'[96]

It is thus clear from the wording of section 6 that the bank has both regulatory and supervisory functions. These functions are performed in terms of other enabling statutes, such as the Payment Systems Act,[97] Central Bank (Capital Markets) Regulations,[98] the Guidelines on Mobile Money, Central Bank of Lesotho (Collective Investment Schemes) Regulations,[99] the Financial Institutions Act,[100] Insurance Act[101] and Money Lenders Act.[102] An in-depth discussion of the said laws will follow in the next section.

3.2 Financial Institutions Act

As has been stated in the Central Bank Act, one way through which the objective of the Central Bank could be attained is through regulation and supervision of the financial institutions. The nature of the risk attaching to banking business precipitated the enactment of the Financial Institutions Act.[103] The Central Bank of Lesotho is given the authority to license and supervise all the financial institutions intending to transact banking or credit business in Lesotho.[104] In terms of the Financial Institutions Act:

> '[b]anking or credit business … shall not be transacted, either in Lesotho or abroad by a local financial institution, or in Lesotho by a foreign financial institution, or by any other person, unless that financial institution or person is in possession of the license issued by the Commissioner….'[105]

As a result of the Financial Institutions Act, it is unlawful for anyone to conduct banking business without a licence from the commissioner who mans the whole sector. The licence in this line is the primary weapon through which the central bank can exercise authority over the

[96] Ibid s 6(a) – (j).
[97] Note 61 above.
[98] Legal Notice 76 of 2014.
[99] Legal Notice 7 of 2001.
[100] Act 3 of 2012.
[101] Act 12 of 2014.
[102] Act 25 of 1989.
[103] Note 100 above.
[104] Note 7 above. This is in line with principle 1 of the Basle Core Principles for Effective Banking Supervision (available at http://www.bis.org/publ/bcbs230.pdf accessed on 12 August 2017) which provides that authorities should have power to among other things authorise and supervise the banks.
[105] Note 100 above s 5(1).

licensed institutions in order to protect the interests of the public and the economy as well as maintaining a stable financial sector.

The need to have a licence is very instructive that there are licensing criteria to be met as set by the Central Bank and that is in line with the core principles that the licensing authority has the power to set the criteria and reject the applications that do not meet the criteria. An applicant shall submit, inter alia, full particulars of the registered office and qualifications of chairperson, director and every officer.[106] The ownership structure, capital adequacy and financial history of an applicant as well as contribution of the institution to the community need to be proved to the satisfaction of the Commissioner in addition to the officers of an applicant.[107]

The nature of risks involved in the banking industry has resulted in the need to have people of some recognised calibre to be in charge of the affairs of the financial institutions.[108] The latter in itself will help the central bank as the commissioner to build confidence within the financial sector as submission of the personal information helps to discern to some extent, whether one is fit and proper to manage the affairs of an institution requesting a licence.

The legal mandate of central bank goes further in ensuring that licensees are doing business within the purview of their licence and protect the interests of consumers by doing business within defined parameters.[109] Financial soundness and compliance with the requirements of the Financial Institutions Act are made possible through the supervisory tool as a function of the central bank.[110]

It is further within the scope of the Bank's mandate to direct the manner in which the affairs of a licencee shall be conducted and even to the extent of taking remedial or corrective actions to address safety and soundness concerns. If the commissioner is of the opinion that a licensed institution conducts its affairs in an unsafe and unsound manner or in violation of the Act, the commissioner may require such institution to immediately take such measures as may be necessary to rectify the situation.[111] This function provides the power to revoke a licence in the

[106] Ibid s 6.
[107] Ibid s 8.
[108] Financial Institutions Act s 42(7) provides that the chairman and all members shall possess legal capacity and be fit and proper persons and be at least 30 years of age.
[109] Part VIII Financial Institutions deals specifically with the supervisory function.
[110] In terms of Section 50 of the Financial Institutions Act, licensed institutions are required to submit their balance sheet to the commissioner as one of the mechanisms employed to assess soundness of an institution. Also Note 11 above principle 5 of the Core Principles.
[111] Note 100 above s 55.

event that the commissioner deems it necessary to do so[112] and this is done in the interests of the banking system as a whole and not any individual stakeholder.

The primary function of the Financial Institutions Act is to give the Central Bank of Lesotho powers to license, supervise and regulate the banking and non-banking financial institutions as a way of protecting the financial sector.[113] It has not been provided that in performing its functions provided for within its sphere, the Central Bank of Lesotho may educate the members of the public about the implications of its provisions.

A closer look at the Financial Institutions Act reveals that the financial sector in Lesotho includes even insurance business that is supervised by the central bank in accordance with the Insurance Act. The provisions of the said Act will also be analysed hereunder to determine whether there is any role for financial education of members of the public.

3.3 Insurance Act

As one of the tools of regulating the financial sector, there has been promulgation of the Insurance Act to give the central bank powers to regulate insurance business in Lesotho.[114] As the Commissioner of Insurance,[115] the central bank is responsible for the general administration and enforcement of the Insurance Act and among other things ensures effective supervision, regulation, control and protection of the insurance business.[116] In the case of MKM Marketing Ltd and Others v Commissioner of Insurance and Another[117] one of the arguments from the appellants was that the petition filed by the commissioner ought to have failed because the petitioner had no locus standi. It was therefore necessary in that decision to clarify who the

Commissioner of Insurance in Lesotho is, and it was held that the Central Bank of Lesotho is the Commissioner of Insurance.

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[112] Note 100 above.
[113] Note 100 above the Preamble.
[114] The Insurance Act 1976 that is referred to under the Central Bank Act was repealed by the current 2014 Act. In terms of Legal Notice 55 of 2014, the 1976 Act was repealed and replaced in order to provide for consolidation, administration, supervision, regulation, control. Protection and development of insurance business in Lesotho, thus ensuring that the insurance industry in Lesotho prudently meet the demands of the economy for risk management and stimulation of growth in the investment sector and the new Act further complies with the Core Principles of the International Association of Insurance Supervisors, of which Lesotho has been a member since 1999.
[115] Note 101 above s 3(1).
[116] Core principle 1 of International Core Principles developed by the International Association of Insurance Supervisors makes it a requirement that insurance supervisors have legislatively defined authority, http://www.iaisweb.org/page/supervisory-material/insurance-core-principles//file/58067/insurance-core-principles-updated-november-2015 accessed on the 12 August 2017.
[117]MKM Marketing Ltd and Others v Commissioner of Insurance and Another (C of A (CIV) 24 of 2011) [2011] LSCA 39 (21 October 2011).

Although the case was decided under the auspices of the 1976 Act, the central bank still remains the Commissioner of Insurance and as such is bestowed with all the power to ensure proper administration of the insurance business. Such power goes even into registration and renewal of the licences of both insurers and insurance intermediaries.[118]

It follows from the registration of insurers and intermediaries that integrity of the business is maintained and as such the sector will be stable in the interests of the consumers. The case of Phokeng Funeral Parlour v The Central Bank of Lesotho[119] is an example where the court noted that it is the Commissioner of Insurance who is obliged and mandated to protect the public.[120]
The application for winding up a funeral undertaking was heard and granted despite the fact that the appellant was not registered as a company doing insurance business in Lesotho. A company can be wound up whether or not it is registered as long as the continuance of the operations of the insurance company is not in the public interest.

The licences are not granted to anyone who lodges an application but are issued to persons satisfying the criteria set out in the Act.[121] In that way, the central bank will be able to assess the safety and soundness of the proposed business model so that it does not affect the financial system. The central bank does not only license insurers and intermediaries but may offer protection, enlightenment and guidance to policyholders and the public in matters of insurance policies and their application or implications.[122] The section gives the bank latitude to decide whether it can provide information to members of the public when it comes to issues around insurance business and the implications around their policies. It then remains to be concluded whether the spirit of that section could be interpreted as financial education or whether it forms part of financial education.

Over and above awareness that has been articulated above, the commissioner conducts inspection for the purposes of prudential supervision to determine whether the licensees are in

[118] Note 101 above s 3(2) (a). Even the Insurance Core Principle four is instructive that a legal entity which intends to engage in insurance activities must be licensed before it can operate within certain jurisdictions and the requirements and procedures must be clear.
[119] Phokeng Funeral Parlour v The Central Bank of Lesotho (C of A (CIV) 45 of2013) [2014] LSCA 26 (24 October 2014).
[120] Ibid at para 6.
[121] A detailed registration process for new applicants has been provided for under section 8(2) and 72 of the Insurance Act dealing with registration of insurers and insurance intermediaries respectively. I confirm that I personally and physically consulted the Act.
[122] Note 101 above s 3(2)(d). There are normally radio and television programmes through which Central Bank employees from insurance supervision and corporate affairs discuss the contents of the Insurance Act and teach the general public of the required conduct of insurance business.

sound financial condition and in compliance with the requirements of the Insurance Act.[123] The results of inspection would dictate an action that is deemed fit by the commissioner, as in MKM Marketing Ltd case,[124] where the commissioner applied for the winding up of an illegal insurance business on the grounds, among others, that the continued operation of that business was not in the public interest. As a regulatory measure, a company doing insurance business can be wound up whether or not registered under the Insurance Act.

The promulgation of the Insurance Act was not the end of the endeavours for safety and soundness of the financial system in Lesotho; there was also the promulgation of the Collective Investment Schemes Regulations as legislation granting and extending on the general mandate under section 6 of the Central Bank Act. A detailed discussion of the provisions of the said regulations follows hereunder in order to appreciate what they provide for in relation to a legal mandate and financial education.

3.4 Central Bank of Lesotho (Collective Investment Schemes) Regulations

Other institutions which are regulated by the central bank are the collective investment schemes although their regulations are not as comprehensive as other pieces of legislation.[125] Instead of regulating collective investment schemes they seem to be focusing more on the managers of the collective investment schemes but that is not the topic for this discussion as the point of discussion in this work is the mandate as outlined in the statute.[126]

There are various definitions that could be ascribed to monitoring and regulating financial markets as generally stated in the Central Bank Act.[127] The collective investment schemes are some institutions which operate within the financial markets of the country. It is against that section that the central bank is mandated to be Registrar of collective investment schemes to

commission the activities related to their affairs in the interests of the economy as a whole.[128]

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[123] Note 101 above s 89(1) – (9).
[124] Supra note 117.

[125] Principle G (24) of the principles of securities provides that there has to be standards set for eligibility, governance organisation and operational conduct of those who wish to market or operate a collective investment scheme. Full text of the principles available at http://www.compliance-exchange.com/governance/library/ioscoprinciples2010.pdf accessed on 07 October 2017.
[126] Note 99 above
[127] Note 7 above s 6 (j).
[128] Note 99 above regulations 43 & 44.

The foregoing gives authority to the central bank that in order to achieve its objective, it has to inter alia license the collective investment schemes which are likely to create floodgates should there be no regulatory authority on their part.

It is the Registrar's function to ensure that managers of collective investment schemes are registered upon them satisfying requirements set out in the regulations.[129] In order to ensure that no person engages in the business of collective investment schemes without prior approval of the Registrar, it is within the Registrar's mandate to declare a specific type of business a collective investment scheme to which the regulations will then apply.[130]

Following registration and approval of the activities relating to collective investment schemes, the regulations go further under part VI to grant supervisory authority to Registrar. It is therefore the Registrar's function to carry out both onsite and offsite examination as it deems fit in the circumstances of each case.[131] Onsite supervision means that the regulator inspects the business at the offices of the licensee while offsite means that information is transmitted to the regulator by the licensee. The proper recourse would be dictated by the outcome of examination of the affairs of a particular scheme. Collective investment schemes regulations like all other statutes administered by the Central Bank, are premised on registration or licensing, regulation and supervision of activities within the financial system and all the other functions are meant to augment the premises of the regulations. The manner in which the function of the Registrar should be done under the regulations does not expressly provide for awareness or education although the education part could enable members of the public to assess risks associated with the products sold.

Over and above regulation of collective investment schemes there will be discussion of the Mobile Money Guidelines, which are meant to regulate the affairs of mobile network operators. The rise of electronic payments precipitated Mobile Money Guidelines to assist in the transfer of insignificant amounts.[132] The contents of the Guidelines are discussed below in order to establish how they relate to the legal mandate of the central bank and financial education.

[129] Ibid regulations 6 & 8.
[130] ibid regulation 11.
[131] The Registrar may request the information or require appearance in person of any person involved in the administration of the collective investment scheme or it can appoint examiners to investigate at any time even without prior notice being given to management of the scheme as outlined under regulation 44 thereof.
[132] Guidelines on Mobile Money 2013, Appendix 11 to the Guidelines provides mobile payment transaction limits, full text available at http://www.centralbank.org.ls/NPS/default.php accessed on the 26 August 2017.

3.5 Guidelines on Mobile Money 2013

The Central Bank of Lesotho has developed Guidelines on Mobile Money to advance its mandate of formulating and implementing policies to promote the establishment, regulation and oversight of the efficient and effective payment system. The Central Bank authorises issuance of mobile money in Lesotho in as much as it has the power to terminate the issuance of mobile money.[133]

The nature of business that mobile network operators conduct as subsidiary to their main telecommunication function has a significant impact on the financial system and as such warranted a different authority with expertise in that line. The Central Bank was therefore better positioned to regulate mobile money business in the interests of the economy by issuing letters of no objections to carry on the business. The said letters create authority over the operators so that they do not defeat the objective of the central bank as they embark on some aspects that relate to the business of a bank and as such necessitate control.

The guidelines not only grant the power to authorise the operation of mobile money but they go further in vesting examination or supervisory power of the affairs of the mobile money issuer. There is an established procedure outlined in the guidelines on how to inspect the operations of the issuer and it includes notification of the operator and giving a report and directives by the Governor following the inspection.[134] The availability of powers to inspect makes it possible for the central bank to protect the financial system because examination reports will reveal the status of the business and dictate the proper course to be taken.

The issuance of mobile money is currently done by only two companies holding telecommunications licences from the Lesotho Communications Authority[135] in addition to licences issued by the central bank. Despite the importance of having educated members of the public on issues of mobile money, there is no provision within the guidelines which allows the central bank to do financial education of the public as far as mobile money is concerned.[136]

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[133] Ibid guideline 6 & Appendix 5 thereof.

[134] There is a need for segregation of funds within the mobile network operators to avoid havoc likely to erupt from an entity holding two licences from two different regulatory bodies. The actual steps followed during examination are contained in appendix 13 to the Guidelines on Mobile Money.

[135] Part B of the Guidelines provides that an issuer of the mobile money be a company incorporated in Lesotho and duly registered by the Lesotho Communications Authority.

[136] The inclusion of financial education as one of the functions of the Central Bank in relation to mobile money could be a tool meant to address limited information on two arms of business regulated by different regulators.

In addition to formulating and implementing policies to promote the establishment, regulation and oversight of the efficient and effective payment system, section 6 of the Central Bank Act provides for supervision of money lenders as discussed hereunder to tie in with the crux of this report.

3.6 Money Lenders Act

As has been stated above, there is another category of institutions in Lesotho dealing with the funds of the public. These are money lenders and the central bank as the Commissioner of financial institutions is responsible for licensing money lenders upon application for such a licence.[137] The licence shall be granted upon satisfaction of the licensing requirements which, among other things, require the money lender or key employee, in the event of a juristic person, to be fit and proper to manage money-lending business.[138]

Supervisory and regulatory functions of licensees follow issuance of an operating licence to a money lender and the mechanism employed by the Commissioner to ensure proper functioning of money lenders is examination of their affairs in order to determine compliance with the requirements of the Act and any other law as may be applicable.[139] The impact that money lending can have on the entire economy warranted that the Commissioner be given a legal mandate to regulate the entire business by setting the parameters, including the interest to be charged.[140]

As brief as it is, the Money Lenders Act does not provide for the education of the public with regard to its administration. The scope of functions of the central bank was further extended by introduction of capital markets regulations. Their contents and analysis follow in the next section to assess any role for financial education in the legal mandate of the central bank.

3.7 Central Bank (Capital Markets) Regulations

The Central Bank has been endowed with the mandate of monitoring and regulating capital markets[141] and that has been spelled out in capital markets regulations. It is in terms of those

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[137] Note 102 above s 3.
[138] Ibid section 3(5).
[139] S 9B Money Lenders (Amendment) Act 6 of 1993.
[140] A licensed money lender is by law required to cap the interest rate at 25% per annum otherwise the interest would be regarded as unconscionable in terms of section 6 of the Money Lenders Act.
[141] Note 7 above s 6(j).

regulations that the central bank is appointed the Registrar of capital markets with its functions clearly spelled out[142] to attain a proper functioning financial market.[143]

The regulations begin by setting out the objectives of the Registrar which objectives are achievable through a plethora of functions. The main objectives are:

> '[t]he creation, maintenance and regulation through implementation of systems in which the securities market participants are self-regulatory and markets in which securities can be issued and traded in an orderly, fair, efficient and transparent manner, also the protection of investors, the reduction of systemic risk and promotion of market confidence.'[144]

The Central Bank of Lesotho as the Registrar licenses, regulates, monitors and supervises the activities of any securities market, exchange or facility in order to attain the above objectives.[145] Any person intending to carry out the business of securities exchange lodges an application with the central bank as the Registrar of capital markets and there are set requirements to be met by that particular person, with the key requirement being that such person must be a public company.[146] In as much as the Registrar can license, there is authority to refuse to grant a licence or withdraw the already granted licence in order to shield the financial sector.[147]

Licensing and supervision in this sense can be tantamount to the authority that the central bank creates in order to manage the affairs within the capital markets and then hold whoever breaches the licence conditions to account. The financial instruments within the capital markets therefore cannot be issued by anyone other than the legally recognised institutions by the Registrar. The need to apply for a licence to operate within the capital markets is attested by the prosecution that one could face upon conviction for contravening the licensing provisions.[148]

The Registrar's function does not end at issuing licences to operate within the market but there is a continuing obligation of ensuring that there is proper compliance with the regulations and the rules of practice.[149] Further, there is an obligation to disseminate information to the

[142] Note 98 above regulations 5 & 6.
[143] T Mollers 'Regulating credit rating agencies – the new United States and European Union law – Important steps or much ado about nothing?' (2009) 4 TSAR 674 at 677, the author in that article noted the importance of legislation in the capital markets.
[144] Note 98 above regulation 6(1)(a) – (d).
[145] Ibid regulation 6(2) (a).
[146] Ibid Regulation 14.
[147] There are very detailed circumstances under which an applicant shall be granted a licence. The Regulations provide a detailed description of when the licence can be withdrawn.
[148] Note 98 above regulations 14(2), 25(2), 26(2) 27(2) and 28(2).
[149] Note 98 above regulation 6(2) (b).

public on capital market and securities.[150] There is recognition that members of the public should have information pertaining to the capital market and securities. The said information should be made available by the central bank as dictated by the regulations, although it has not been articulated how such information shall be obtained. This has been left open-ended as one could reasonably assume that the information involved relates to the value of shares and the financial position of listed companies.

In addition to licensing the securities exchange, the Registrar is mandated to license broker dealers, stock brokers, investment advisers and their representatives as the case may be, provided they meet the criteria set out in the regulations.[151]

Capital Markets Regulations are not the last statute? to enshrine the legal mandate of the Central Bank as the nature of the business relationship that prevails within the financial sector in terms of all the statutes discussed above is coupled with transfer of monetary value, either locally or across borders. The exposure to financial crimes brought about by the globalisation of business relations dictated a need for a repository of power to guard the payment systems in Lesotho as a way of protecting the financial sector. That was made possible through the enactment of the National Payment Systems Act, which is discussed hereunder to see how it relates to the financial education and legal mandate of the central bank.

3.8 Payment Systems Act

The functions of clearing, settling and transferring cash between system participants has proved to be of great significance to the financial sector and the community as a whole because of its potential to speed up nationwide settlements and transfers.[152] The significance of the said role warrants that it be legally vested in an independent institution and the Central Bank of Lesotho

[150] Just like in the case of Insurance Act in 3.3 above, there are weekly radio programmes where members of the public are informed of the business of the stock exchange and its importance in the financial markets. The presentations are made by the employees of the Central Bank as the Registrar as one of the regulatory measures in the capital markets.

[151] Note 98 above regulations 25 – 30 set out the category of market players who are required to hold the licences and go even further to provide the manner in which licences should be granted and/or renewed, for instance, a stockbroker, broker-dealer or dealer's licence shall only be granted to a company incorporated under the Companies Act 2011 as provided for under regulation 30(1) and 'an investment advisor's licence may be granted to an individual in consideration of educational and other experience, the ability of a person to provide investment advice honestly and fairly and also the reputation, character, financial integrity and reliability of the person' see regulation 30(2)(a) – (c).

[152] I Van Jaarsveld 'Following the money across cyber highways: A herculean task or international challenge? Some thoughts on money laundering on the internet' (2004) 16 SA Merc LJ 685 at 682. The author asserts that the electronic payment system is an efficient means to move money without having to rely on cash transactions.

performs that function in Lesotho. It is also adduced by the Bank for International Settlements that central banks should ensure the efficiency and soundness of the payment system in their respective jurisdictions in line with the core principles.[153]

It is provided that over and above the functions enunciated in the Central Bank Act, the Bank shall have the functions tabled in the Payment Systems Act.[154] Notwithstanding that it can delegate such functions, section 5 provides that:

> '(2) The functions of the Central Bank are –
>
> (a) to oversee, inspect and monitor the national payment system, the operations of the payment system body, systems participants and service providers;
>
> (b) to establish and operate a settlement system, the operations of the payment system and to authorise persons and service providers to participate in the clearing and settlement system activities and to withdraw such authorisation; and
>
> (c) to authorise the operation of the Body by issuing a certificate of recognition to commence and operate the business, after having satisfied itself with the constitution, rules, competence and readiness of the Body to manage the payment system.'[155]

In terms of the above section, the Central Bank of Lesotho is granted the authority of overseeing the national payment system in all respects and manages interbank payment systems, clearing house and securities settlement systems. It is further mandated to license the system participants who must be incorporated under the laws of Lesotho[156] and in that way it ensures elimination of the financial risk that could arise from the use of a particular asset to settle payments.[157]

The provisions of the Payment Systems Act, as succinct as they are, do not provide the role of financial education of members of the public when it comes to issues of payment systems generally in Lesotho. As a result, the Central Bank cannot rely on the provisions of that Act to educate members of the public on issues around the payment system in the country despite the magnitude of the role that can be played by such education.

The summary of the legal mandate of the Central Bank of Lesotho as derived from the above discussion is regulation and supervision of the financial sector in order to maintain its safety and soundness. However, there are various other functions which are provided for in order to fulfil the said mandate. These other functions are dictated by the specific sector that is

[153] Note 64 above.
[154] Note 61 above s 5(1).
[155] Note 61 above s 5(2) (a) – (c).
[156] Note 61 above ss 10 (1) - (2) & 15.
[157] Note 64 above, principle VI.

involved. Among the many statutes discussed above, only the Insurance Act and the Capital Markets Regulations provide that in carrying out its mandate, the Central Bank can enlighten and disseminate information to the public.[158] The two however do not in any part provide definitions or guidelines in order to conclude outright that the manner in which such enlightenment and dissemination is done is financial education. It could however be safely concluded that those are meant to ensure public awareness, which is promoting public understanding of the financial system.[159]

As it has been shown that there is a link between the legal mandate of the central bank and the role of financial education of members of the public by virtue of the regulatory structure adopted in Lesotho, it is now appropriate to discuss the meaning and importance of financial education.

3.9 Meaning and importance of financial education

The global financial crisis was followed by in-depth research into the financial sector to understand what in fact went wrong to cause this disaster.[160] Financial education and literacy also gained some recognition as critical life skills for individuals[161] and as such it is worth explaining and giving its importance in the contemporary world.

Financial education has been introduced in many countries as a policy response to low financial literacy and financial exclusion. According to Huston, 'creation of financial education programs designed specifically to enhance financial literacy has been viewed as a solution to mitigating financial problems that individuals and families face.'[162] There appeared to be a concern about knowledge of financial issues and accordingly the bulk of authors including the example above view financial education as a perfect response to resolve this problem.

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[158] Note 101 above s 3(2)(f) and note 98 above regulation 6(2)(k).

[159] English Financial Services and Markets Act of 2000 read with the Financial Services Act of 2012 provide a definition of public awareness as including promoting awareness of the benefits and the risks associated with different kinds of investment or other financial dealing and the provision of appropriate information and advice. See also Schooner (note 89 above) at 335.

[160] There was even doubt regarding the efficiency of the market players such as credit rating agencies, which were criticized as serving no purpose as the crisis was experienced despite the high rating results.

[161] 'OECD/INFE High-Level Principles National Strategies for Financial Education' (August 2012) available at https://www.centralbank.org.ls/images/Financial_Stability/Financial_Education/FINANCIAL%20EDUCATION%20STRATEGY%20FINAL%20COPY.pdf accessed on 30 November 2017.

[162] S Huston 'Measuring financial literacy' (2010) 44 The Journal of Consumer Affairs 296 at 309.

Financial education is the process by which financial consumers or investors improve their understanding of financial products and concepts.[163] It is education about financial concepts undertaken with the purpose of increasing knowledge and skills, confidence and motivation.[164] It has been defined as the process by which individuals access information to improve their understanding of personal financial management, financial products and concepts and gain the knowledge to make informed choices to improve their financial well-being.[165] From various definitions ascribed to financial education, it appears that it needs to place much focus on knowledge of financial products, concepts and risks. The concepts include but are not limited to household budgeting, household saving risk and debt management.[166]

There is inherent value in having a financially capable and literate population as growing access to finance without financial education is unsustainable and potentially harmful to a variety of different stakeholders. The importance of financial education is that it can transform consumers into responsible and empowered market players with the competence to make financial decisions that increase their own welfare. It means therefore that financial education can in summary result in improvement of the financial knowledge and skills of the population in order to empower them from an economic point of view; it also raises the awareness of consumers' rights and responsibilities and as such improves financial inclusion by encouraging saving and access to formal financial products.

The public, equipped with financial education, will then be financially literate and financially capable. Financial literacy is knowledge of financial management, concepts and products and the ability to consider the application and use of financial skills effectively.[167] Literacy brought by financial education means that the public can challenge the service providers and avoid the trap of engaging in illegal business, which can be harmful to the financial sector. Rasoaisi and Kalebe stated that 'financial literacy answers the question why spend on this as

opposed to that.'[168]

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[163] OECD Report (note 2 above)
[164] LE Willis 'Against financial-literacy education' (2008) 94 IOWA LR 197 at 202.
[165] Genesis Analytics 'Financial Education Interim Strategy for the Kingdom of Lesotho: Implementation Plan and Roadmap' (14 July 2014) available at https://www.centralbank.org.ls/images/Financial_Stability/Financial_Education/FINANCIAL%20EDUCATION%20STRATEGY%20FINAL%20COPY.pdf accessed on 30 November 2017.
[166] Ibid.
[167] Ibid.
[168] L Rasoaisi and K Kalebe 'determinants of financial literacy among the National University of Lesotho students' (2015) 5 Asian Economic and Financial Review 1050 at 1051. T Mbarire and A Ali in their article, 'Determinants of

Financial capability on the one hand is the ability to act in a financially responsible manner through access to financial management techniques, financial products and services. It leads to personal financial skills which are crucial in today's fluctuating economic conditions to enable appropriate consumption and investment decisions to be made and is also vital to the prosperity of the nation's economy and individuals.[169]

According to the OECD, 'financial education has thus become an important complement to market conduct and prudential regulation, and improving individuals' financial behaviour(s) has become a long-term policy priority in many countries.'[170] Although they failed to flag it in relation to the central bank of Lesotho, the foregoing quote shows that the OECD also is aware of the relationship between the legal mandate of the central bank emanating from regulatory structure and financial education as part of market conduct regulation.

The education will not only benefit those who are taught fiscal concepts but also the economy[171] as the nature of products offered in financial markets will be responding to the needs of a particular economy.[172] It has been argued that improved financial literacy could be an important tool to fight financial exclusion as consumers need those skills and knowledge to avoid the threat imposed by the complexity and range of financial products.[173] It follows therefore that literate people will make viable decisions about their financial issues.[174]

There are various stakeholders within the parameters of financial education who get different benefits depending on the position they occupy and these in summary are public authorities, private sector and financial services providers, as well as other civil society and international stakeholders like donors.[175] Public authorities include the central banks and the

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financial literacy among employees of Kenya Ports Authority in Kenya' (2014) 5 Research Journal of Finance and Accounting 44 have defined financial literacy as the ability to make informed judgements and to make effective decisions regarding the use and management of money.

[169] C Mbekomize and M Mapharing 'Assessment of the level of financial literacy and economic behaviour among college students in Botswana' (2015) 3 International Journal of Economics, Commerce and Management 1 at 2.

[170] OECD Report (note 2 above).

[171] L Goyette 'Education connection: financial education leads to better financial decisions' (2013-2014) 34 Children Legal Rights Journal 125.

[172] WG Gaile, BH Harris & R Levine 'Raising household saving: does financial education work?' (2012) 72 Social Security Bulletin 39 at 41.

[173] N Ryder 'Two plus two equals financial education – The financial services authority and consumer education' (2001) 35 Law Teacher Journal 216.

[174] M Zhan, SG Anderson & J Scott 'Financial knowledge of low – income population: Effects of a financial education program' (2006) 33 Journal of Sociology and Social Welfare 53 at 56.

[175] OECD Report (note 2 above).

financial regulators and supervisors and the manner in which the financial system is organised dictates the size of the bite each stakeholder gets.

The foregoing discussion establishes that financial education is meant to enhance the knowledge and skills of the public for them to make informed decisions. It is further clear that financial education is meant to raise awareness of financial issues and to improve financial inclusion by encouraging saving and access to formal financial products. In carrying out its supervisory role, the Central Bank of Lesotho recently adopted the modus operandi of raising the awareness of implications of the legislation that it administers and that practice has been established as financial education. There are sometimes joint ventures with other market players while at times the awareness campaign is carried out solely by the central bank.[176] This is done with regard to all the legislation despite the fact that only two statutes are clear on information dissemination and public enlightenment. It means that if the argument is to be made for financial education of members of the public by the central bank, it expressly extends to the issues relating to insurance and capital markets while other statutes will be subsumed under the regulatory approach employed. The approach allows even market conduct regulation and in this instance, the central bank uses financial education as one of the tools to accomplish that type of regulation.

4 CONCLUSIONS AND RECOMMENDATIONS

It is worth concluding that the Central Bank Act of Lesotho has provided for all the functions which are regarded as traditional to central banks under part two. All those functions are done in accordance with the specific sector legislation as discussed under part three above. An important aspect of the central banking in Lesotho is that unlike other SADC central banks, the Central Bank of Lesotho is not established under the constitution.[177] It is purely a statutory corporation so it cannot hide behind the practice or custom that prevails within the central banking to perform functions beyond those that are spelled out in the Central Bank Act of Lesotho.[178]

The other important conclusion from this research is that Lesotho has adopted a single regulator approach to financial sector regulation and supervision as shown through various pieces of legislation. The approach then enables the central bank to do both prudential and

[176] According to the financial education interim strategy for Lesotho, Central Bank of Lesotho is part of the Financial Education Steering Committee as its Secretariat.
[177] South African Reserve Bank is one of those central banks which are established under the Constitution as provided for under s 223 of the Constitution of the Republic of the Republic of South Africa 108 of 1996.
[178] S 6 Central Bank of Lesotho Act 2 of 2000 found in Legal Notice No 64 dated 07 August 2000.

market conduct regulation of the financial system and financial education is part of market conduct regulation.[179] The latter conclusion stands despite the fact that there is currently no financial education policy in Lesotho except vision 2020, which expresses the national commitment of achieving economic growth.[180]

The Central Bank Act as an enabling legislation has been couched in a generic manner and provides the high-level functions, hence the enactment of specific sector statutes detailing how the legal mandate bestowed on the central bank shall be performed. A detailed discussion of the said statutes has proved an ambiguity or inconsistency in the manner in which the central bank is required to perform its function. While the bulk of the statutes have not made provision on the central bank engaging in educational activities in the performance of its duties, there are two which have the educational component within them.[181]

Financial education as defined under part three[182] encapsulates the spirit carried by section 3(2)(f) of the Insurance Act, which provides that the Commissioner shall offer among other things, enlightenment and guidance to policyholders and the public in matters of insurance policies and their application or implications. The definition further includes sharing of knowledge which can be equated to dissemination to the public, information on capital markets and on securities as articulated in the Capital Markets Regulations.[183]

The above then precipitates into financial education as being partially provided for under the statutory mandate of the Central Bank of Lesotho so that whatever education given by the institution has to fall squarely within the purview of the Insurance Act and the Capital Markets Regulations. Anything that covers other areas to which it has authority to administer is covered under market conduct aspect, as has been highlighted previously.

Financial education has an impact on stability within the financial sector, which is the main focal point for the central banks as regulators. It can therefore be employed as one of the tools

[179] D Milliard 'The impact of the twin peaks model of the insurance industry' (2016) 19 PER/PERLJ 1 at 3, the author has provided that financial sector authority is responsible for among other things, education in relation to financial products.
[180] G20/OECD INFE Report on ensuring financial education and consumer protection for all in the digital age (2017) at 6 available http://www.oecd.org/finance/financial-education/G20-OECD-INFE-Report-Financial-Education-Consumer-Protection-Digital-Age.pdf accessed on 30 November 2017. See also M Raselimo, J Thabane and T Makhele 'Financial literacy level of primary and secondary school learners in Lesotho: Prospects for integration of financial education into school curriculum' (2017) 5 Journal of Economics, commerce and management 412 at 414.
[181] Note 101 above and note 98 above.
[182] Definition and importance of financial education part 3.9.
[183] Note 98 above regulation 2 (k).

through which the main objective of the central bank can be achieved and as a result maintain confidence in the financial system.[184] It is also advocated that the financial crisis resulted from, among other reasons, failure by the authorities to adequately manage the risk that the system is exposed to.[185]

The glaring inconsistencies of the financial sector legislation require a response in order to set standards at par and ease the regulatory function of the central bank. In order to address that discrepancy it is recommended that the policy makers amend the statutory provisions granting powers to the Central Bank of Lesotho for the regime to incorporate financial education as one of the express mandates. The amendment of the laws could in itself be a hurdle due to the procedures that are followed when amending the laws; the easier approach is to develop regulations or guidelines to provide that in carrying out the mandate that is bestowed upon the central bank, it may among other things provide financial education. In that way it will not raise any eyebrows when it slots in different media platforms in the country to provide education on the legislation it administers and the institutions that are under its supervision as well as the implications of not adhering to financial laws and standards.

It is noteworthy that the world is shifting towards segregating the functions of central banks as regulators so that they are left with only the prudential supervision and give market conduct to a different body.[186] The central banks should normally not be seen having too much responsibility as that is likely to impact on their supervisory role, which is the primary duty of every central bank. The size of the economy in Lesotho however does not warrant different regulatory bodies which might have conflicting views and as such upset the system. The most feasible action and which is under way, is to incorporate financial education in the school curriculum and not to make it a responsibility of the central bank completely.[187]

The Ministry of Education and Training is best suited to deal with issues surrounding education in Lesotho; what the central bank could do is to motivate the necessity of having a financially educated nation in order for financial literacy to be incorporated in the schools' curriculum and done at least at an introductory level. There are high cost implications, so the outreach might be a problem but if it becomes a part of the curriculum, it will be an easier task as

[184] WM Berenson 'Current legal issues affecting central banking' (1995 – 1996) 29 Geo Wash J Int'l Law & Econ 337 at 355.
[185] D Tarullo 'International cooperation in the central banking' (2014) 47 Cornell Int'l LJ I.
[186] ibid at 9.
[187] Goyette (note 170 above) 125.

schools are all over the country. The reduction of high budgetary implications will be realised notwithstanding that central banks' engagement in financial education and meeting a variety of stakeholders could result in the removal of the misunderstanding that central banks are remote institutions operating from inaccessible glass towers with little or no connection to the society within which they exist.[188]

The rate at which the financial sector is changing makes one assume that in the near future, there will be some developments in central banking requiring amendments and modifications to the statutory provisions. In order to guard against the negative implications of any developments, it is recommended that the policy makers amend the constitution to have an enabling provision that will go further in providing that the central bank can do any other function that is done by other central banks.

[188] Rossouw et al (note 70 above) 105.

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