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V

CRIMINAL LAW TREATMENT OF SEXUAL ACTIVITY

LAND AND POPULATION PERSONAL MOBILITY

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(SENATE ROOM)

CRIMINAL LAW TREATMENT OF SEXUAL ACTIVITY

After Lesotho was disannexed from the Cape Colony in 1883, a General Law Proclamation the following year provided that in all legal proceedings, both civil and criminal, the law to be applied was the law for the time being in force in the Colony of the Cape of Good Hope in so far as the circumstances permit.[1] Provision was made for the continued application of customary law in cases where all parties are African. The result of the reception of Cape Colonial law under the Proclamation is that the modern criminal law of Lesotho is the South African common law of crimes as modified by Lesotho legislation. With regard to sexual offences customary law is not directly significant. While customary law may be relevant in some criminal prosecutions involving sexual conduct in deciding if the essential elements of the offence are present, it is the common law which defines the offence unless superseded by statute.

Abortion

Very little information is available concerning the traditional approach to the question of abortion in Lesotho prior to the arrival of Christian missionaries and the introduction of European law in the 19th century. However, the existing sources do strongly suggest that abortion traditionally was considered to be a matter that fell within the province of the family for resolution rather than the indigenous courts. In 1873, two years after the annexation of Basutoland to the Cape Colony, a Commission was appointed by the Cape Colony legislative assembly to inquire into the laws and customs of the Basotho people. The Commission sitting in Basutoland

/received ...

received evidence from a number of Basotho who were thought to be particularly knowledgeable in the customary law. George Moshesh, son of the founder of the Basotho Nation, who at the time was an inspector in the Basutoland Police, was asked by the Commission the following question to which he answered:

> "What is the law with regard to abortion? [1] - Never heard of any punishment being inflicted for this offence." [2]

The same question was put to Sofonia Moshesh who had experience in the King's judiciary and he replied: -

> "There is no law about it [abortion] and no punishment." [3]

Support for this position was provided by Ashton in the first full-length study of the Basotho by a professional anthropologist. Based on field work in 1935-6 and thereafter, Ashton found it impossible to obtain data on the incidence of abortion but did learn that abortifacients were known and used. [4] In his study of the customary law and the indigenous courts, he concluded that abortion was a matter which was dealt with by the family concerned rather than in the courts. [5]

Whatever the earlier indigenous law and attitudes of the Basotho on the subject of abortion, the legal position, at least, was altered by the introduction of European law into the country. In order to ascertain the present Lesotho law relating to abortion, it is necessary to look to the South African criminal law dealing with abortion. Lesotho has no statutory law with regard to the offence of abortion as such and while South Africa has recently enacted legislation which replaces the common law dealing with the crime of abortion, this legislation has no application in Lesotho. [6]

/It is ...

It is necessary therefore to examine the common law offence of abortion as it has been developed in Southern Africa.[7]

Surprisingly, no reported case in Southern Africa has ever given a definition of abortion. In fact, very few decisions dealing with the law of abortion have appeared in the law reports and the few reported cases have been concerned with issues peripheral to the fundamental problems.[8] Because of the paucity of case law, both courts and academic writers dealing with the criminal law of abortion rely heavily on the Roman-Dutch law authorities who wrote in the 17th and 18th centuries.[9] Also, English decisions may be referred to on an uncertain question on the common law of abortion.

A 19th century South African decision treated abortion as a species of infanticide but this case has not been followed.[10] The early Roman-Dutch criminal law writers were very much concerned with the question of the stage of maturity reached by the foetus at the time of the termination of the pregnancy in relation to the seriousness of the offence but the law as it has been developed in Southern Africa has disregarded this issue.[11] It is considered that the offence of abortion consists in the unlawful and intentional killing of a living human foetus at any stage of its development.[12] There is disagreement among leading contemporary writers on South African criminal law as to whether the offence of abortion requires, in addition to the killing of the foetus, the causing of the foetus to be expelled from the uterus.[13] However, there is no judicial decision on this point. If the foetus is not living at the time of the effort to terminate the pregnancy or in fact there is no pregnancy or means are employed which are impossible, there is clear judicial authority that the lesser offence of attempted abortion may be committed.

/In looking...

In looking at the fundamental problems raised by the crime of abortion of primary concern is the requirement that the abortion be performed unlawfully. What is a lawful abortion? Certainly, the consent of the woman in itself is no defence. In fact, the woman would, by consenting to submit herself for an abortion, be liable as a socius criminis (a partner in the offence).[15] However, the woman's consent would be required for a lawful therapeutic abortion. It appears that therapeutic abortion has never been the subject of a reported decision in the courts of Southern Africa. In the absence of any judicial authority defining the nature of a lawful abortion, it is necessary to turn to other sources.

Some of the 17th and 18th century Roman-Dutch authorities did express opinion on the question of whether an abortion could be performed without criminal liability in the case where it was necessary to save the life of the mother, concluding that in such circumstances an abortion was justified and not punishable.[16] Contemporary criminal law writers in South Africa are in agreement that the defence of necessity may be successfully raised in the situation where an abortion is performed to save the life of the mother.[17] But beyond this narrow justification based on necessity lies a wide area of uncertainty and speculation. How immediate must the danger to the mother's life be? Does the danger have to be organic or may it be to her mental health? Will a threat of suicide by a pregnant woman which is believed to be serious and probable justify an abortion on the ground of necessity? May a therapeutic abortion be performed on a young girl who has been raped or in the case of pregnancy arising from an incestuous relationship? Is a serious impairment of health, mental or physical, falling short of a danger to the

/woman's life...

woman's life, sufficient grounds for termination of the pregnancy? May a defective foetus be destroyed? To these questions the common law of South Africa and of Lesotho provides no answer because they were not questions which the old Roman-Dutch authorities considered in their writings and there is no case law.

One authoritative South African criminal law text does express the opinion that the English decision, R. v Bourne is probably good law in South Africa.[18] Since the courts in at least twelve Commonwealth countries have followed the Bourne decision[19] it seems probable that serious consideration would be given its application in Lesotho if the issue was before a Lesotho court. R. v. Bourne concerned the prosecution of a very prominent surgeon for an abortion performed in a famous hospital on a girl under the age of 15 years who had become pregnant as a result of rape with great violence. Since the accused was found not guilty, the statement of the law is contained in the judge's direction to the jury where he states that a surgeon need not wait until the patient was in actual peril of death but had a duty to perform the operation if he had reasonable grounds and adequate knowledge to be of the opinion that the continuance of the pregnancy would be to make the patient a physical and mental wreck.[20] While no firm data exist, it is generally believed that the medical profession in Southern Africa did not always confine itself to the narrowest interpretation of necessity but, as in the Bourne case, terminated pregnancies where the mother's health, physical or mental, was in danger.[21] It seems reasonable to suppose that a somewhat similar approach is taken in Lesotho today.

/Substantial ...

Substantial support for reform of South Africa's abortion law developed in the 1960's for reasons which are relevant to Lesotho. Undoubtedly, the interest in reform was a reflection of the general movement throughout the world to bring antiquated abortion laws into line with 20th century attitudes and circumstances. As elsewhere, the major criticism of the existing law of abortion was concentrated on two defects which it was argued legislation could correct.

One objection to the South African common law of abortion was to the large area of uncertainty particularly with regard to when a therapeutic abortion could be performed with freedom from the risk of criminal liability. This was of obvious concern to the medical profession. Reputable medical practitioners who performed pregnancy terminations in circumstances where the law was unclear or silent did so subject to the risk of prosecution. While it was true that in such cases it was known that law enforcement authorities were lenient and reluctant to initiate prosecutions, nevertheless the possibility of criminal liability, however remote, was a source of uneasiness. The medical profession's interest in the subject of abortion law was shown by a Symposium on Therapeutic Abortion held at the Interim Congress of the South African Society of Obstetricians and Gynaecologists in 1968 at which a paper on therapeutic abortions and the South African law was presented.[22]

Another major criticism of the existing law was based on the contention that because of the restricted area of permitted abortions, the law encouraged resort to illegal abortions performed by medically unqualified persons or to efforts at self-abortion. There was recognition that the death rate from illegal abortions

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in South Africa was very high. Within the period of one year, 1958-59, 1,436 incomplete abortions were treated at Groote Schuur Hospital in Cape Town.[23] In 1960, the same hospital in a Report from the Gynaecological Department noted that the new septic abortion unit had 'the highest bed occupancy and the greatest patient turnover of all wards in Groote Schuur Hospital'.[24]

The movement towards reform of the abortion law in South Africa culminated in the Abortion and Sterilisation Act 2 of 1975. The Act replaced the common law and gave definition to the crime's element of unlawfulness. It also provided penalties for the offence and laid down procedures to be followed in performing lawful abortions. Section 3 (1) provides that lawful abortions may be done only by a medical practitioner and only under the following circumstances: -

(a) where the continued pregnancy endangers the life of the woman concerned or constitutes a serious threat to her physical health;

(b) where the continued pregnancy constitutes a serious threat to the mental health of the woman concerned;

(c) where there exists a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he will be irreparably seriously handicapped; and

(d) where the foetus is alleged to have been conceived in consequence of 'unlawful carnal intercourse' (rape, incest or intercourse with a woman who is an idiot or imbecile).

Section 3 of the Act also prescribes elaborate procedures which must be followed to ascertain if in fact one of the statutory grounds for performing a lawful abortion is present. In each case, two medical practitioners, other than the practitioner performing the abortion, must certify by written opinions the existence of the ground relied upon for the lawful abortion. A medical practitioner who gives the

/certificate ...

certificate required under s. 3 may not perform or assist in any way in the abortion in question. Failure to comply with the various procedural requirements makes a practitioner liable on conviction to a fine not exceeding five thousand rand or imprisonment for a period not exceeding five years or both fine and imprisonment. (s. 10). Section 5 requires all lawful abortions to be performed only in State-controlled hospitals and imposes the same penalty for failure to comply.

Leaving aside the combersome procedure required to authorise an abortion, the South African Act has certain provisions which appear to present serious problems for both the medical profession and the public. The most important is the problem posed by s. 3 (1) (a) which restates the common law position by providing for a lawful abortion 'where the continued pregnancy endangers the life of the woman' but adds a new procedural requirement of the written opinions of two independent medical practitioners in support of the fact. It should be noted that in addition to these two written opinions, s. 6 requires that the medical practitioner in charge of the hospital where the abortion is to be performed must give his written authority before the abortion. Most modern legislation on abortion which includes the independent medical opinion requirement, also makes provision for dispensing with the requirement where the medical practitioner faced with the decision is of the opinion, formed in good faith, that the termination of the pregnancy is immediately necessary to save the life or prevent grave injury to the woman. The South African Act makes no provision for the emergency situation. The absence of any qualification on the need for two independent medical opinions and the authority in writing from the medical

/practitioner...

practitioner in charge of the hospital introduces doubt into the one area in which the common law of abortion was clear. The medical practitioner in South Africa who performs an emergency abortion to save the life of the mother without complying with the procedural requirements is placed in the position where he must rely on the defence of necessity or on the unlikelihood of prosecution under the circumstances. While the defence of necessity was recognised under the common law, it is not at all certain that it would be available to a statutory offence created by an Act which expressly provides in s. 2 'No person shall procure an abortion otherwise than in accordance with the provisions of this Act.' The other choice open to the medical practitioner is to depend upon the good sense of the law enforcement authorities but this is, of course, the feature of the common law situation which was so objectionable to the medical profession. A similar problem is produced by the requirement that an abortion may only be performed in a State-controlled hospital. Here, again, modern legislation on abortion which includes the requirement that abortions be carried out in recognised hospitals or clinics usually makes provision for emergency situations where immediate termination of pregnancy is necessary. The absence of such provision in the South African Act appears to be a serious defect.

Overall, the 1975 South African Abortion and Sterilization Act presents an impression of extreme legislative suspicion which imposes on the medical profession an unnecessarily complex set of requirements. For example, in the case of a woman who seeks an abortion of a pregnancy resulting from rape, at least five persons are required to make decisions on the question of termination of pregnancy: the medical

/practitioner...

practitioner who is to perform the abortion, two other medical practitioners whose opinions are required under s. 3 (1) (d) (aa) that the pregnancy is due to the alleged rape, a certificate from a magistrate based on police documents (s. 6(4)) and finally the written authority of the medical practitioner in charge of the hospital where the abortion is to be performed (s. 6 (1)). One may compare this with the simplicity of R. v. Bourne and the requirement that the physician's decision be made in good faith.

Whatever the defects of the South African Act, it has immediate significance for Lesotho. Because of the size and geographical position of Lesotho, a woman residing in Lesotho who is pregnant under circumstances which allow for a lawful abortion in South Africa may, if she can afford it, cross the border and have her pregnancy terminated at the nearest hospital.

Less immediate but of importance is the fact that with the enactment of the South African Abortion Act, only Lesotho, together with Swaziland and Rhodesia still continue under the South African common law of abortion.[25] Also, Lesotho and Swaziland appear to be the only Commonwealth countries without any statutory provisions on the subject of abortion.[26]

The two major criticisms leveled at the common law of abortion seem relevant to Lesotho as well. The uncertainty due to the absence of case law and the need to resort to speculation about the probable criminal consequences of a pregnancy termination except for the preservation of life is the present position in Lesotho. While it appears that no Lesotho medical practitioner has ever been prosecuted for committing an illegal abortion, nevertheless the situation seems unsatisfactory for two reasons. Selective enforcement, i.e. prosecution

/of the ...

of the unskilled abortionist and not the reputable physician who performs what may be an illegal abortion in a hospital for therapeutic reasons, may seem to be reasonable solution. The simple objection is that discretion so exercised is unlawful. The answer is not, it is suggested, to rely on the intelligent use of discretion by enforcement authorities but to bring the law into conformity with generally accepted practice. The second objection is that it places the Lesotho medical practitioner in a vulnerable position where he could find himself charged with the crime of abortion, though he acted in good faith, because of pressures placed on law enforcement authorities or because of a personal prejudice of a person with power to prosecute.

With regard to the second criticism of the common law of abortion, that by being unduly restrictive, the law encourages illegal abortions which often have tragic consequences to the woman involved, no data exist for Lesotho on the number of illegal abortions or the number of deaths or serious impairment as a result of such abortions. The available criminal statistics in Table 1 below indicate the existence of an abortion problem in Lesotho without, of course, providing any real measure of the size of the problem.

The general impression is that requests for termination of pregnancy by women to medical practitioners in Lesotho are not uncommon and resort to clandestine abortions in neighbouring South Africa have in the past occurred with some frequency. It is also apparent that self-induced abortions and non-professionally-assisted abortions take place and on occasion become known to the police and are the subject of prosecution.

/Table 1 ...

TABLE 1

ABORTION STATISTICS FOR THE YEARS 1972 - 1977

(1) Arising during year: cases known or reported to Police;

(2) undetected; (3) acquited; (4) Nolle prosequi;

(5) Convicted; (6) Investigation incomplete.

YEAR	(1)	(2)	(3)	(4)	(5)	(6)
1972	38	15	-	4	8	11
1973	49	11	1	-	30	7
1974	44	15	4	-	20	5
1975	42	10	3	-	12	17
1976	18	2	-	1	4	11
1977	23	9	2	1	3	8
TOTAL	214	62	10	6	77	59

Source: Office of Commissioner of Police, Maseru.

The question whether more liberal abortion laws reduce deaths and injuries caused by illegal 'back-street' abortions or attempts at self-induced abortion has been widely debated. In an article appearing in a South African law journal shortly before the enactment of the new legislation, the writer expressed doubts that a reduction of illegal abortions followed from a liberalization of legislation.[27] However, the Lane Committee appointed in 1971 to review the operation of the United Kingdom abortion law, after two and half years of taking evidence, reached the conclusion that the incidence of illegal abortions and resulting complications and deaths had decreased since the Abortion Act came into force.[28] Similar conclusions were reached by a Canadian Committee appointed to examine the working of the Canadian abortion law.[29]

/Through the ...

Though the number of illegal abortions both before and after legislation must always be a matter of speculation and not calculation, there does seem good reason to believe that legislation may reduce the number of illegal abortions with their concomitant effects. But the reduction is dependent upon the type of legislation adopted. A useful classification of abortion laws has been suggested which divides the laws into four types: (1) Common law, (2) Basic law, (3) Development law, and (4) Advanced law.[30] Lesotho falls into type one because of its total reliance upon the common law. The Botswana Penal Code provisions represent a variety of type two which is basic prohibitory legislation.[31] Much basic legislation simply codifies the common law prohibiting the unlawful and intentional killing of a foetus and leaves the courts free to decide under what circumstances an abortion is unlawful. Developed law is reached when, in fact, judicial decisions clarify the basic prohibitory legislation, e.g. the application of the rule in R. v. Bourne. The last type, advanced law, is achieved when detailed legislation authorising abortions for a number of stated reasons is enacted. Examples of advanced laws are the British Abortion Act 1967, the Zambia Termination of Pregnancy Act 1972 and the South Africa Abortion and Sterilization Act 1975.

For the purpose of analysis and comparison, advanced laws for the termination of pregnancy may be considered under two headings: indications or grounds for termination of a pregnancy and provisions for implementation or procedural requirements.

Advanced legislation, in addition to restating the common law position permitting abortion to save the life of the woman, always makes provision for termination of pregnancy for health reasons.

/The precise...

The precise language used in such a provision determines the character and direction of the law. This can be illustrated by comparing the South African and the British or Zambian provisions. Section 3 (1) (a) of the South Africa Act provides that the continued pregnancy must constitute a serious threat to the woman's physical health and the abortion must be necessary to ensure the physical health of the woman. On the other hand, the Zambia provisions (s. 3 (1) (2)) and the British provisions (s. 1 (1) (2)) are expressed in terms which provide that the continued pregnancy must involve a risk of injury to physical health 'greater than if the pregnancy were terminated'. South Africa, in effect, gives statutory expression to the necessity rule with regard to physical health, while the British and Zambian provisions go beyond it and also expressly provide that in determining the risk to health of the pregnant woman, her environmental situation is relevant. Because of the well-documented fact that for all age groups the death rate for first-trimester abortion is substantially lower than childbirth mortality, the language of the British and Zambian statutes by measuring risk to health in terms of abortion or continued pregnancy permit termination during the period of the first trimester.[32] Unlike South Africa, the statutes of Britain and Zambia do not make separate provision in the event of rape, incest or pregnancy of mentally defective women. Such cases will fall within the terms of the main provision which includes risk to both physical and mental health.

The fundamental difference between the provisions noted above has important consequences with regard to the objective of reducing illegal abortions and the resulting deaths and serious injury to

/the women ...

the women involved. While the British and Zambian legislation makes it possible to accomplish this objective, it is difficult to see how the South African Act could substantially reduce illegal abortions.

The second feature of modern abortion legislation are provisions relating to implementation which commonly provide that a lawful abortion must only be performed in a hospital as defined in the statute and then only when additional medical opinions are obtained. It is on the question of independent medical opinions that much criticism has been directed. A recent study of Commonwealth abortion laws while recognising the value of the traditional second opinion in medical practice, states 'but its use in the legality of an abortion decision has become perverted'.[33] Indeed, it is doubtful whether the requirement serves any real purpose since a medical practitioner wishing to perform an abortion may shop around for satisfactory medical support for his decision. In addition, the requirement may impose difficulties in a country where medical practitioners are few in number. Certainly, the complex procedural requirements of the type contained in the South Africa Act would seem to be undesirable for Lesotho. The implementation provisions in a number of advanced laws also contain a conscience clause which permits medical personnel as well as medical practitioners to excuse themselves from participation in the termination of a pregnancy on the grounds of conscience.[34] The only problem raised by such a provision is whether there should be some qualification which would exclude the conscience clause where the necessity to save life or prevent serious injury requires such participation.

/Most fundamental ...

Most fundamental law reform involves the need for assessment and education of public attitudes. In order to determine the attitudes of the people of Lesotho to the question of abortion, the Law and Population Project prepared an abortion questionnaire which was included in a national survey conducted by the Lesotho Distance Teaching Centre from November, 1978 to January, 1979.

The survey procedure was to select eight rural villages at random from the 1976 Census of villages. Included in the sample were villages in the mountains, foothills and lowlands. In addition, two urban areas were selected for interviewing. The field work was carried out by four interviewers, two men and two women. The male interviewers interviewed men and the women interviewed women. Within each village or urban area selected all the adults (people over the age of eighteen) in every other household were interviewed so that half the households in each 'cluster' were sampled. The interviewer read a total of thirteen questions dealing with different circumstances and asked whether the respondent felt that abortion was justified in each case. The results of these questions are set out below. The numbers in brackets show the basis from which the percentages were calculated.

TABLE 2

ATTITUDES TOWARDS ABORTION

QUESTION: Do you think that abortion is justified in this case?		URBAN % (n = 93)	RURAL % (n = 352)
Q1 An expectant mother is ill and the doctor tells her that she may die during childbirth. Do you...?	YES	41	15
	NO	59	81
	D/K (Don't know)		4

/Q2 ...

QUESTION: Do you think that abortion is justified in this case?		URBAN %	RURAL %
Q2 An expectant mother is told by a doctor that if she has the child she will remain ill for the rest of her life. Do you...?	YES	39	14
	NO	60	83
	D/K	1	3
Q3 An unmarried woman who is under the age of 16 finds herself pregnant. Do you ... ?	YES	23	7
	NO	76	91
	D/K	1	2
Q4 An unmarried woman over the age of 16 finds herself pregnant. Do you ... ?	YES	16	4
	NO	84	94
	D/K		2
Q5 A woman has been raped and finds herself pregnant. Do you ... ?	YES	27	12
	NO	73	86
	D/K		2
Q6 A woman finds herself pregnant as a result of incest. Do you ...?	YES	35	12
	NO	65	87
	D/K		1
Q7 A married woman is made pregnant by a man who is not her husband. Do you ... ?	YES	31	9
	NO	68	90
	D/K	1	1
Q8 After a medical examination, a doctor has told a woman that her future child will be born with a serious handicap such as deafness or blindness. Do you ... ?	YES	18	8
	NO	81	90
	D/K	1	2
Q9 An expectant mother does not want the child. Do you ... ?	YES	29	7
	NO	71	91
	D/K		2

/Q10 ...

QUESTION: Do you think that abortion is justified in this case?		URBAN %	RURAL %
Q10 Both the expectant mother and the future father do not want the child. Do you ... ?	YES	32	13
	NO	67	85
	D/K	1	2
Q11 The prospective parents are very poor and cannot afford to feed and clothe the child when it is born. Do you ... ?	YES	16	8
	NO	83	92
	D/K	1	
Q12 A woman is breast-feeding young twins and finds that she is pregnant again. The birth of a third baby will mean that the other two will not be fed well and will probably become sick. Do you ... ?	YES	18	7
	NO	81	93
	D/K	1	
Q13 A pregnant woman is insane and/or idiot. Do you ... ?	YES	39	17
	NO	58	80
	D/K	3	3
Q14 This is a SUB-QUESTION of Q13, and is addressed to those who answered YES to that question 13: Why do you say YES?			
- Because the woman will not be able to care for the child?		79	88
- Because the child will grow up to be insane or an idiot?		21	12

Factors Affecting Attitudes towards Abortion

Although most of the sample disapproved of abortion in all circumstances, there was a significant difference between the urban and rural samples; however, because of Lesotho's small urban population, the rural response more accurately reflects the general attitude. In order to investigate differences in attitude which might arise from sex, age, religion, education and knowledge of family planning, these factors were cross-tabulated with the answers to the questions on abortion. The age and sex variables are noted in the following table:-

TABLE 3

Attitudes : Age and Sex Factors

(Percentage of those who believed abortion justified in response to questions set out in Table 2 above)

Quest.	Men under 35 (n=41)*	Men over 35 (n=109)*	Women under 35 (n=152)*	Women over 35 (n=143)*
	%	%	%	%
1	49	17	16	20
2	41	16	17	17
3	39	13	7	4
4	26	7	6	3
5	36	12	14	14
6	40	16	13	10
7	41	14	10	9
8	34	12	8	6
9	38	13	9	6
10	53	25	10	9
11	32	10	9	4
12	27	10	6	6
13	46	21	16	23

* Basis from which percentages have been calculated vary slightly from question to question because of the exclusion of the Don't Know responses.

/There is ...

There is, of course, a significant difference between the attitudes of men and women under 35 years of age. It should be noted that men under the age of 35 years of age are under-represented in the sample because of the absence of men in this age group from Lesotho and that it is this category which gives the most favourable response to the questions, e.g. question 10, where both father and mother do not want the pregnancy to continue, 53% thought an abortion was justified.

Religious affiliation was cross-tabulated with attitudes towards abortion but in no case did the results show any significant difference between those of different religious affiliations. For example, the denominations were divided into two groups: Roman Catholics and Protestants, 22% of the Roman Catholics believed that an abortion was justified to prevent the death of the mother compared with 21% of the Protestants. A similar pattern occurred with the remaining questions.

The national survey included a question to determine knowledge of family planning. This, together with the educational level of the sample, was cross-tabulated with the answers to the questions on abortion and the results are as follows: -

TABLE 4

Education and Knowledge of Family Planning

(percentage of those who believed abortion justified in response to questions set out in Table 2)

	Standard 4 education or less		Standard 5 education or more	
Question	Don't know about Family (n=145)	Know Planning (n=82)	Don't know about Family (n=83)	Know Planning (n=135)
1	7	29	15	36
2	7	26	13	32
3	4	10	4	21
4	1	4	3	15
5	5	14	13	28
6	6	18	14	28
7	7	14	10	23
8	7	8	3	19
9	5	14	6	20
10	10	23	11	26
11	8	1	5	20
12	5	4	4	19
13	15	25	12	31

/Considering...

Considering the implications of the above table, it is apparent that knowledge of family planning is a significant factor in attitudes towards abortion. While education makes a difference, it appears less significant, at least at the non-university level, than a knowledge of family planning. Combined education of a standard 5 or above and knowledge of family planning substantially increases the response which finds abortion justified.

In order to determine attitudes towards abortion at Lesotho's highest educational level, the Department of Statistics of the National University conducted a survey on behalf of the Law and Population Project in March 1979 using the same questions which were used in the national survey to enable comparisons to be made. The results of this survey are set out below.

TABLE 5

University Attitudes towards Abortion

(Percentage of those who believed abortion justified in response to questions set out in Table 2 above)

Question	Male (n = 50)	Female (n = 36)	TOTAL (n = 86)
1	90	89	90
2	72	75	74
3	40	47	43
4	16	22	20
5	70	89	78
6	38	61	47
7	26	42	33
8	62	69	66
9	22	36	29
10.	36	53	44
11	34	58	44
12	40	55	47
13	56	89	70

Note: the sample of 86 consists of students drawn from all four years of study plus one fifth year student and 15 members of the academic staff, all of whom were Basotho.

/Comparison ...

Comparison of the results of the University survey with those of the National survey shows a striking difference in attitudes towards abortion. In every question there was significant difference between the rural sample and the University samplesand between the urban and University samples . There were significant differences in all but four questions. In contrast to the consistently more favourable response of males under the age of 35 compared with females under the age of 35 in the national survey as indicated in Table 3, University females gave a more favourable response than University males to all questions except question one where the response was the same. The greatest differences between University males and females were in response to the questions on incest, poverty and pregnancy when the mother is mentally disabled where the female sample showed a favourable response 23 to 33 percent higher than the males. While in no case did the national survey show a majority in favour of abortion in any question, a majority of the University sample believed abortion was justified in seven out of the thirteen situations and in the case of the female sample, nine out of thirteen. It is interesting to note that the situations in which a majority of the University sample would consider an abortion justified parallels the statutory grounds which permit an abortion in South Africa under the recent legislation.

Conclusion

The 1974 National Population Symposium held in Maseru rejected the liberalisation of Lesotho's abortion laws [35] and the 1970-79 national survey results which have been discussed overwhelmingly support this view. The Symposium reported that the majority view

/was that ...

was that unwanted pregnancies should be prevented through contraception rather than termination through abortion.[36] Certainly liberalisation of Lesotho's abortion law as a conscious means of limiting population growth is not only undesirable but is clearly unacceptable to the people of Lesotho. At the same time, it should be recognised that contraception except in rare cases does not offer an answer to pregnancies resulting from rape or incest or where the mother is mentally disabled or very young or where the foetus itself is defective. Also, circumstances which could not have been anticipated which seriously affect the health of the mother may arise after the pregnancy.

Given the generally unfavourable attitude towards abortion in Lesotho at present, it would appear that the needed clarification of Lesotho's abortion law is more likely to come, if at all, by judicial decision rather than legislation. In the future, the growing urbanisation and increased education may well create a shift in attitudes which will produce pressure for legislation. When this stage is reached, it will be important to recognise the wide variations in modern abortion legislation and to select an appropriate model for adaptation to the Lesotho situation.

Advertising

The Regulation of Advertisements Proclamation regulates and controls publication of advertisements relating to certain medicines and medical treatment.[37] Section 1 (d) prohibits advertisements concerning cures for sexual habits or for the promotion of sexual virility, desire or fertility. There is no express prohibition on advertisements which are aimed at promoting the use of fertility

/control ...

control devices or offering treatment or advice for fertility reduction. Section 3 prohibits publication of advertisements for articles which are calculated to lead to their use for 'procuring the miscarriage of women'. The Proclamation excludes from criminal liability persons who publish otherwise prohibited advertisements in publications of a technical character intended for circulation among medical practitioners, chemists, druggists and hospital managers.

Sterilization

Lesotho has no legislation dealing expressly with sterilization. Such an operation is regulated by the law generally applicable to surgical operations and medical practice. In the case of sterilization purely for the purpose of preventing conception, the legal position under the common law is uncertain. South African legislation in 1975 made provision for the control of sterilization by prescribing procedures which must be followed.[38] The Act does not impose any restrictions concerning the reasons which motivate the consent to sterilization but prior to the Act questions were raised about criminal liability arising from certain sterilization operations. A leading textbook on South African criminal common law states: -

> "Consent will only justify operations without any curative purpose, such as castration or sterilization, if a legally approved objective is striven for."[39]

It is suggested by the authors that a legitimate objective might be therapeutic or eugenic but would not include sterilization for purely personal reasons, e.g. sexual pleasure without the danger of pregnancy. However, neither South Africa or Lesotho

/have ....

have judicial decisions providing any authority on the question. In spite of the unsettled legal position, sterilizations are performed in Lesotho for the purpose of family limitation. Sterilization is also readily available to those who can afford the operation by crossing the border into South Africa. While sterilization in Lesotho today is an infrequent method of limiting family growth, in the light of the preceding discussion, it would seem desirable for Lesotho to clarify the law on the subject.

Infanticide, Crimen Expositionis Infantis and Concealment of Birth

Infanticide and Crimen Expositionis Infantis are both common law offences while concealment of birth is a statutory crime. It is convenient to consider these offences together because of their close relationship under Lesotho's criminal procedure and their substantive similarity.

Under the common law infanticide is not a substantive crime but in the case of an intentional killing merely a particular type of murder.[40] However, the Lesotho Criminal Procedure and Evidence Proclamation does make special provision for the punishment of a woman who has wilfully caused the death of her child under the age of twelve months.[41] If at the time of the act or omission the balance of the mother's mind was disturbed by reason of the effects of childbirth, the offence which would have otherwise been murder shall be treated as culpable homicide. Also, negligent abandonment of a child rather than a wilful killing may lead to a prosecution for culpable homicide.

/The Roman-Dutch ...

The Roman-Dutch substantive crime of crimen expositionis infantis, the exposure or abandonment of an infant, is a recognised offence in Lesotho. The crime appears to be committed in two ways: (1) exposure or abandonment of an infant with intent to kill under circumstances that death is likely to occur and (2) abandoning an infant under circumstances that its death from heat, cold, hunger, thirst or neglect might result with an intention not to kill but to avoid parental obligations to the child. [42]

It is doubtful whether the first form of the offence serves any useful purpose since a charge of murder or attempted murder could be brought and the Roman-Dutch law treated this form of the offence as severely as murder. [43] While the second form of the offence might well be prosecuted alternatively on a charge of culpable homicide in the event of the death of the infant, when death does not result it is not clear that a charge of attempted culpable homicide is available. In the absence of a statute imposing special liability on a parent who abandons a child, as distinct from a failure to maintain, [44] the common law offence of exposing or abandoning an infant provides a way to deal with the case where a child is negligently abandoned and survives. [45]

The statutory offence of concealment of childbirth makes it a crime to dispose of the body of a child with intent to conceal the fact of its birth whether the child died before, during or after birth. [46] Even if it is not proved that the child died before disposal, a person may be convicted under the statute.

The close connection of the three crimes is shown by the Criminal Procedure and Evidence Proclamation which provides that ... if a person is charged with murder or culpable homicide of a recently born child and it is not proved that the accused killed the child,

/the accused ...

the accused may be convicted of exposing an infant or disposing of the body to conceal the fact of birth.[47] Prosecutions for all three offences occur in Lesotho.

TABLE 6

YEAR	Concealment of Birth: Cases reported to or known to Police	Concealment of Birth: Convicted/ Case proved	Exposing of Infants: Cases reported to or known to Police	Exposing of Infants: Convicted/ Case proved
1973	33	21	24	12
1974	49	27	10	8
1975	58	30	13	2
1976	38	19	9	-
1977	38	17	10	2

Source: Annual Reports of the Commissioner of Police

While no cases of infanticide are included in the police statistics for the period 1973 to 1977, the Department of Prisons Annual Reports do list prisoners imprisoned for infanticide: 1972: 19; 1973: 23; 1974: 21; and 1975, the last year for which this information is available: 16. The absence of infanticide from police statistics and its inclusion in the prison statistics probably is a result of a prison classification of offences which combines both concealment of birth and exposing an infant under the heading of infanticide.

No sociological data have been collected for Lesotho concerning infanticide and related crimes but in addition to the usual reasons for destruction of infants, it is reasonable to expect that migratory labour system plays a significant role in these crimes. A wife who becomes pregnant during her husband's frequent and prolonged absence to the mines and farms of South Africa may choose to dispose of the child rather than face the anger of her husband on his return or she may find an additional child too great a burden to shoulder alone.

/Other Sexual ...

...

Other Sexual Offences

Under the common law are found the usual sexual offences: rape, incest, sodomy (sexual relations per anum between males) and indecent assault. In addition, Lesotho has legislation, the Women and Girls' Protection Proclamation, which is directed against prostitution (particularly procuring a woman to become a common prostitute or to enter a brothel as an inmate) and against unlawful sexual relations or indecent acts with a girl under the age of sixteen.[48] Section 3 expressly makes it a criminal offence for any person to have 'unlawful carnal connection with a girl under the age of sixteen'. Unlawful carnal connection is defined in the Proclamation as sexual relations other than between husband and wife. Since a customary law marriage may be contracted by/with a girl under the age of sixteen and also under the marriage Act under special circumstances[49] no offence would be committed between husband and wife because sexual relations would not be unlawful.

Section 3 of the Proclamation does not alter the law with regard to the crime of rape. Under the common law rape is committed when sexual intercourse takes place outside marriage without the consent of the woman and there is an irrebutable presumption that a girl under the age of 12 years is incapable of giving her consent. Sexual intercourse with a girl of 12 years or over but under 16 years of age without her consent would constitute rape but if with her consent, prosecution would lie for the statutory offence. On conviction, the offender is punishable by a fine not exceeding one thousand rands or imprisonment for any term not exceeding six years.

/A fine ...

A fine of one thousand rands was a very large amount in 1949, the year the Proclamation came into force. It can thus be seen that the purpose of the Proclamation's provision is to provide additional protection to unmarried girl's under the age of sixteen. Lesotho's concern to protect unmarried girls and women is further shown by rules under delegated legislation, the Laws of Lerotholi, Part II, which punish seduction or abduction of girls under the age of 16 and the abduction of an unmarried girl over the age of 16 years without her consent.[50] The latter offence would seem to be an alternative to a prosecution under the common law for the crime of kidnapping which includes adults.[51]

FOOTNOTES

1. Proclamation 28 of 1884, Laws of Basutoland, 1960, Vol. I; on the reception of Cape Colony Law, see Palmer & Poulter, The Legal System of Lesotho, 1972, p. 44 et seq.
2. Commission on Laws and Customs of the Basutos, 1873, Cape Town, reprinted Morija, Lesotho, n.d.p. 40.
3. Ibid, p. 43
4. Ashton, H., The Basuto, 2nd ed., OUP 1967, p. 28.
5. Ibid, p. 255.
6. Abortion and Sterilization Act 2 of 1975.
7. The same common law of crimes is generally applicable in Rhodesia, Swaziland and Botswana until the enactment of the Botswana Penal Code in 1964.
8. See, e.g. R. v. Davies 1956 (3) S.A. 52 (A.D.)(attempt); R. v. O. 1963 (1) S.A. 43 (S.R.) (evidence); R. v. Vones 1958 (1) S.A. 412 (C.) (parties to the crime and punishment).

/9. See ...

9. See authorities cited in R. v. Davies, supra; Strauss, S.A., "Therapeutic Abortion and the South African Law" 1968 S.A.L.J., 453, 455-457.

10. A.P. v. State 1895 2 Off. Rep. 103, the decision relied entirely upon a statement of the Roman-Dutch writer van der Linden, apparently from his 1806 textbook, a Practical Legal Manual.

11. Hunt, P.M.A., South African Criminal Law and Procedure, Vol. II: Common-Law Crimes, Cape Town, 1970 pp. 305, 313.

12. Ibid, pp. 308-313.

13. Hunt, supra, pp. 312-3. Cf. De Wet & Swanepoel, Die Suid Afrikaanse Strafreg, 2nd ed. 1960, Durban, p. 221.

14. R. v. Davies, supra.

15. R. v. Voges, supra.

16. Voet's Commentarius ad Pandectas, 1698, trans. Gane, P. The Selective Voet being the Commentary on the Pandecta, Durban, 1957, Vol. 7, 47.11.3; see generally Strauss, supra, pp. 455-457.

17. Gardiner and Lansdown, South African Criminal Law & Procedure, 6th ed., p. 1598; Hunt, supra, p. 311; De Wet & Swanepoel, supra, p. 222.

18. Burchell and Hunt, South African Criminal Law & Procedure, Vol. I: General Principles of Criminal Law, 1970, Cape Town, p. 290, fn. 66.

19. Three Studies of Abortion Laws in the Commonwealth, pub. by Commonwealth Secretariat, London, 1977, Table I, pp. 64-70.

20. R. v. Bourne 1938 3 All E.R. 615.

21. Hunt, supra, pp. 309-310.

/22. Symposium ...

22. Symposium paper published in the South African Medical Journal, 1968, vol. 42, no. 28.

23. Strauss, supra, p. 461.

24. Harrison, E. "Abortion: the Winds of Change Confounded?" 1973 Natal U. Law R. vol. I, no. 2, p. 44, 45.

25. Sri Lanka where Roman-Dutch common law applied generally has enacted a Penal Code replacing the common law as has Botswana.

26. Three Studies of Abortion Laws in the Commonwealth, supra, Table I, pp. 64-70.

27. Harrison, supra, pp. 45-50.

28. Report of the Committee on the Working of the Abortion Act, Vol. I, London, HMSO, 1974, p. 147.

29. Report of the Committee on the Operation of the Abortion Laws, (Badgley Committee) Ottawa, Canada, p. 66.

30. Three Studies of Abortion Laws in the Commonwealth, supra, pp. 6-10.

31. The Botswana provisions even as prohibitory provisions seem objectionable because of the ambiguity inherent in the language used.

32. See Tietze, C. & Lewit, S.: "Legal Abortion", 1977, in Scientific American, vol. 236, no. 1, pp. 21-28, which surveys abortion and childbirth mortality experience globally.

33. Cook & Dickens, "A Survey of Abortion Laws in Commonwealth Countries", Three Studies of Abortion Laws in the Commonwealth, supra.

34. e.g. South Africa, s. 9; Zambia, s. 41; Britain, s. 4.

35. Report on the National Population Symposium, Maseru, June 1974, p. 14.

/36. ibid...

36. ibid.

37. Proclamation 60 of 1953, Laws of Basutoland 1960 revision, Vol. II.

38. Abortion and Sterilization Act 2 of 1975, ss. 4, 5, 6, 7.

39. Burchell & Hunt, supra, p. 312.

40. Hunt, supra, p. 347.

41. s. 291 (1), Criminal Procedure and Evidence Proclamation, Laws of Basutoland 1960 revision, vol. II.

42. Hunt, supra, p. 348, also see Gardiner & Lansdown, South African Criminal Law and Procedure, 6th ed., Cape Town, 1957, p. 1605.

43. Hunt, supra, p. 348.

44. See (Poulter's section - Family Law - p. 22).

45. e.g. R. v. Mantenako Lehloenya (1978 unreported case, Maseru Magistrate's Court, Lesotho Weekly, 30th September 1978) where the accused was convicted of the crime of exposing an infant where it was likely to die. The child was found and survived. The accused was sentenced to 6 months imprisonment with the whole of sentence suspended.

46. Concealment of Childbirth Proclamation No. 3 of 1943, Laws of Basutoland, 1960 revision, vol. II.

47. s. 185.

48. Women and Girls' Protection Proclamation 14 of 1949, Laws of Basutoland, 1960 revision, vol. II.

49. See Poulter's paper, p. 9.

50. Laws of Lerotholi, Part II, s. 2, s. 3.

51. Hunt, supra, p. 467 et seq.

LAND and POPULATION

In a predominantly rural country such as Lesotho in which nearly 90% of the population derives all or part of its income and subsistence from agriculture and stock raising, the importance of land is obvious. Here it is only possible to discuss briefly those aspects of land tenure, land usage and resources which impinge directly on issues related to Lesotho's population growth. Both land tenure and land usage must be considered in the context of available land resources.

Because of the geographical situation of Lesotho - steep terrain, erodible soils and a concentrated rainfall - Lesotho's land surface is very susceptible to erosion.[1] Poor cultivation methods and over-grazing have substantially accelerated the natural process leaving Lesotho with large areas of land which are non-productive. Aside from the problem of erosion, there is the serious question of the sufficiency of land to support the population. Sheddick in the early 1950's in an important study of Lesotho's land tenure system stated: -

> "...there is sufficient arable land in Basutoland to satisfy all legitimate claims... The apparent shortage of land may be more adequately explained in terms of the failure of the existing production units and of existing methods of land utilisation to achieve an expendable surplus over and above the direct subsistence requirements."[2]

Whether the validity of this view at the time, it is certainly not accepted as true today.[3] Bawden & Carroll found in a survey of land resources that only 12.8% of the land area was suitable for cultivation while 15.3% of the land was suitable for combined cultivation and grazing and 59.7% for grazing alone.[4]

/Monyake states: ...

Monyake states: -

> "In 1960, of the estimated area of 11,720 square miles for Lesotho, 1,362 square miles were under cultivation. This represents only 11.6 percent of the total area of the country." [5]

Surveys in 1950, 1960 and 1970 show in fact a decline in the cultivated area; see Table 1 below.

T A B L E 1

Cultivated Area by Zone (Acres)

ZONE	1950	1960	1970
Lowland	526 000	407 238	440 537
Foothill	110 000	148 925	228 668
Mountain	176 000	236 910	162 261
Orange River Valley	118 000	78 614	78 322
TOTAL	930 000	871 687	909 788

Source: Monyake.

The decline in cultivation area was due in part to an expansion in village settlements to accomodate a growing population and increasing erosion. It has been estimated that 43.3% of the total cultivated area is subject to soil erosion and that the shortage of land itself is a contributing factor to increased erosion. [6] Pressure arising from land shortage leads to extension of cultivation to unsuitable areas such as steep slopes which in turn accelerates the process of erosion.

In addition to the decline in acreage under cultivation, there has been a reduction in the average size of holdings by farm households as shown in the following table.

/TABLE 2 ...

TABLE 2

Average Size of Holdings (Acres)

ZONE	1950	1960	1970
Lowland	7.2	6.8	5.9
Foothill	4.0	4.0	4.0
Mountain	5.7	4.9	4.2
Orange River Valley	5.7	5.2	4.2
TOTAL	6.2	5.4	4.9

Source: Monyake. [7]

There is the further serious problem of an increasing number of Lesotho households who are without land. The 1960 and 1970 Agricultural Census Reports show an increase from 8.5% to 12.7% of households without land to cultivate, [8] while a 1973 Survey showed 23 per cent of the rural households without land. [9] In the national survey conducted by the Lesotho Distance Teaching Centre for the Law and Population Project a question was asked whether respondents had fields including those they share-crop. The results are given below.

TABLE 3

QUESTION: Do you have fields including those you share-crop?

ANSWER	Urban %	Mountains %	Foothills %	Lowlands %	Total Rural %
YES	33	62	72	73	68
NO	67	38	28	27	32
	(n=54)	(n=89)	(n=50)	(n=62)	(n=201)

The figure of 32 per cent of landless people in the rural areas shows that there has been a great increase in the last decade and that a very real problem exists.

/From the ...

From the standpoint of land resources the Lesotho situation is that there is no longer any possibility of significant expansion of cultivation areas and a substantial number of fields presently under cultivation are in areas which are unsuitable or suffer from various degrees of erosion.[10] It is against this background that land tenure must be considered.

While the essential elements of the land tenure system may be stated, it must be emphasised that land tenure in Lesotho is a complex subject shaped and influenced by the country's historical experience, geographical position and economic realities. Also, land tenure is very closely associated with and important to the traditional political structure - the chieftainship.

A basic principle of customary land tenure in Lesotho is expressed in the statement, "mobu ke oa morena-e-moholo bitsong le sechaba", meaning "land belongs to the King in trust for the nation". With some variation in wording the principle was stated in the 1966 independence constitution and post-independence legislation.[11] As understood and applied in Lesotho, this principle has much wider implications than the mere fictional vesting in the state or Crown of ultimate ownership of land found elsewhere. One consequence is that land is not permitted to be sold nor permanently transferred by a land holder.

The administration of the Nation's land is a prerogative of the chieftainship. A chief holds administrative title to the land within the area of his jurisdiction and has the responsibility for allocation of residential sites, gardens, tree plantations and arable fields in an equitable manner to persons who qualify for such allocation.[12] In order to qualify a person must fulfil

/two basic ...

two basic requirements: (1) membership in the community where the land is situated, which is shown by residence, allegiance to the chief and payment of taxes in a particular area. Ordinarily, a person must also be a member of the Basotho Nation; (2) marriage: land is usually allocated only to married males though on rare occasions may be allocated to unmarried men.

Traditionally, a qualified person had a right to three fields to maintain himself and his family and, in the case of a polygamist, a claim for additional fields but today this represents the ideal. While Sheddick in 1947-1949 found that the average was three fields, the number decreased in 1960 to an average of 2.4 fields and the 1970 Agricultural Census showed an average of 2.1 fields.[13] A more recent Bureau of Statistics Pilot Survey suggests a continued decline in the number of fields held as shown by the following table.

TABLE 3

Distribution of Households according to Number of Fields Held

No. of Fields	Households	%
0	35	23.3
1	40	26.7
2	41	27.3
3	26	17.3
4	5	3.3
5	3	2.0
TOTAL	150	99.9

Source: Report of the Lesotho Pilot Survey on Population and Food Consumption, May 1973.

/Under customary ...

Under customary law, both fields and residential sites are allocated without any payment to the chief by the holder though bribes are not unknown. The grant is normally for the life of the holder; however the Laws of Lerotholi provide that the chief has an obligation to make periodic inspections and may terminate the allocation of fields in cases where the holders have more land than is necessary for "their families' subsistence" or where the fields have not been cultivated for two successive years without sufficient reason.[14] Also, allocation of both residential sites and arable fields may be lost by the removal of a person and his family from the area to another chief's juriodiction for which he is entitled to no compensation but may remove materials which he has provided at his own expense, e.g. doors and window frames, roofing and other materials which form part of house construction.

On the death of a holder of a residential site and arable fields the position is complicated.[15] As a corollary of the principle that land belongs to the Nation there is a principle, 'mobu hase lefa', meaning 'land is not an inheritance'. Generally, arable fields revert to the chief for reallocation on the death of the holder, however the Laws of Lerotholi provide that the widow has a right to retain the fields of her deceased husband subject to a reduction based on diminished need or non-use.[16] The widow's rights are for her life and may be lost if she moves from the area. Provision is made by the Laws of Lerotholi for minor dependents where both parents die; in such case the fields are retained for their maintenance and on reaching majority a son is entitled to be confirmed in possession of the land.[17] With respect to residential sites, the heir of the deceased or, if no heir,

/the dependents ...

the dependents are entitled to continue to use the site including gardens.

Though subject apparently to occasional local modification, generally the rights of a holder are not continuous over allocated fields. The established practice is for all fields to be thrown open for communal grazing after harvest until the beginning of the next planting season. Purely grazing land is held communally and is never allocated to an individual.

The land tenure system of Lesotho has been criticised by a number of specialists as an obstacle to development.[13] Criticism has been concentrated on a number of aspects: (1) insecurity of tenure arising from the possibility of reallocation; (2) improper allocation and reallocation; (3) restrictions on inheritance; (4) fragmentation due to the smallness and scattered character of the fields; (5) communal grazing patterns which make improvement of stock impossible; (6) absence of a right of enclosure because of the non-continuous nature of the rights of holders of fields; (7) lack of title to the land which prevents loans given on land as security.

Since Independence, the Lesotho government has taken steps to correct some of the obvious defects in the land tenure system. The Land Act of 1973 which replaced the Land (Procedure) Act of 1967 sets up procedures for controlling the allocation of land by chiefs which when fully implemented should reduce instances of unfairness. A companion Act, the Administration of Lands Act of 1973, though never brought into operation, made even more drastic modifications to the traditional system by introducing State leases in the urban areas and providing for Selected Development Areas.

/Because ...

Because of the importance to the country and the very sensitive nature of land reform, the government has been cautious but nevertheless very substantial changes are under active consideration.

While there certainly is scope for reform, it is important to recognise the advantages the existing system offers. While some rural households lack any land there is still a fairly equitable distribution of land among the population. As Sefali points out, conversion to a type of freehold which would allow the sale of land would only accelerate social stratification by creating a small landowning class and a large landless majority. [19]

It is doubtful that any reform of the present land tenure system could improve the capacity of the land to provide for a larger population. On the other hand, improvement of the methods of land usuage offers some possibility of progress towards a better standard of living. This has been recognised in the Lesotho Second Five Year Plan which gives emphasis to the better use of available agricultural land and in addition to a number of special projects actively supports five large area based projects aimed at an improvement of both crop and animal production. [20]
The Land Husbandry Act of 1969 gives the Minister of Agriculture extensive powers to make regulations to ensure land is beneficially used and to promote soil conservation. The Act provides a framework for improved land usuage though it must be observed that implementation has been slow.

FOOTNOTES

1. Bawden, M.G. & Carroll, D.M.: The Land Resources of Lesotho, Directorate of Overseas Surveys, Tolworth, England, 1968, p. 24.
2. Sheddick, V.: Land Tenure in Basutoland, London, H.M.S.O., 1954, p. 187.
3. See Hamnett, I.: "Some Problems in the Assessment of Land Shortage: A Case Study in Lesotho", 1973, African Affairs, p. 39.
4. Bawden & Carroll, supra, Table 2, p. 75.
5. Monyake, L.B.: "Lesotho - Land, Population and Food" in Report on National Population Symposium, Morija, Lesotho, 1974, p. 63.
6. Smit, P: Lesotho: A Geographical Study, Pretoria, 1967, p. 26.
7. Monyake, supra, p. 63; see also 1970 Census of Agriculture Report compiled by Bureau of Statistics, Maseru, Graph 2, p. 63.
8. Ibid, p. 64; also 1970 Census of Agriculture Report, supra, p. 30.
9. Report of the Lesotho Pilot Survey on Population and Food Consumption, May 1973, Bureau of Statistics, p. 19.
10. See Smits, L.G.A.: "The Distribution of the Population in Lesotho and some Implications for Economic Development" 1968 Lesotho (Basutoland) Notes and Records, No. 7, p. 12; Smits, P., supra, pp. 26-29; even as early as 1935 the view was expressed that there was little room for expanding cultivation, see Pim, Sir A., Financial and Economic Position of Basutoland, H.M.S.O., London, 1935, p. 179.
11. Constitution of Lesotho 1966 (suspended by Lesotho Order No. 1, 1970) ss. 92-93; Land Act 1973, ss 3-4; Administration of Lands Act 1973, s. 2.

/12. See ...

12. Laws of Lerotholi, 1959 ed., Part I, Rule 7.

13. Sheddick, supra, p. 89; Morojele, C.M. R., 1960 Agricultural Census, Part 3, Agricultural Holdings, Maseru, 1963, pp. 40-41; 1970 Census of Agriculture Report, supra, pp. 29-32.

14. Laws of Lerotholi, 1959 ed., Part I, Rule 7 (2) (3).

15. Poulter paper, pp. 24-26; also Poulter, S. Family Law & Litigation in Basotho society, supra, pp. 248-254.

16. Laws of Lerotholi, 1959 ed., 7 (4).

17. Ibid, 7 (5).

18. See e.g. Lesotho: A Development Challenge, World Bank Country Economic Report, Washington, D.C., 1975, pp. 8-11; Williams, J.C.: Lesotho Land Tenure and Economic Development, Pretoria, 1972, pp. 28-48; Report of an Economic Survey Commission (Report of the Morse Commission), London, H.M.S.O., 1960; Bawden & Carroll, supra, pp. 20 & 68; generally, see Cowen, D.V. "Land Tenure and Economic Development in Lesotho", 1967, S.A. J. Econ., pp. 57-74.

19. Sefali, M.: "Some Aspects of the Development of Land Policy in Lesotho", paper prepared for Seminar on Development of Land Resources in East, Central and Southern Africa, Lusaka, Zambia, April 1976, p. 9.

20. Kingdom of Lesotho Second Five Year Development Plan, Vol. I, p. 71 et seq.