Penal Code Act, 2010

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ACT NO. 6 OF 2012

Penal Code Act, 2010

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ACT NO. 6 OF 2012 Penal Code Act, 2010

An Act to establish a code of criminal law.

Enacted by the Parliament of Lesotho

PART I - GENERAL PRINCIPLES Citation and commencement

1. This Act may be cited as the Penal Code Act, 2010 (in this Act referred to as the "Code") and shall come into operation on the date of its publication in the Gazette.

Application

2. (1) Except where expressly provided, nothing in this Code shall affect -

(a) the liability, trial or punishment of a person for an offence against any other written law in force in Lesotho other than this Code;

(b) the liability of a person to be tried or punished under any provisions of any law in force in Lesotho relating to the jurisdiction of

the courts of Lesotho for an offence in respect of an act done beyond the ordinary jurisdiction of such courts;

(c) the power of any court to punish a person for civil contempt of such court;

(d) the liability or trial of a person, or the punishment of a person under any sentence passed or to be passed in respect of any act done or commenced before the coming into operation of this Code; or

(a) any of the written laws for the time being in force for the governance of the police, security services and armed forces of Lesotho.

(2) No person shall be tried, convicted or punished for an offence other than an offence specified in this Code or in any other written law or statute in force in Lesotho.

(3) The existing jurisdiction of The Local and Central Courts in relation to customary law offences and punishment shall continue until such time as the Minister responsible for Justice, may decide otherwise.

(4) Where a court in any trial considers that a charge is proved, but is of the opinion that, having regard to the character, age, health or mental condition of the accused and to the mitigating circumstances in which the offence was committed, it is inexpedient to inflict any punishment, the court may, without proceeding to conviction, make an order dismissing the charge.

(5) Subsection (4) shall not apply in respect of any offence for which but for the factors therein mentioned, a court would impose a custodial punishment of six months or more.

Interpretation

3. In this Code, unless the context otherwise requires -

"adult" means any person who has attained 18 years or acquired majority by virtue of marriage;

"agent" means any person who, pursuant to an agreement, acts on behalf of another in the conduct of that other person's affairs;

"child" means any person who has not attained the age of 18 years;

"grievous bodily harm" means any harm which amounts to serious harm, or seriously or

permanently injures or is likely to injure health, or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense;

"legal practitioner or advisor" means any person admitted to the practise of law in Lesotho;

"medical practitioner" means any person who is registered in terms of the law regulating the admission of medical, dental and pharmaceutical professionals and qualified to practice medicine, dentistry or pharmacy;

"member of the victim's household" is any person normally residing in the same private dwelling as a victim and includes any domestic servant of the victim;

"mental disorder" means a condition which involves a temporary or permanent disruption of the mental state, excluding a condition which has an incidental effects;

"noxious substance" means any substance which, when administered, causes physical or mental harm, distress or annoyance to the person to whom it is administered;

"possession" -

(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession, control or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his, her or their custody, control or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

"property" includes movables and immovables, money, salary, debts, legacies and all deeds and instruments relating to or evidencing title or right;

"private dwelling" includes any building or structure used by any person

for the purposes of residence, whether permanent or temporary, any accommodation lawfully occupied for residential purposes, whether shared with other persons or not, and any hospital ward;

"public official" includes any person in the employment of the Government of Lesotho or employment of any other organization exercising a public power or performing a public duty pursuant to law;

"public place" includes any road, building, conveyance or place to which the public has access, either upon condition of making any payment or not, and any building or place used for religious gatherings or public meetings;

"sexual act" means -

(a) direct or indirect contact with the anus, breasts, penis, buttocks, thighs or vagina of one person and any other part of the body of another person;

(b) exposure or display of the genital organs of one person to another person;

(c) the insertion of any part of the body of a person or of any part of the body of an animal or any object into the vagina or penis or anus of another person; or

(d) cunnilingus, fellatio or any other form of genital stimulation, but does not include contact, exposure, insertion or genital stimulation done by hand or any harmful object-

(i) for sound health practices or proper medical purposes;

(ii) for reasonably necessary body search by law enforcement agencies -

(A) done for lawful purposes without putting in jeopardy the health and safety of the arrestee, suspect or the person who is

being searched; and

(B) not carried out abusively or for the purpose of humiliating or punishing an arrestee, suspect or the person who is being searched;

"statute" means the Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of the International Criminal Court on 17 July 1998 and ratified by Lesotho on 6 September 2000.

Territorial application

4. (1) The jurisdiction of the courts of Lesotho for the purposes of this Code extends to every

place within Lesotho.

(2) When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if any such act had been done wholly within the jurisdiction.

(3) A person who, while outside Lesotho, commits an act or makes an omission where such an act or omission forms part of an offence, of which the other elements occur or have effect within Lesotho or is an offence in respect of which Lesotho is enjoined to punish under international law, may, on coming into Lesotho, be tried and punished for such an offence as if the act or omission had been committed within Lesotho.

(4) An offence committed by any citizen of Lesotho within the confines of a Lesotho diplomatic mission abroad shall be triable within Lesotho as if the offence had been committed within Lesotho.

(5) A person who, while outside Lesotho, counselled another to do or omit to do in Lesotho an act or make an omission of such a nature that, if he or she had done the act or omission in Lesotho, he or she would have committed an offence, may be tried for an offence of the same kind, and is liable to the same punishment, as if he or she had done the act or made the omission in Lesotho.

(3) A person who creates or is in control of a situation of danger and who fails to prevent harm to others resulting from such danger, commits an offence.

(4) A person who sees another person in immediate danger of death or serious injury commits an offence if he or she omits to take reasonably practicable steps to rescue that person from such danger.

(5) A person who, having direct knowledge of the commission of an offence involving the taking or endangering of human life, without reasonable excuse fails to disclose to a chief, police or other law enforcement agents as soon as reasonably practicable such information as he or she possesses, commits an offence.

(6) The provisions of subsection (5) shall not apply to a legal practitioner or advisor or medical practitioner who acquires such knowledge in the course of professional duties.

(7) A person who has knowledge of the fact that a criminal offence involving danger to human life is about to be committed or who witnesses the commission of such an offence and fails, without reasonable excuse, to take steps to summon a chief, police or other law enforcement agencies, commits an offence.

Double Jeopardy

5. A person cannot be tried or punished twice under the provisions of this Code for the same act or omission, except in the case where the act or omission is such that by means thereof he or she causes the death of another person, in which case he or she may be convicted of the offence of which he or she is guilty by reason of causing such death, notwithstanding that he or she has already been convicted of some other offence constituted by the act or omission.

PART II - GENERAL PRINCIPLES OF CRIMINAL LIABILITY

Age of criminal responsibility

6. (1) A person under the age of seven years is not criminally responsible for any act or omission.

(2) A person above the age of seven years but below the age of fourteen years is not criminally responsible for any act or omission unless it is proved that at the time of doing the act or making the omission he or she understood the nature and implications of the conduct and, knowing that the conduct was wrong, he or she was capable of acting in accordance with that knowledge.

Omissions

7. (1) No person shall be criminally liable for any omission to act unless he or she is under a legal duty to perform the act which he or she has omitted to do.

(2) A legal duty to act exists where -

(a) a person is required to do something by any provision of the law; or

(b) a person owes a duty of protection or assistance to the person affected by the omission, this duty having come into existence as a result of a natural or assumed relationship between the parties or by virtue of the office occupied by one of them; or

(c) there has been an agreement giving rise to a duty to act.

Involuntary acts

8. (1) In this section, "involuntary act"

means an act of which the actor at the time of the commission of the act is not conscious, or an act over which he or she has no control.

(2) Except where expressly provided for in any other written law, a person shall not be criminally liable for any involuntary act.

Automatism

9. (1) A person who acts in a state of unconsciousness, or whose consciousness is so impaired as to make him or her unable to control his or her actions, shall not be liable for any offence committed during such a state.

(2) This defence shall not be available to any person who, knowing

of the existence of the condition which gives rise to such conduct, nonetheless recklessly places himself or herself in circumstances where she or he is likely to cause harm to persons or property.

(2) Where conduct referred to under subsection (1) is the result of a mental disorder, and where it appears to the court that there is a significant danger that the accused person is likely to cause harm to others, the court may acquit the accused person subject to the making of an order under section 172 of the Criminal Procedure and Evidence Act, 1981[1].

Negligence or recklessness

10. A person who causes harm to the person or property of another or exposes others to a risk of injury or death through negligence or recklessness commits an offence.

Culpability

11. (1) Liability for any act or consequence of any act shall be imposed only if a person intended to perform that act or intended the consequences which form the subject of the criminal charge.

(2) A person intends to perform an act if he or she purposefully directs his or her will towards the performance of that act. A person intends the consequences of his or her act if-

(a) he or she acts knowing that the consequences will occur as a result of his or her action; or

(b) he or she acts while foreseeing that there is a real possibility of that consequence occurring and he or she is reckless as to whether or not the consequence

occurs.

(3) Where it is a requirement of an offence that the accused should have known of the existence of a particular circumstance, then awareness on the part of the accused of the possibility of the existence of that circumstance, together with recklessness as to whether it existed, shall satisfy the requirement of knowledge in that case.

(4) A person is reckless in relation to a possible consequence if he

or she knows that there is a substantial possibility that the consequence will occur and acts nonetheless, being indifferent as to whether or not the consequence occurs.

(5) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is irrelevant so far as regards criminal liability.

Ignorance of the law

12. (1) It shall be a defence for any person charged with an offence if he or she proves that at the time of the act or omission forming the basis of a criminal charge he or she could not reasonably have been expected to be aware of the fact that the conduct contravened the law.

(2) The defence of ignorance of the law shall be proved by such person on the balance of probabilities.

Mistake

13. A person who does or omits to do an act under an honestly held, but mistaken belief in the existence of a state of affairs, is not criminally responsible for the act or omission to any greater extent than if the real state of affairs had been as he or she believed them to be.

Claim of right

14. A person shall not be guilty of an offence relating to property if his or her act or omission in relation to that property was accompanied by a reasonably held belief that he or she was exercising a claim of right.

Intoxication

15. (1) For the purposes of this section, "intoxication" includes those states of mind produced by alcohol, drugs or any other intoxicating substance.

(2) Except as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(3) Intoxication shall be a defence to any criminal charge if by rea-

son of intoxication a person charged at the time of the act or omission did not know that such act or omission was wrong or did not know what he or she was doing, and -

(a) the state of intoxication was caused without his or her consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(2) Where the defence under subsection (3) is established, then in a case falling under paragraph (a), the accused person shall be discharged, and in a case falling under paragraph (b), the provisions of section 172 of the Criminal Procedure and Evidence Act 1981 shall apply.

(3) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed that intention, specific or otherwise, necessary for conviction of the offence charged.

(4) A person commits an offence if he or she intentionally or negligently becomes intoxicated through the use of alcohol, drugs or other intoxicating substances and while in that intoxicated condition performs a punishable act.

(5) It shall be irrelevant for purposes of conviction under subsection (6) that the person charged was so intoxicated as to be incapable of forming the intention necessary for conviction of any crime.

Sudden emergency

16. Subject to the express provisions of this Code relating to acts done under coercion, provocation or self defence, a person acting or omitting to act in a sudden or extraordinary emergency shall not be held criminally liable for acts and omissions done or made in such circumstances, if his or her acts or omissions were such as would have been done or made by a reasonable person.

Compulsion

17. A person who commits an offence as a result of a threat of immediate and

serious bodily harm either to himself or herself or to a member of his or her immediate family shall not be liable if -

(a) he or she had not intentionally or negligently placed himself or herself in circumstances where he or she should have foreseen the likelihood of he or she being subjected to such a threat; or

(b) he or she is not a member, agent or servant of a criminal group;

(c) the threat was not one which could at any time before the commission of the offence have been avoided; or

(d) the threat was one which would have and did in fact induce the accused to commit the offence.

Superior orders

18. (1) A person who is placed in authority over another person commits an offence if he or she issues orders that are clearly or manifestly illegal.

(2) It shall not be a defence to a criminal charge that the offence specified in the charge was carried out by the accused person while acting under the clearly or manifestly illegal orders of a superior placed in authority over him or her.

Insanity

19. (1) For the purposes of subsection (2), every person is presumed to be of sound mind and to have been of sound mind, until the contrary is proved.

(2) No person shall be convicted of a criminal offence if he or she proves on the balance of probabilities that at the time of the commission of the offence he or she was suffering from mental disorder of such a nature that he or she was substantially unable to appreciate the wrongfulness of his or her actions or that he or she was unable to conduct himself or herself in accordance with the requirements of the law.

(3) Where proof of mental disorder is established, the court shall re-

turn a verdict of insanity and order the detention of the person in terms of section 172 of the Criminal Procedure and Evidence Act 1981.

Self defence

20. (1) No person shall be criminally responsible for the use of force in repelling an unlawful attack -

(a) upon himself or herself or another person if -

(a) it was not reasonable to avail himself or herself of any means of retreat of which he or she was aware; and

(ii) the degree of force used in repelling the attack was no greater than that which was reasonably necessary in the circumstances;

(b) upon his or her property or the property of another provided that the means he or she chooses and the degree of force he or she uses in so doing are reasonable in the circumstances.

Judicial immunity

21. Except as expressly provided by this Code, a judicial officer is not criminally responsible for any thing done or omitted to be done by him or her in good faith in the exercise of his or her judicial functions, although the act done is in excess of his or her judicial authority or although he or she is bound to do the act omitted to be done.

Attempts

22. (1) If, with intent to commit a criminal offence, a person does an act which is more than merely preparatory to the commission of the offence, she or he commits the offence of an attempt to commit the offence.

(2) Subsection (1) shall apply even where the facts are such that the commission of an offence is impossible.

Counseling, procuring etc

23. (1) A person who counsels, procures or incites another to do any act or make any such omission of such a nature that if the act were done or the omission were made, an offence would thereby be committed, commits an offence.

(2) A person counsels, procures or incites the commission of an offence if he or she recruits, advises or otherwise encourages another person to commit that offence.

(3) A conviction under subsection (1) shall carry the same penal consequences as a conviction for the actual commission of the offence.

Aiding and abetting

24. (1) Where an offence is committed, each of the following persons is liable and may be charged -

(a) a person who actually does the act or makes the omission which constitutes the offence;

(b) a person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) a person who, with the intention of giving assistance, is present at the scene of the crime within such distance from the perpetrator as to be in a position to render immediate assistance to him or her to evade arrest or conceal the offence;

(d) a person who counsels, procures or incites any other person to commit the offence.

Conspiracy

25. If a person agrees with another person or persons that a course of conduct shall be pursued or joins such agreement which, if carried out in accordance with their intentions, either -

(a) will lead to the commission of any offence by one or more of the parties to the agreement; or

(b) would do so but for the existence of facts which render the commission of the offence impossible,

he or she commits an offence of conspiracy to commit the offence or offences in question.

Shared intention or common purpose

26. (1) Where two or more persons share a common intention or purpose to pursue an unlawful purpose together, and in the pursuit of such purpose an offence is committed, then each party to the common intention is deemed to have committed the offence.

(2) There shall be no conviction in the circumstances under subsection (1) if it cannot be proved that the accused person could reasonably have been expected to have foreseen the commission of the offence.

Accessory after the fact

27. A person who assists another person who has completed the commission of an offence to escape arrest or apprehension commits the offence of being an accessory after the fact.

Offences by companies

28. (1) Where a person acting on behalf of a company or body corporate commits an offence, the company or body corporate may be charged with the offence if -

(a) that offence is one created by statute with an express or implicit intention of creating liability on the part of a company for the acts of its employees or officers; or

(b) the person who commits the act is a person charged with the direction of the affairs of that company or body corporate.

(2) Where a body corporate commits an offence under subsection

(1) , the punishment shall be a fine or imprisonment as may be provided for under the relevant statute.

PART III - OFFENCES AGAINST THE PERSON

Consent

29. (1) The consent of a person to the causing of his or her own death or to the infliction upon himself or herself of serious physical injury does not affect the criminal responsibility of any person by whom such death or serious physical injury is caused.

(2) It shall be a defence for a person charged with causing death or serious injury to show that the victim consented to the infliction of physical force for a purpose recognised as lawful.

(3) Any person who uses an excess of force for a lawful purpose shall be criminally responsible for that excess.

Assault

30. (1) A person who intentionally applies unlawful force to the person of another commits the offence of assault.

(2) A spouse who intentionally applies unlawful force to another, commits the offence of assault.

Aggravated assault

31. (1) A person who assaults another in circumstances where one or more of the factors contained in subsection (2) are present commits the offence of aggravated assault.

(2) The factors referred to in subsection (1) are -

(a) the intentional causing of serious bodily injury or any form of lasting physical disablement;

(b) the use of any form of instrument or substance, explosive

or otherwise, with the intention of inflicting serious physical injury;

(a) the commission of assault with intent to commit another criminal offence;

(b) the assault of a judicial officer, lawyer, police officer or any other officer of the law in the execution of duty;

(c) the assault of a person on account of an act done by that person in the execution of a legal duty;

(d) the assault of a person who by virtue of age, physical or mental condition is vulnerable;

(e) the commission of assault in circumstances where the accused was at the time of the assault in a position of authority over the victim;

(f) the assault takes place in the private dwelling of the victim and is committed by a person other than a member of the victim's household.

(2) No conviction for aggravated assault shall be made unless the accused is shown to have known that the relevant aggravating factor was present.

Lawful physical force

32. No offence is committed by a person who applies reasonable physical force to another when this is necessary -

(a) for the furtherance of public justice;

(b) for the execution of lawful orders;

(c) for the prevention of crime;

(d) for the apprehension of criminal suspects;

(a) for the defence of person or property; or

(b) for the lawful and reasonable chastisement of children. Risking injury or death

33. A person who intentionally and unlawfully subjects another or others to a risk of injury or death commits an offence.

Threats

34. (1) A person who communicates to another an unlawful threat of death or physical harm, either directly or indirectly, by gesture or words written or spoken, commits an offence.

(2) It shall be a defence to a charge under subsection (1) that the threat in question would not have caused fear or apprehension in any reasonable person.

Poisoning

35. A person who unlawfully and with intent to injure another causes any poison or noxious substances to be administered to or consumed by the other person commits an offence.

Suicide

36. No offence is committed by a person who attempts to take his or her own life.

Counseling and assisting suicide

37. Subject to any written law, a person who -

(a) counsels another to kill himself or herself and thereby causes that person to take or attempt to take his or her own life; or

(b) assists another in the taking of his or her own life,

commits an offence.

Culpable homicide resulting from suicide pact

38. (1) For the purposes of this section,

"suicide pact" means a common agreement between two or more persons having for its object the death of all of them whether or not each is to take his or her own life.

(1) Nothing done by a person who enters into a suicide pact shall be treated as done by him or her in pursuance of the pact unless it is done while he or she has the settled intention of dying in pursuance of the pact.

(2) A person who kills another in a suicide pact commits an offence of culpable homicide.

Causation in homicide

39. (1) Homicide is causing the end of the life of another person.

(2) A person is deemed to have caused the end of the life of another person if the court is satisfied that -

(a) his or her conduct was substantially productive of the death of that person; and

(b) there is no substantial legal cause intervening between the original conduct and the death of that person.

Murder and extenuating circumstances

40. (1) Any person who performs any unlawful act or omission with the intention of causing the death of another person, commits the offence of murder if such death results from his or her act or omission.

(2) The punishment on conviction for murder shall be a sentence of

death.

(3) Notwithstanding subsection (2), the court shall in the conviction for murder impose a lesser sentence where it is satisfied that -

(a) the convicted person was under the age of eighteen years at the time of the commission of the offence;

(b) the convicted person is pregnant at the time of sentence; or

(c) the offence was committed in the presence of extenuating circumstances.

(1) In deciding whether or not there are extenuating circumstances the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.

Culpable homicide

41. (1) A person commits the offence of culpable homicide if he or she causes death of another person through a criminally negligent act or omission.

(2) An act or omission shall be deemed to be criminally negligent if it involves a risk of serious harm to another, and the risk would have been apparent to a reasonable person.

Provocation in murder and assault

42. (1) For the purposes of this section -

"provocation" includes, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another person who is under his or her immediate care or to whom he or she stands in a conjugal, parental, filial or fraternal relations to deprive him or her of the power of self-control and to induce him or her to assault the person by whom the act or insult is done or offered;

"ordinary person" means an ordinary person of the class of the community to which the accused belongs.

(2) A person who -

(a) unlawfully and intentionally kills another under circum-

stances which, but for the provisions of this section, would constitute murder; and

(b) does the act which causes death in the heat of passion caused by sudden provocation as defined in subsection

(1) and before there is time for the person to have reasserted his or her self-control, commits the offence of culpable homicide only.

(2) The provisions of this section shall not apply unless the court is satisfied that the act which causes the death bears a reasonable relationship to the provocation.

(3) Where such an act or insult is done or offered by one person to another or, in the presence of another, to a person who is under the immediate care of that other or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault.

(4) A person who knowingly incites another to act towards him or her in what would otherwise be a provocative manner shall not be held to have acted under provocation.

Infanticide

43. Where a female person by any unlawful act or omission causes the death of a child to whom she gave birth within the previous six months, she will be presumed to have acted under the effects of childbirth, unless it can be shown to the contrary, and she shall not be convicted of murder but may be convicted of infanticide.

Concealment of childbirth

44. A person who disposes of the dead body of a new-born child with intent to conceal the fact of its birth, whether the child died before, during, or after birth, commits an offence.

Abortion

45. (1) A person who does any act bringing about the premature termination of pregnancy in a female person with the intention of procuring a mis-

carriage, commits the offence of abortion.

(2) It shall be a defence to a charge under this section that the act intended to terminate pregnancy was performed by a registered medical practitioner -

(a) in order to prevent significant harm to the health of the pregnant female person, and the person performing the act has obtained a written opinion from another registered medical practitioner to the effect that the termination of pregnancy is necessary to avoid significant harm to the health of the pregnant female person;

(b) in order to prevent the birth of a child who will be seriously physically or mentally handicapped, and the person performing the act has obtained in advance from an-other registered medical practitioner a certificate to the effect that the termination of the pregnancy is necessary to avoid the birth of a

seriously physically or mentally handicapped child; or

(c) in order to terminate the pregnancy of a female person who is pregnant as a result of incestuous relationship or victim of rape.

Abduction

46. (1) A person who unlawfully takes or entices a child or any person of unsound mind out of the custody of the lawful guardian of such person, with or without the consent of such guardian, for the purpose of marriage, sexual intercourse, or commercial and labour exploitation, commits the offence of abduction.

(2) A guardian who consents to the enticement or taking of any child or person of unsound mind out of his or her custody for the purpose of marriage, sexual intercourse or commercial and labour exploitation, commits the offence of constructive abduction.

Unlawful detention

47. (1) A person who unlawfully by force, threats, deception or any other unlawful means deprives another person of his or her freedom of movement, commits the offence of unlawful detention.

(2) A person who unlawfully detains another with the intention of causing that person serious bodily harm or death, or with the intention of securing payment or any other advantage for the release of the unlawfully detained person commits an offence.

Indecency with children

48. (1) An adult who commits an indecent act with or directed against a child, or who solicits or entices such a child to the commission of such acts, commits an offence.

(2) For the purposes of this section, the consent of the child to the act of indecency is irrelevant.

(3) An adult who knowingly commits an indecent act in the presence of a child capable of witnessing such an act, commits an offence.

Unlawful sexual intercourse with children

49. (1) An adult who has sexual intercourse with a child commits an offence, and the consent of the child is irrelevant.

(2) It shall be a defence for a person charged with this offence to prove that he or she had reasonable grounds to believe, and did so believe, that the child had

attained an age of eighteen years.

Sexual molestation of minors

50. An adult who has sexual act with a child under the age of twelve years, whether or not such child consents, commits the offence of sexual molestation.

Indecent assault

51. (1) A person who, without the consent of another person, touches

that person in an indecent manner, commits the offence of indecent assault.

(2) A touching may be deemed indecent if, according to the standards of reasonable members of the community, it demonstrates a sexual intention or motive.

Unlawful sexual act

52. (1) A person who has unlawful sexual act with another person, or causes another person to commit an unlawful sexual act, commits an offence.

(2) A sexual act is unlawful if committed under the following circumstances -

(a) there is an application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;

(b) there are threats, whether verbal or through conduct, of the application of physical force to the complainant or to a person other than the complainant;

(c) there are threats, whether verbal or through conduct, to cause harm other than bodily harm, or mental harassment to, or public humiliation or disgrace of, or to use extortion against, the complainant or any person other than the complainant;

(d) the complainant is below the age of 12 years;

(e) the complainant is unlawfully detained;

(f) the complainant is affected by -

(i) physical disability, mental incapacity,

sensory disability, medical disability, intellectual disability, or other disability, whether permanent or temporary; or

(ii) intoxicating liquor or any drug or other sub-

stance which mentally or physically incapacitates the complainant; or

(iii) sleep, to such an extent that he or she is rendered incapable of understanding the nature of the sexual act or

deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;

(g) the complainant submits to or commits the sexual act by reason of having been induced, whether verbally or through conduct, by the perpetrator, or by some other person to the knowledge of the perpetrator, to believe that the perpetrator or the person with whom the sexual act is being committed is some other person;

(h) as a result of the fraudulent misrepresentation of some fact by or any fraudulent conduct on the part of the perpetrator, or by or on the part of some other person to the knowledge of the perpetrator;

(i) a perpetrator, knowing or having reasonable grounds to believe that he or she is infected with a sexually transmissible disease, the human immuno-deficiency virus or other life-threatening disease, does not, before committing the sexual act, disclose to the complainant that he or she is so infected.

A person does not consent to sexual intercourse if -

(a) his or her submission has been obtained by force or by threats of whatever nature;

(b) his or her submission has been obtained by a fraudulent representation by the accused that he or she is her husband or wife;

(c) the person having sexual intercourse with him or her has made a fraudulent representation to him or her as to the

nature of the act of intercourse, and the affected person has acted on this misrepresentation; or

(d) he or she is asleep or otherwise unconscious at the time at which the sexual

intercourse takes place, and the accused has no reasonable grounds for assuming that he or she would on awakening or gaining consciousness consent to the fact that intercourse has taken place;

(e) he or she is under the age of eighteen years; or

(f) he or she is so intoxicated at the time at which sexual intercourse takes place as to be incapable of giving or withholding consent;

(g) the accused person, with the intention of overcoming his or her resistance, has administered to him or her any substance, the nature of which is concealed from him or her, which has the effect of rendering him or her incapable of expressing his or her lack of consent to the act of sexual intercourse; or

(h) he or she withholds consent from an act of sexual intercourse with a person to whom he or she is currently married, and one of the following conditions is satisfied -

(i) he or she is sick;

(ii) the husband or wife uses abusive language, violence or threats in order to have sexual intercourse;

(iii) he or she has obtained a judicial order of restraint in respect of the husband or wife; or

(iv) he or she has been separated from the husband or wife by judicial order.

Incest

53. (1) For the purposes of this section, "brother" and "sister" include half-brother and half-sister respectively, and the provisions of this section shall apply whether the relationship between the parties involved is or is not traced through a valid marriage.

(2) A person who has sexual intercourse with another person who is, to his or her knowledge, his or her granddaughter or grandson, his or her grandmother or grandfather, daughter or son, sister or brother, or mother or father commits an offence.

(3) It shall not be a defence to a charge under this section that the person permitted the intercourse to take place because of his or her dependence on the relative involved or because of fear of such a relative.

(4) A person who has sexual intercourse with another person who is, to his or her knowledge, his or

her adopted child, fostered child or step child, commits an offence.

Bestiality

54. (1) In this section, "animal" includes a bird.

(2) A person who has sexual contact with an animal commits an offence.

Prostitution

55. (1) In this section, "prostitute" means a person who engages in sexual activity for payment.

(2) A person who incites, instigates or engages or procures another to engage, either in Lesotho or elsewhere, in prostitution, commits an offence.

(3) A person who persistently importunes others in a public place with the intention of engaging in sexual intercourse or with the intention of facilitating their sexual intercourse with another person commits an offence.

(4) A person who lives or habitually associates with a prostitute or

is proved to have exercised control, direction or influence over the movement of the prostitute, in such a manner as to show aiding or compelling prostitution for commercial gain, commits an offence.

(5) A person who detains another person against his or her will in premises which are used for prostitution or in any other place with the intent that such person should engage in sexual intercourse with another person, commits an offence.

Public indecency

56. (1) A person who creates or takes part in any indecent spectacle or performance, or who does in public or in private any indecent act which is calculated to offend any reasonable member of the public, commits an offence.

(2) person who commits any act prohibited in subsection (1) but does so only because he or she has been threatened in any way by the person with whom he or she commits the act or by others or being a child, does the act in ignorance of its unlawfulness, does not commit an offence.

PART IV - OFFENCES AGAINST PROPERTY

Theft

57. (1) Theft is the unlawful and intentional appropriation of property belonging to another.

(2) A person steals property and thereby commits the offence of theft

if-

(a) he or she unlawfully takes property belonging to another with the intention of permanently depriving the owner of that property;

(b) he or she unlawfully takes property from a person who is in lawful possession of that property with the intention of permanently depriving the possessor of the possession of the property; or

(c) he or she unlawfully takes property from the owner or

possessor of that property with the intention of subsequently returning that property to the owner or possessor in a condition substantially different from that in which it was at the time of the taking.

(2) The taking of property shall not be unlawful if -

(a) the owner consents to the taking of the property;

(b) the person taking the property believes that the owner would consent to the taking of the property if he or she were aware of the taking; or

(c) the person taking the property reasonably believes that he or she has a legal right to take the property.

(3) A person shall be regarded as taking property from its owner or possessor if he or she has performed any act which has the effect of depriving the owner of the control of that property.

(4) A person who, in any premises where merchandise is offered for sale to the public, conceals on his or her person or elsewhere any goods offered for sale within those premises, performs an act which has the effect of depriving the owner of control of that property.

Wrongful application of funds

58. (1) A person who is lawfully in possession of money belonging to another and who wrongfully applies that money to his or her own use, or wrongfully applies it to a use other than that for which he or she understood the owner to have entrusted it to his or her possession, commits the offence of theft.

(2) A person who receives the money of another person with whom, in respect of the payment of that money, he or she stands in a creditor-debtor relationship does not commit theft if he or she uses that money for his or her own or other purposes.

Aggravated theft

59. A person commits aggravated theft if the property he or she steals is -

(a) in postal transit at the time of the stealing;

(b) the property of a public office; or

(c) the property of the State and has come into his or her possession in the course of his or her employment as an employee of the State.

Things capable of being stolen

60. (1) Any moveable corporeal thing which is the property of any person is capable of being stolen.

(2) Any right or title to money is capable of being stolen.

(3) Any immoveable corporeal thing is capable of being stolen when that thing or part of it becomes movable.

(4) A wild animal is not capable of being stolen until such time as that wild animal is placed in confinement or is otherwise subjected to control by a person who intends to make that animal his or her property.

(5) A wild animal which has effectively escaped from the control of a person ceases to be capable of being stolen.

(6) Electricity, any other harnessed form of energy and water are capable of being stolen.

Unauthorised use

61. (1) A person who, in the absence of any belief on his or her part that he or she has the consent of the owner of property or would have such consent if the owner were aware of the taking, takes and uses

property belonging to another without any intention to permanently deprive the owner of the property, commits an offence.

(2) It shall not be a defence to a charge of an offence under this section if the person using the property intended to restore it to its owner.

Misuse of property of another

62. (1) A person who, having lawful possession of property belonging to another person, or having access thereto, uses such property in a way in which he or she has no reason to believe the owner would consent, commits an offence.

(2) A person who either lawfully or unlawfully gains access to a computer or electronic storage device owned by another, commits an offence if he or she -

(a) extracts from the computer or electronic storage device information which he or she has no reasonable cause to believe the owner of the computer or storage device would allow him or her to extract; or

(a) not having the consent of the owner of the computer or storage device, and having no reasonable grounds to believe that such consent would be given, he or she interferes with such computer or storage device or information contained therein, with the intention of securing an advantage for himself or herself or causing damage to the electronic data or programmes.

Stock theft

63. (1) The words "stock" or "produce" have the same meaning as in the Stock Theft Act[2].

(2) A person who enters any enclosure or any kraal with intent to steal any stock which is in or upon such enclosure or kraal, commits an offence.

(3) A person found in possession or if not in possession is proved to have been in possession of stock or produce in circumstances where it is reasonably believed or proved that the possession was unlawful, commits an offence.

(4) It shall be a defence to a charge under subsection (3) if the person in possession of the stock or produce is able to provide satisfactory explanation of such possession.

(5) A person who knowingly disposes of or who assists in the disposal of stock or produce that has been stolen

or that has been received with knowledge that it has been stolen, commits an offence.

Robbery

64. A person who unlawfully uses or threatens to use violence to any person in order to steal or obtain property, or retain stolen property or to prevent or overcome resistance to its being recovered commits the offence of robbery.

Housebreaking

65. (1) For the purposes of this section, "premises" means any structure or part of the structure the normal use of which might be for human habitation or the storage of property and which can be entered by any person.

(2) A person commits the offence of housebreaking if, with the intention to commit a crime, he or she displaces or breaks any part of the structure of a house or other premises and thereby inserts into the building any part of his or her body or any instrument intended by him or her to exercise control over any object within the building.

(3) A person who commits the offence of housebreaking with the intention of committing an offence punishable with death or with imprisonment for more than six months may be convicted of the offence of aggravated housebreaking.

(4) A person who gains uninvited entry into premises while carrying a weapon upon his or her person, may be convicted of the offence of aggravated unlawful entry into premises.

(5) A person who is found in possession of housebreaking tools in such circumstances as to suggest an intention upon his or her part to commit an offence of housebreaking commits an offence.

(6) A person who enters any premises without permission with the intention to commit a crime unknown to the prosecutor commits an offence.

Criminal trespass

66. A person who gains uninvited entry into premises and refuses to leave when requested to do so, commits an offence of criminal trespass.

Receiving stolen property

67. (1) A person who unlawfully takes possession or control of property, knowing such property to be stolen or otherwise unlawfully obtained, or believing that there is a strong possibility that it has been stolen or otherwise unlawfully obtained, commits an offence.

(2) A person who receives property which has been stolen and who does not, at the time of receiving the goods, have reasonable grounds for believing that the property is lawfully in the possession of the person from whom he or she receives the property, commits an offence.

(3) A person who is found by a police officer, chief or any other person to be carrying or otherwise transporting anything which the police officer, chief or any other person has reasonable cause to believe to have been stolen or otherwise unlawfully obtained may be charged with being in possession of, conveying , or having control over the property which is suspected of being stolen or otherwise unlawfully obtained and shall, if unable to give a court a satisfactory account as to how he or she came into possession of such property, be found guilty of an offence with which he or she is charged.

(4) A person who is found in possession of Government property which is clearly marked as such, and who cannot give a satisfactory explanation as to how he or she came into possession of such property, commits an offence.

Fraud

68. (1) A person who deliberately makes to another person a false representation , or conceals from another a fact which in the circumstances he or she has a duty to reveal, with the intention that such a person should act upon the representation to his or her detriment, and thereby causes him or her so to act, commits the offence of fraud.

(2) Where the representer fails to cause the representee to act upon

the misrepresentation, the offence of attempted fraud is committed.

Extortion

69. A person who uses a threat to another person with the intention of obtaining for himself or herself some advantage, whether of a proprietary nature or otherwise, to which he or she knows himself or herself not to be lawfully entitled, commits the offence of extortion.

Forgery

70. (1) A person who makes a false document with the intention of defrauding any other person to his or her detriment commits the offence of forgery.

(2) A person makes a false document if he or she-

(a) makes a document

purporting to be what it is not; or

(b) alters any document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document.

(3) A person who, without lawful authority, makes any document purporting to be a judicial or Lesotho Government document or document of any country, or any stamp, currency note, or coin purporting to be a stamp, currency note or coin issued by any government official, commits the offence of forgery of official material.

(4) A person who, without lawful authority or excuse, the proof of which lies on him or her, has in his or her possession any equipment or supplies the exclusive purpose of which is the forging of such official or government material as is included in this section commits an offence.

(5) A person who knowingly passes or communicates to another a forged document with the intention of defrauding any person or body, commits an offence.

(6) A person who knowingly and without lawful authority passes to another person or body any forged document, commits an offence.

(7) Any person who -

(a) without lawful excuse, the proof whereof shall lie upon him or her, makes or has knowingly in his or her possession any die, instrument or document capable of making the impression of any postal or revenue stamp;

(b) fraudulently cuts, tears or removes from any material any stamp used for revenue purposes with intent that another use shall be made of such stamp or any part thereof; or

(c) fraudulently interferes with such a stamp with intent that another use shall be made of such a stamp, commits an offence.

False statements

71. A person who makes a false statement to any person having control of any official government register or register of a public body or private body dealing with members of the public, with intent that false information should be included in such a register, commits an offence.

Unlawful damage to property

72. A person who, without lawful excuse, does any act with the intention of damaging property, even if singly or jointly owned or possessed, commits the offence of unlawful damage to property.

Arson

73. A person who, without lawful excuse, sets fire to immovable property even if singly or jointly owned or possessed, with the intention of causing damage to that property, commits an offence.

PART V - OFFENCES AGAINST ADMINISTRATION AND PUBLIC ORDER

Treason

74. (1) A person who, owing allegiance to the Kingdom of Lesotho, is a citizen of Lesotho or a bearer of a Lesotho passport, unlawfully does any act with the intention of overthrowing or coercing the government of Lesotho commits the offence of treason.

(2) The overt act which shall constitute treason includes -

(a) preparing or endeavouring to overthrow the Government of Lesotho;

(b) preparing or endeavouring to procure by force the alteration of any laws or policies of the Government of Lesotho;

(c) preparing or endeavouring to carry out by force any e- nterprise which usurps the executive, legislative or judicial power of the State in any matter;

(d) during time of war or state of emergency doing any act intended to give assistance to any state engaged in hostile or belligerent actions towards the Kingdom of Lesotho;

(e) instigating or assisting any person to invade Lesotho with an armed force.

(3) A person referred to in subsection (1) may be tried and punished for an offence under this section for an act done outside Lesotho, even if the entire act is done outside Lesotho.

(4) A person referred to in subsection (1) who incites, conspires or attempts to commit treason or

knowingly assists any person who has committed treason commits the offence of treason.

Failure to prevent or report treasonable conduct

75. A person who, knowing that another person intends or other persons intend to commit treason, does not give information thereof with all reasonable dispatch to the Government or law enforcement agencies or who does not use other reasonable endeavours to prevent the commission of treason commits an offence.

Sedition

76. (1) A person who, with a number of other people, comes together in an unlawful gathering with the intention of defying or subverting the authority of the Government of Lesotho, but without the intention to overthrow or coerce the Government of Lesotho, commits an offence of sedition.

(2) A person who -

(a) does or attempts to do or makes any preparation to do, or conspires with any person to do, any act with seditious intention;

(b) utters any seditious words;

(c) prints, publishes, sells, offers for sale, distributes or re-produces any seditious publication; or

(d) knowingly imports any seditious publication, commits an offence.

(3) A person who, without lawful excuse, has in his or her possession any seditious publication, commits an offence.

(4) No prosecution for an offence under this section shall be initiated except within six months of the commission of the offence.

(5) A seditious intention is an intention -

(a) to bring into hatred or contempt or to excite disaffection against the person of His Majesty or the Government of Lesotho as by law established;

(b) to incite the people and residents of Lesotho to attempt to procure the alteration, otherwise than by lawful means, of any law in

Lesotho;

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Lesotho;

(d) to cause discontent or disaffection amongst the people and residents of Lesotho; or

(e) to promote feelings of ill-will and hostility between different classes of the population of Lesotho.

(6) An act, speech or publication is not seditious if its effect is to -

(a) show that the Government has been misguided in or mis taken in any of its measures;

(b) point out errors or defects in the Government or Constitution of Lesotho as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

(c) identify and criticise with a view to their discussion or removal of any matters which are producing or have a tendency to produce feelings of ill-will, hostility and enmity between different classes of the population of Lesotho.

(7) In determining whether the intention with which an act was done, any words were spoken, or a document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally flow from his or her conduct at the time and under the circumstances in which he or she so conducted himself or herself.

(8) For the purposes of this section -

(a) "publication" includes all written matter and everything whether of a nature similar to written or printed matter or not, containing any visible representation, or by its

form, shape, or in any manner capable or suggesting words or ideas, and every copy or reproduction of any publication;

(b) "seditious publication" means any publication having a

seditious intent;

(c) "seditious words" means any words having a seditious intent.

Respect for national flag and anthem

77. A person who does any act in relation to the national flag and anthem which shows disrespect, contempt or irreverence, commits an offence.

Expression of hatred or contempt

78. A person who utters any words or publishes any writing expressing hatred, ridicule or contempt for any person or group of persons, wholly or mainly, because of the person's or group of persons' race, ethnic affiliations, gender, disability or colour, commits of an offence.

Offences against the Royal Family

79. (1) For the purpose of this section, "Royal Family" means the King, the King's nuclear family and the Regent.

(2) A person who knowingly commits any act calculated to violate the dignity or injure the reputation of the Royal Family commits an offence.

(3) It shall be a defence to a charge under this section that the act was a genuine response to provocative acts emanating from any member of the Royal Family.

Bribery

80. (1) A person who offers a bribe to any person in the employment of the Government of Lesotho, public company, public institution, public office, or to any person occupying any Government office, and any person being in such employment or occupying such office who accepts a bribe, commits an offence.

(2) A person shall be held to offer a bribe if he or she offers to another person any gift or consideration with the intention of extracting or obtaining from that person some specific or indeterminate action or inaction by him or her in relation to his or her official duties.

(3) A person shall be held to accept a bribe if he or she agrees to take any gift or consideration in return for some specific or indeterminate action or inaction by him or her in an official or public capacity, knowing that the gift or consideration has been given for such action or inaction or realising that there is a substantial risk that it might have been given for this purpose.

(4) Where it is proved that any gift or consideration has been given to or received by a person in the employment of the Government of Lesotho, public company, public institution or occupying a public office by or from a person holding or seeking to obtain an advantage from the Government, public company or public institution in an area of activity in respect of which the recipient of the gift or consideration has influence, the gift or consideration may be deemed to amount to a bribe unless the contrary is proved on the balance of probabilities.

Corruption of agents and employees

81. A person who -

(a) corruptly gives or agrees to give or offers any gift or consideration to any agent or employee as an inducement or reward for doing or not doing or having done or not done any act in relation to his or her principal's or employee's or employer's affairs or business;

(b) being an agent or employee corruptly accepts or obtains or agrees to accept or attempts to obtain from any person, either for himself or herself or for another, any gift or consideration as an inducement or reward for doing or not doing or for having done or not done any act in relation to his or her principal's or employer's affairs or business, or for showing or not showing favour or dis favour to any person in relation to his or her principal's or employer's affairs or business; or

(a) knowingly gives to any agent or employee or, being an agent or employee, knowingly uses, with intent to deceive, his or her principal, any receipt, account or other document in which the principal or employer is interested and which contains any statement which is false or erroneous or defective in any material particular, and which to his or her knowledge, is intended to mislead the principal or employer, commits an offence.

Insider trading

82. (1) A person who uses confidential information which he or she has obtained in his or her position as an employee, agent, or professional adviser of another in order to secure for himself or herself or another some improper commercial advantage in any

transaction, commits an offence.

(2) For the purposes of this section, an improper commercial advantage is any financial gain which would not have been obtained if the person securing the advantage did not possess information which is not known to any other party involved in the transaction.

(3) It shall be a defence under this section that at the time the confidential information was used, its confidential nature had disappeared or the user thereof was no longer an employee, agent or professional adviser of the complainant.

Going armed in public

83. A person who goes armed in public without lawful excuse and in such a manner as to cause terror to any other person commits an offence.

Breach of the peace

84. A person who, in a public place, uses obscene, abusive, threatening or insulting words or behaviour or otherwise conducts himself with intent to provoke a breach of the peace or in such a manner that a breach of the peace is committed or likely to be committed, commits an offence.

Provoking public violence

85. A person who, in any place acts or conducts himself or herself in such a manner or speaks or publishes such words from which there is a real likelihood that the natural and probable consequence of his or her act, conduct or speech or publication will under the circumstances lead to the commission of public violence by members of the public generally or by persons in whose presence the act or conduct takes place or to whom the speech or publication is addressed, commits an offence.

Perjury

86. (1) A person who in any judicial proceedings or before any officially constituted public enquiry, intentionally makes a false statement related to any matter material to the course of the judicial proceeding or enquiry commits the offence of perjury.

(2) A person who induces another person to commit perjury commits an offence.

(3) A person who, with intent to deceive in any judicial proceeding or any officially-constituted public enquiry fabricates evidence or knowingly makes use of such fabricated evidence, commits an offence.

(4) A person who swears falsely or makes a false affirmation or declaration before any person

authorised to take an oath or declaration upon a matter of public concern under such circumstances that if such affirmation or declaration had been made before a judicial proceeding would amount to perjury commits an offence.

Obstruction of course of justice and officially constituted public enquiries

87. (1) A person who wilfully fails to obey a court order or bring the administration of justice into disrepute, commits an offence.

(2) A person who makes any statement or performs any act with the intention of defeating or interfering with the course of justice, commits an offence.

(3) A person who in the course of judicial proceedings fails, without

lawful excuse, to comply with the requirements of those judicial proceedings commits an offence.

(4) A person who applies or threatens to apply any sanction against any witness or prospective witness because such witness has given evidence or is likely to be required to give evidence before judicial proceedings or an officially constituted public enquiry, commits an offence.

(5) A person who makes an approach to any witness or prospective witness in judicial proceedings or officially constituted public enquiry with the intention that such witness should alter his or her testimony or refrain from giving testimony, commits an offence.

(6) A person who dismisses a servant or employee because he or she has given evidence or refused to give evidence on behalf of a certain party to judicial proceedings or at an officially instituted public enquiry, commits an offence.

Disrespect for judicial proceedings

88. A person who, within the premises in which judicial proceedings or an officially constituted public enquiry is being conducted within the precincts of the same, shows disrespect in speech or conduct to or with reference to such proceedings or any person before whom such proceedings are being conducted, commits an offence.

Escape from lawful custody

89. A person who escapes from lawful custody or who assists another to escape from lawful custody, commits an offence.

Bringing judges etc. into disrepute

90. A person who makes or publishes any statement which he or she knows or has reasonable grounds to suspect is untrue and is calculated to bring any judicial officer or court into disrepute, commits an offence.

Offences relating to drugs

91. (1) For the purposes of this Code, "an illegal drug" means any drug

or plant listed in any law regulating the manufacture, possession, sale or distribution of drug.

(2) A person who, without lawful authority or lawful excuse, has in his or her possession an illegal drug, commits the offence of possession of an illegal drug.

(3) A person is deemed to be in possession of an illegal drug only

if-

(a) knowing of its nature or knowing that it is an illegal drug, he or she knows the drug to be on his or her person or otherwise under his or her actual or potential control;

(b) he or she has concealed the drug in a place to which he or she has or may be expected to have access; or

(c) he or she has passed or entrusted the drug to another with the intention that the other person should hold the drug on his or her behalf.

(4) A person shall not be deemed to be in possession of an illegal drug if he or she has abandoned the drug and has not done so in order to avoid imminent arrest.

(5) A person who, without lawful authority or excuse -

(a) has in his or her possession any illegal drug with intent to supply the drug to another;

(b) knowingly supplies to another person an illegal drug;

(c) with the intention of supplying another with an illegal drug does any act calculated to secure the importation into Lesotho or the export from Lesotho of an illegal

drug;

(d) with the intention of supplying another with an illegal drug does any act calculated to facilitate the process of

the unlawful importation into any other country of an illegal drug; or

(e) either in Lesotho or in any other country does an act calculated to transfer or conceal the proceeds of a transaction concerning the provision of an illegal drug which is unlawful in terms of the corresponding legislation of any other country, commits the offence of dealing in illegal drugs.

(6) For the purposes of charges under subsection (5) (a) to (d), a person may be deemed, unless the contrary is proved on the balance of probabilities, to have the intention of supplying another with an illegal drug if the quantity of the drug found in his or her possession, or the quantity of the drug involved in a transaction, actual or anticipated, exceeds that which might reasonably be judged as sufficient for the short-term personal consumption of a person consuming such a drug.

(7) A person who, without lawful authority, cultivates any plant specified in any law regulating the manufacture, possession, sale or distribution of drugs commits the offence of cultivating an illegal plant.

(8) A person charged with an offence under sub-section (7), being the person in actual possession or actual control of land upon which an illegal plant is growing, may be deemed, unless the contrary is proved on a balance of probabilities, to be cultivating the plant, if he or she could reasonably be expected to have been aware of the existence of that plant and of its nature.

PART VI - GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES

Jurisdiction in respect of offences under this part

92. (1) For the purposes of this Part, "Court" means the High Court.

(2) The Court shall have jurisdiction in respect of offences under this Part whether committed by a Lesotho citizen or a citizen of another state against a Lesotho citizen or a citizen of another state outside Lesotho.

(3) In exercising its jurisdiction under subsection (2), the Court shall be governed by the provisions of the Statute or any other law giving effect to the provisions of the Statute applicable in Lesotho.

Genocide

93. A person commits an offence of genocide if by his or her act or omission he or she commits any of the following acts with intent to destroy, in whole or in part, a national, ethnic, racial, religious group or any other identifiable group -

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical de-struction in whole or in part;

(d) imposing measures intended to prevent births within the group; and

(e) forcibly transferring children of the group to another group.

Crimes against humanity

94. (1) A person commits an offence of a crime against humanity if he or she engages in the following acts as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack -

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation or forcible transfer of population;

(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) torture;

(g) rape, sexual slavery, forced prostitution, forced preg nancy, enforced sterilization, or any other form of sexual or comparable gravity;

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, ' gender as defined in paragraph 3, or other grounds that are universally recognized as

impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) enforced disappearance of persons;

(j) the crime of apartheid;

(k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health of another person.

(2) For the purpose of subsection (1) -

(a) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in subsection (1) against any civilian population, pursuant to or in furtherance of a State or organization policy to commit such attack;

(b) "extermination" includes the intentional infliction of conditions of life, among other things, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "enslavement" means the exercise of any or all of the

powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(a) "deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(b) "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(a) "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intention of affecting the ethnic composition of any population or carrying out other grave violations of international law;

(b) "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(c) "the crime of apartheid" means inhumane acts of a character similar to those referred to in subsection (1) committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(d) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the in tention of removing them from the protection of the law

for a prolonged period of time.

War crime

95. (1) A person commits a war crime if he or she engages in acts involving the following -

(a) grave breaches of the Geneva Convention of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention -

(i) willful killing;

(ii) torture or inhuman treatment, including biological experiments;

(iii) willfully causing great suffering, or serious injury to body or health;

(iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) compelling a prisoner of war or other protected person to serve in the forces of a hostile power;

(vi) willfully depriving a prisoner of war or other

protected person of the rights of fair and regular trial;

(vii) unlawful deportation or transfer or unlawful confinement;

(viii) taking of hostages;

(b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts -

(a) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) intentionally directing attacks against civilian objects, that is, objects which are not military objects;

(iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) attacking or bombarding, by whatever means, towns, villages, dwelling or buildings which are undefended and which are not military objects;

(vi) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) making improper use of a flag of truce or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) the transfer, directly or indirectly, by the occu-

pying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objects;

(x) subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiii) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xiv) compelling the nationals of the hostile party to take part in the operation of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

pillaging a town or place, even when taken by

assault;

(xvi) employing poison or poisoned weapons;

(xvii) employing asphyxiating poisonous or other gases, and all analogous liquids, materials or devices;

(xviii) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xix) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict,

provided that such weapons, projectiles and material and methods of warfare are the subject of

a comprehensive prohibition and are included in an annex to the Statute;

(xx) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxi) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in section 95 (2), enforced sterilization, any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxii) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the

Geneva Conventions in conformity with international law;

(xxiv) intentionally using starvation of civilians as a method of warfare, depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;

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(xxv) conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;

(a) in the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combatby sickness, wounds, detention

or any other cause -

(i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) committing outrages upon

personal dignity, in particular humiliating and degrading treatment;

(iii) taking of hostages;

(iv) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable;

(b) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international

law, namely, any of the following acts -

(i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) pillaging a town or place, even when taken by assault;

(vi) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in section 95 (2), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) conscripting or enlisting children under the age of fifteen years into armed forces or groups or

using them to participate actively in hostilities;

(viii) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) killing or wounding treacherously a combatant adversary;

(x) subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person con-emed nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) destroying or seizing the property of an adversary unless such destruction or seizure be im-peratively demanded by the necessities of the conflict;

(2) Subsection (1)(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(3) Subsection (1)(d) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

(4) Nothing in subsection (1)(c) and (d) shall affect the responsibility of the Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

PART VII - ACTS OF TERRORISM AND RELATED OFFENCES Offence of terrorism

96. Any person who does or threatens or omits to do anything that is reasonably necessary to prevent an act which -

(a) may seriously damage a country or an international organization;

(b) is intended or can reasonably be regarded as having been intended to-

(i) seriously intimidate a population;

(ii) unduly compel the Government or an international organization to perform or abstain from performing any act;

(iii) seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization; or

(iv) otherwise influence the government, or international organisation; and

(c) involves or causes -

(i) attacks upon a person's life which may cause death;

(ii) attacks upon the physical intergrity of a person;

(iii) kidnapping a person;

(iv) extensive destruction to the Government or public facility, a transport system, an infrastructure facility including an information system, a fixed platform located on the continental shelf, a pub-

lie place or private property, likely to endanger human life or result in major economic loss;

(v) the seizure of an aircraft, a ship or other means of public or goods transport;

(vi) the manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of biological and chemical weapons;

(vii) the release of dangerous substance, or coming of fires, explosives or floods, the effect of which is to endanger human life;

(viii) interference with or disruption of the supply of water, power or any other fundamental natural resource, the effect of which is to endanger life, commits an offence of terrorism.

Harbouring terrorists

97. Any person who harbours, or conceals, or causes to be harboured or concealed, any person whom he knew to have committed, or to have been convicted of, an act of terrorism, or against whom he or she knew that a warrant of arrest or imprisonment for such an act had been issued, commits an offence.

Information about acts of terrorism

98. (1) Subject to subsections (2) and (3), where a person has information which he knows or believes might be of material assistance -

(a) in preventing the commission by another person of an offence of terrorism; or

(b) in securing the apprehension, prosecution or conviction of another person for an offence under this part, and the person fails to disclose the information to a police officer at any police station as soon as reasonably practica-

ble, that person commits an offence.

(2) It shall be a defence for a person charged under subsection (1) to prove that he or she has reasonable excuse for not making the disclosure.

(3) Subsection (1) does not require disclosure by a law practitioner of any information, or a belief or suspicion based on any information, which he or she obtained in privileged circumstances.

(4) For the purpose of subsection (3), information is obtained by a law practitioner in privileged circumstances where it is disclosed to him or her -

(a) by his or her client in connection with the provision of legal advice, not being a disclosure with a view to furthering a criminal purpose;

(b) by any person for the purpose of actual or contemplated legal proceedings, and not with a view to furthering a criminal purpose.

Obstruction of terrorist investigation

99. (1) Any person who-

(a) discloses to another anything which is likely to prejudice a terrorist investigation;

(b) interferes with material which is likely to be relevant to a terrorist investigation, commits an offence.

(2) It shall be a defence for a person charged with an offence under subsection (1) to prove -

(a) that he or she did not know and had no reasonable cause to suspect that the disclosure was likely to affect a terrorist investigation; or

(b) that he or she had a reasonable excuse for the disclosure or interference.

(3) Subsection (1) does not apply to a disclosure which is made by a law practitioner -

(a) to his or her client in connection with the provision of legal advice, not being a disclosure with a view to furthering a criminal purpose;

(b) to any person for the purpose of actual or contemplated legal proceedings, and not with a view to furthering a criminal purpose.

Hostages

100. (1) In this section, "third party" means a State, an international organization, a natural or juridical person or a group of persons.

(2) Any person who -

(a) seizes or detains; or

(b) threatens to kill, injure or continue to detain another person in order to compel a third party to do or abstain from doing any act, as an explicit or implicit condition for the release of the hostage, commits an offence.

PARTVIII - DEFAMATION AND CRIMEN INJURIA Definition of defamatory matter

101. "Defamatory matter" means matter likely to injure the reputation of any person by exposing him or her to hatred, contempt of ridicule, or likely to damage the person in his or her profession or trade by an injury to his or her reputation, and it is immaterial whether at the time of the publication of the defamatory matter the person concerning whom the matter is published is living or dead.

Definition of publication

102. (1) A person publishes a defamatory matter if he or she causes the print, writing, painting, effigy or other means by which the defamatory matters is conveyed to be dealt with, either by exhibition,reading, recitation, description,

delivery or otherwise, so that the defamatory meaning thereof becomes known or is likely to become known to either the person defamed or any other person.

(2) It is not necessary for defamation that a defamatory meaning should be directly or completely expressed, and it suffices if such meaning and its application to the person alleged to be defamed can be collected either from the alleged defamation itself or from any extrinsic circumstances, or partly by the one and other means.

Definition of unlawful publication

103. Any publication of defamatory matter concerning a person is unlawful within the meaning of this Part, unless -

(a) the matter is true and it was for the public benefit that it should be published; or

(b) it is privileged on one of the grounds set out in this Part.

Defamation

104. A person who, by print, writing, painting or effigy, or by any means otherwise than solely by

gesture, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, commits an offence of defamation.

PART IX - OFFENCES RELATED TO MARRIAGE

Cases in which publication of defamatory matter is conditionally privileged

105. A publication of defamatory matter is privileged, on condition that it was published in good faith, if the relation between the parties by and to whom the publication is made is such that the person publishing the matter is under a legal, moral or social duty to publish it to the person to whom the publication if made or has a legitimate personal interest in so publishing it, and the publication does not exceed either in extent or matter what is reasonably sufficient for the occasion, and in any of the cases namely -

(a) if the matter is published is in fact a fair report of anything said, done or shown in a civil or proceeding before

any court prohibits the publication of anything said or shown before it, on the ground that it is seditious, immoral or blasphemous, the publication thereof shall not be privileged;

(a) if the matter is published is a copy or reproduction, or in fact a fair abstract, of any matter which has been previously published, and the previous publication of it was or would have been privileged under section dealing with cases in which publication of a defamatory matter is absolutely privileged;

(b) if the matter is an expression of opinion in good faith as to the conduct of a person in relation to any public question or matter, or as to his or her personal character so far it appears in such conduct;

(c) if the matter is an expression in good faith as to the conduct of any person as disclosed by evidence

(d) if the matter is published concerning a person subject to military discipline for the time being, and relates to his or her conduct as a person subject to such discipline, and is published by some person having authority over him or his in respect of such, and to some person having authority over him or her in respect of such conduct;

(e) if the matter is published in the course of any judicial proceedings by a person taking part therein as a judge, magistrate, commissioner, advocate, assessor, witness or

party thereto;

(f) if the matter published is in fact a fair report of anything said, done or published in the Cabinet of Ministers or in Parliament; or

(g) if the person publishing the matter is legally bound to publish it.

Where a publication is absolutely privileged, it is immaterial for

the purposes of this Chapter whether the matter is true or false, and whether it is or is not known or believed to be false, and whether it is or is not published in good faith, but nothing in this section shall exempt any person from any liability to punishment under any other Chapter of this Code or under any other written law in force within Lesotho.

Explanation as to good faith

103. A publication of defamatory matter shall be deemed not to have been made in good faith by a person, within the meaning of section dealing with cases in which publication of defamatory matter is conditionally privileged, if it is made to appear either -

(a) that the matter was untrue, and that he or she did not believe it to be true, or

(b) that the matter was untrue, and that he or she published it without having taken reasonable care to ascertain whether it was true of false; or

(c) that, in publishing the matter, he or she acted with intent to injure the person defamed in a substantially greater degree or substantially otherwise than was protection of the private right or interest in respect of which the claims to be privileged.

Bigamy

104. A person who unlawfully and intentionally enters what purports to be a lawful marriage ceremony with any person while lawfully married to another commits an offence of bigamy unless -

(a) the previous marriage is under customary law and the person is marrying another wife under customary law;

(b) the previous marriage has been dissolved or annulled by a

competent court of law;

(c) the husband or wife has been continually absent from the person for a period of 7 years and has not been heard

of by that person as being alive for that period.

Marriage with dishonest or fraudulent intent

108. A person who dishonestly or with fraudulent intention goes through a ceremony of marriage knowing that he or she is not lawfully married commits an offence.

PART X - PENALTIES

Penalties

109. (1) Upon convicting a person for an offence provided for in this Code, the court may impose such penalty in the manner provided for in this section.

(2) Upon conviction for an offence under any of the sections set out in the Schedule, a court may sentence the convicted person to a penalty in terms of a fine level of the Schedule up to the maximum penalty prescribed.

(3) Where no penalty is provided for in the Schedule, the court may impose, on a person convicted for an offence provided for in this Code, such penalty as provided for by any other law, and where no such penalty is provided for in any other law the court shall impose a penalty that it thinks fit, taking into consideration the gravity of the offence and the Sentencing Guidelines issued by the Chief Justice under the Criminal Procedure and Evidence Act, 1981.

(4) Where an imprisonment penalty is listed, then it shall not be open to a court to impose a fine in lieu of the penalty listed or to suspend the sentence.

(5) The Minister responsible for justice may, by notice published in the Gazette, amend the Schedule.

SCHEDULE

PENALTIES Fine levels

Level 1: a fine up to M1000.00;

Level 2: a fine between M1000.00 and M5000.00;

Level 3: a fine between M5000.00 and M10,000.00;

Level 4: a fine between M10,000.00 and M15,000.00;

Level 5: a fine between M15,000.00 and M20,000.00.

Section:

31. Assault: a fine under level 3 or imprisonment up to 1 year or both;

32. Aggravated Assault: a fine under level 4 or imprisonment up to 8 years or both;

39. Culpable homicide resulting from Suicide Pact: Imprisonment up to 5 years;

42. Culpable Homicide: a fine under level 5 or life imprisonment;

46. Abortion: a fine under level 3 or imprisonment up to 3 years;

47. Abduction: a fine under level 3 or imprisonment up to 3 years;

52. Indecent Assault: a fine under level 3 imprisonment up to 3 years;

57. Public Indecency: a fine under level 2 imprisonment up to 1 year or both;

58. Theft: a fine under level 4 or imprisonment up to 10 years or both;

65. Robbery: imprisonment up to 18 years;

66. House-breaking: a fine under level 2 or imprisonment up to 6 years;

68. Receiving Stolen Property: a fine under level 4 or imprisonment up to 5 years or both;

69. Fraud: imprisonment up to 20 years;

70. Extortion: imprisonment up to 15 years;

74. Arson: a fine under level 5 or imprisonment up to 15 years or both;

75. High treason: imprisonment up to 20 years or death by hanging;

76. Failure to prevent or report a treasonable conduct: imprisonment up to 5 years;

81. Bribery: imprisonment up to 20 years;

88. Obstructing the course of Justice and officially constituted public enquiry: a fine under level 3 or

imprisonment up to 3 years or both;

90. Escape from lawful custody: imprisonment up to 5 years.

NOTE

1. Act No.9 of 1981

2. Act No. 4 of 2000

GOVERNMENT NOTICE NO. 11 OF 2012

Statement of Objects and Reasons of the Penal Code Act, 2010 (Circulated by the Authority of the Minister of Law and Constitutional Affairs) 1. The Purpose of a penal code

Lesotho at present has a criminal law system based on the Roman-Dutch law, otherwise known as the common law. This is a system of law which was inherited from the protectorate days and is essentially the legal system which was initially applied in the Cape Colony and subsequently in the Union and Republic of South Africa. The sources of the common law are based on the expert legal writings and decisions of the courts of law in Lesotho and South Africa which have built up over the year into a body of law contained in the various law re-ports.

The alternative to a common law system of criminal justice is a codified system. Under such a system, the main source of criminal law is a penal code, which sets out in straightforward terms the general and specific rules of criminal law. Criminal law matters might also be contained in statutes, which will be enforced alongside the Code, but most of the day to day criminal law matters will be found in the Code.

This is the system which is favoured in the vast majority of African countries, as well as in the overwheldming majority of jurisdictions all over the world. Criminal codes are in force in most Commonwealth countries, including, to name just a few, Ghana, Nigeria, Zambia, Botswana, Kenya, Canada and parts of Australia. In the Southern African region, Botswana introduced a penal code in 1964, and that country’s experience of codified penal law has been extremely positive.

2. The case for codification

There are strong arguments in favour of codification. The most immediate of these is undoubtedly the attraction of simplicity and convenience: a code states the law unambiguously and in short form. The person using it therefore does not have to search out the legal rule in a variety of judgements scattered in the law-

report; one has the basic rule there before him or her in a short document. From the point of view of public access to law, therefore, the attractions of codification

are strong.

Codification of the law does not completely eliminate the need to refer to the reports of courts decisions. In those jurisdictions in which criminal codes are employed the courts obviously still refer to courts precedents, principally to explain the application of provisions in the code. A body of case law will therefore build up, although in a code jurisdiction this body of case law will tend to be much less extensive than in an uncodified jurisdiction.

The status of court decisions reached before the introduction of the Code may still be referred to although the main source of the law will be the law as stated in the Code. Pre-code decisions may nonetheless throw light on ambiguities or unexpected difficulties.

The accessibility of the law brought about by codification is particularly desirable in circumstances where it may not always be possible to gain access to full sets of law reports or up-to-date textbooks. For the magistrate or prosecutor working away from the main centre, this is a particularly attractive feature. Most clauses of the Code are accompanied by commentaries which are not part of the law but aid in the construction of the Code in order to provide a clear idea of the law without it being necessary to resort to expensive and increasingly complex text books. These commentaries will be published separately in a booklet form.

From the point of view of the police, a criminal code is a very useful document as it is immediately possible to identify offences in accordance with the scheme of offenses laid out in the code. Policemen therefore will be able to see the definitions of offenses set out clearly in a way which should be intelligible to those who have not necessarily had a legal training.

The process of codification also provides an important incidental benefit. When a code is introduced, the legislature has the opportunity to make certain reforms in criminal law. The Code thus offers a chance to bring the law up-to-date, taking into account the major developments in criminal law which have occurred in recent years.

2. The content of the Code

A basic question which has to be addressed is that of deciding whether a new code should be a codification of the existing Roman-Dutch law or whether it might follow another pattern. In this Code, the option favoured is that of the embodiment in the Code of the rules of the existing Roman-Dutch law, but modified where it has been thought that modification is appropriate. The main grounds for such modifications have been the successful application in other jurisdictions (particularly within the Commonwealth) of rules which have found wide favour among judges and legal commentators.

To a very considerable extent, then, this Code does not

involve any change in the law of Lesotho. It is not therefore a radical document, proposing fundamental legal changes. Most of its provisions are no more than the restatement, in clear and concise form, of the existing law.

The values embodied in this Code are the values of the existing law, which has been applied over the years within Lesotho. There is therefore nothing in it which departs in any substantial way from the social and legal basis of Lesotho society. The main aim of the drafting exercise has been to produce clear statements of the law with a view to creating a logical and easily-applied system of criminal justice.

For this reason, the Code would not require those concerned in the administration of justice to "re-learn" criminal law; most of it would be exactly the same and the terms used would be the same, but the law would merely be more directly stated. Indeed the task of the lawyer would become remarkably easier with the Code than it is under the uncodified system.

Not every criminal matter can be included in a code. Criminal law statutes remain largely untouched. Road Traffic offences, for example, are not included in the Code, nor is any change proposed to the provisions in the Internal Security Act, although some of the offences created by that Act are embodied in the Code itself. This is purely for convenience, as it is desirable, as far as possible, to find as much of the criminal law in one place.

3. The structure of the Code

The Code is divided as follows:

PART I - APPLICATION

This section deals with the territorial of the Code and with questions of interpretation.

PART II - GENERAL PRINCIPLES OF CRIMINAL LIABILITY

In this section the basis of criminal liability is set out. Defences to criminal charge are defined.

PART III - OFFENSES AGAINST THE PERSON

This section covers crimes such as homicides, rape, assault, etc.

PART IV - OFFENSES AGAINST PROPERTY

This section covers offenses which are property-based: theft, fraud, arson etc.

PART V - OFFENSES AGAINST ADMINISTRATION AND PUBLIC

ORDER

The offences dealt with are those such as treason, sedition, bribery of officials and conduct threatening public order; also included are those offences which compromise the administration of justice (Perjury etc.).

PART VI - PERNALTIES

This sets out the maximum penalties for a number of the offences contained in the Code. In many cases no penalty is set out, as it is thought desirable that the discretion of judges and magistrates be preserved. The judiciary will rely on sentencing guidelines issued by the Chief Justice.

GOVERNMENT NOTICE NO. 17 OF 2012 Commentaries On The Penal Code Bill, 2010 Objective of the commentaries

The purpose of these commentaries is to provide members of the legislature, the police, law students, and the public generally with a guide offering an explanation on the provisions of the Penal Code Act (the Code). In that the Code codifies the current common law criminal justice system.

Commentary: section 2

The purpose of this section is to restrict the application of the Code. An important implication of this section is that statutory offences of strict liability will continue to be interpreted by the courts as strict liability offences and the requirements of this Code as to mens reawill not be taken into account. It is also stated that the Code does not have retrospective application. Military and police laws and regulations are unaffected by the Code.

It is a fundamental principle of criminal law recognized by subsection (2) that no person shall be tried, convicted and punished for an offence unless the offence is specified in a statute book. The Local and Central courts exercise a certain degree of jurisdiction over criminal matters, and this jurisdiction is not affected by this Code, but leaves open the possibility that the Government of Lesotho may, at some stage, wish to examine this matter.

Subsection (3), which reflects a very similar provision in the Penal Code of Botswana, states the well-known de minimisprinciple, and allows the court to discharge an offender where it would be inappropriate to proceed to conviction. An example of its application might be where a very aged person, of previously good record, commits a minor offence; the court might feel here that there is no point in proceeding to conviction and might discharge the accused. Obviously the circumstances in which such a provision might be invoked are going to be few and far between.

Commentary: section 3

It is inevitable that problems of interpretation will arise in connection with this Code. In confronting these difficulties, the courts of Lesotho will resort to ordi-

nary rules of interpretation of statutes. An important difference between the precode position and the post-code position is that once the Code is introduced the courts would not need to observe the common law as expounded by the courts of law to the same extent. The main source of law, and the one with the greatest authority within Lesotho, would then be the Penal Code Act of Lesotho. The text of the Code would be the ultimate foundation of the criminal law.

Commentary: sections 5 -11

Sections 5-11deal with the question of the jurisdiction of the Lesotho courts. The issue of jurisdiction has occasioned some difficulty in common law systems, where two main theories have been supported.

According to the initiatory theory, a criminal act takes place where the initiating acts of the actus reusare performed. The terminatory theory, by contrast, regards the place where the effects of the acts are felt as being the place of commission of the crime. Sections 6 and 9 of this Code incorporate elements of both theories and effectively give the courts of Lesotho a very wide jurisdiction.

The following examples illustrate the operation of the rules proposed here. A, in Lesotho, posts poison to B in Swaziland and B eats the poison in Swaziland and dies there. A may be tried for murder in Lesotho even though the death has taken place in Swaziland. (He or she could also be tried in Swaziland.)

A decides to commit fraud on B. He or she posts a letter in Lesotho arranging an appointment with B in Harare. He or she then leaves Lesotho and travels to Harare for the appointment, at which he makes fraudulent misrepresentations to B. The act of posting the letter is punishable in Lesotho.

A, acting outside Lesotho, encourages B to commit robbery within Lesotho. Later, A ventures into Lesotho; he or she may be prosecuted in Lesotho in respect of the act of incitement committed outside the country.

Commentary: section 6

This section states the rule against being punished twice for the same offence, but leaves prosecution for murder or culpable homicide open in those cases where the victim dies after a conviction for assault has already been secured.

This matter is further dealt with in the Criminal Procedure and Evidence Act, 1981, which lists the available pleas.

Commentary: section 7

This section embodies, with some modification, the existing Roman-Dutch law on the age of criminal responsibility and incorporates the age of criminal re-

sponsibility recommended under the U.N. Convention on the Rights of the Child. The age at which a legal system begins to hold a person criminally responsible is an arbitrary matter, as the achieving of maturity is something that happens at different times in different individuals. There is a widely-held view, however, that the age of seven is a significant age as far as the development of conscience is concerned.

The second part of this provision modifies the existing law. Currently, Roman- Dutch law merely requires that the accused in this category should have known that what he was doing was wrong, although it is not clear whether this is moral or legal knowledge. This places great emphasis on knowledge of wrongfulness and ignores the importance of maturity in respect of self control. A young person may know that something is wrong, but may lack the maturity to conduct himself in accordance with that knowledge. It is inappropriate to hold responsible one who is not old enough to be able to behave in accordance with the requirements of the law, and for this reason the test stated above seems preferable.

Commentary: section 8

The general principle currently recognised by the criminal law is that responsibility is imposed only in respect of positive actions. There are circumstances, however, where the law recognises the existence of a duty to act. These are set out in subsections (1) - (3). The following examples demonstrate the operation of these subsections:

(a) Duty imposed by law.

A public official who fails to perform the functions required by law may be criminally responsible for harm which results from that failure. An inspector of machinery, for instance, who fails to carry out an inspection required could be guilty of culpable homicide in respect of deaths which result from that omission. For this liability to be imposed, however, the omission would have to arise either from a deliberate decision not to perform the duty (a deliberate omission) or from negligence of a high order. Negligence which is less than gross should not normally give rise to criminal liability.

(b) Duty flowing from an assumed or natural relationship.

A parent who, being in a position to provide food, fails to do so for a child may be held responsible for the consequences of this failure. Similarly, a person who voluntarily agrees to look after the child of another and who then fails to take care of that child could be held responsible for harm that befalls the child.

(c) Duty arising from an agreement.

If a person agrees with another to watch a fire on that other's behalf, and then fails to do so, such a person

may be held accountable for the consequences of the failure.

Subsections (3)-(5) create new forms of criminal liability which are currently not recognised in Roman Dutch law. Subsection (3) applies criminal sanctions in respect of a failure to rescue a person in danger. Under those legal systems based on English common law (and for these purposes Roman Dutch law may be so considered, in view of the influence of English criminal law on that system), there is no liability for failure to rescue. Therefore it is quite legal for an adult to stand by and watch a child drown in a puddle of water (provided there is no relationship of dependency between child and adult). The principle is firmly rejected in many other legal systems, where such a failure would be considered a crime. Subsections (4) and 5 provide for liability in situations where a person fails to impart to the police knowledge which they might have of the past or future commission of a crime involving danger to life. These sections are limited to such crimes, as it would be undesirable to extend the scope of potential liability here to include lesser offences. A lawyer who receives such information from a client would be under no obligation to impart it to the police, nor would a doctor have to do so. In each of these cases the value of preserving the principle of professional confidentiality justifies the exclusion. The conflict which this may involve with the public interest in the prevention and detection of crime is evident, but the values which the lawyer or client and doctor or patient exemptions embody are also extremely important. In particular, the need to maintain the medical confidentiality is seen by the medical profession as vital to public health goals. If people feel that they cannot consult doctors in confidence, then the health of the community may suffer. There may well be circumstances where a doctor may decide to breach a patient's confidence and inform the police of some matter of criminal significance, but this is a matter for the individual doctor's conscience and he will be unlikely to make such a decision lightly. If a doc-

tor decides against giving information, then he should not be placed underpressure from the criminal law to do so.

In the case of a lawyer, somewhat different considerations are involved; here the argument in favour of the client's privilege is that the right of the individual properly to instruct his or her own defence lawyer is a matter which would be seriously damaged if lawyers were placed under pressure from the law to divulge what passes between them and their clients.

Commentary: section 9

It is a basic principle of criminal liability that the accused should have committed a voluntary act (omissions constitute a special exception). An involuntary act is one which does not involve the exercise of the conscious will, or, to use different terms, it is one which the person does not "take himself to be doing". A reflex movement

is the classic example of the involuntary act. A muscular spasm, being an act over which the person has no control, is also to be considered involuntary.

Commentary: section 10

This section deals with acts which may be considered involuntary, but which are involuntary in a different way from the reflex action-type act dealt with in section 9. In the case of a reflex action, consciousness is not impaired and the person may be fully conscious at the time of the action. In the case of automatic action, which is covered by section 10, the person acting is unconscious or has impaired consciousness. He or she may have no recollection of acting, or his or her recollection may be hazy. Such behaviour is known as automatic behaviour (automatism).

The defence of automatism is currently recognised by Roman Dutch law. The condition may be attributable to a variety of causes, the common feature being that the brain is adversely affected. Automatic behaviour may occur during, or immediately after an epileptic seizure; it may occur during a hypoglaecemic episode suffered by a diabetic; or it may be the result of concussion. Somnambulistic behaviour - sleepwalking - is also an example of automatic conduct, and may, rarely, result in the doing of violence by one who would not normally engage in such conduct. During a state of automatism the person may perform complex actions, but have no knowledge of what he or she is doing or why he or she is doing it. Usually there will also be no memory of it once he or she has recovered.

Although the law accepts that a person who acts in a state of automatism does not deserve to be convicted of an offence, there are strong policy reasons why not everyone who acts in this way should be acquitted. In the case of one who, knowing of his propensity to act automatically, nonetheless places himself in such a position where there is a risk of this occurring, then he or she is precluded from claiming the defence. It is necessary that he or she should have been reckless in taking a risk; a belief on his part that he or she is unlikely to cause damage would therefore serve to maintain the option of the defence for him.

Persons who act automatically and who are likely to be dangerous to others in the future may be acquitted but will be dealt with on the same basis as if they were insane offenders. This means that the court may assess whether their automatic conduct is likely to be repeated and, by applying the insanity provisions, may ensure that they are subjected to restraint. The subsection refers to mental disorder. Similar terms have given rise to difficulties in other legal systems; the term is defined in the interpretation section as embracing those conditions which involve temporary or permanent disruption of the mental state and consequently affect mood and behaviour, excluding those conditions which have an only incidental effect on the brain. Epilepsy would thus qualify as mental disorder for the purposes of this section; diabetes and concussion would not.

Commentary: section 11

The effect of this section is to restrict liability to those cases where there is intention to cause harm, unless otherwise provided for in the Code or other legislation.

Commentary: section 12

This section defines the mental element (mens rea)which is required for any offence under the Act. Unintended consequences of action are not attributable to the person performing the action. Liability is imposed in respect of (1) those consequences which the person knows will occur as a result of his actions (whether or not he or she positively wants these consequences to occur); and (2) those consequences which he or she knows might occur but to the possibility of the occurrence of which he or she is indifferent. An illustration of the latter would be where A throws a heavy object out of the window. If he or she is aware of the

possibility that there might be somebody standing outside who could be harmed by the object, and he or she decides to go ahead and throw it anyway, he or she may be described as being reckless. The consequence in question - the object's hitting the person outside - is regarded as being intended by A and is attributable to him or her.

Recklessness as to an element of an offence may also be treated here as intention. This would give rise to liability in a case where, for example, a person knows that there is a possibility that an article she/he is buying is stolen but who does not bother to ascertain whether or not this is so. The fact that he or she is reckless may lead to the conclusion that he or she is deemed to have committed the offence intentionally.

A "real possibility" of the occurrence of an event means that there is a reasonably high chance that it will occur. This does not mean a probability. Of course, there may be a real possibility that something will occur even when it is unlikely to occur on a balance of probabilities.

Negligent conduct is not normally punishable under the Code unless it amounts to recklessness. A high degree of negligence(gross negligence) that is, conduct demonstrating that the person simply does not care about the safety of others - will probably be deemed to be recklessness and is punishable. Simple negligence - a failure to meet expected standards of care - is a matter for civil law and not for the criminal law. This is in accordance with the existing law.

Commentary: section 13

Modem Roman Dutch law accepted such a defence some years ago in the De Blom decision, but this position has been subjected to considerable criticism. A major objection to allowing ignorance of the law as a defence is that it might make it very difficult to apply the

criminal law if there were to be no presumption of knowledge of the law. The section suggested above avoids this criticism by allowing the defence only in those circumstances where the accused can show that he or she was unavoidably ignorant of the law. This will be difficult to do in practice. Nobody could be said to be unavoidably ignorant of the vast majority of the provisions of criminal law; doubt as to legality can always be rectified by asking others. In the area of technical regulation, however, the person who does not normally operate in that particular area of activity could genuinely be ignorant and should be excused. A person who makes it his business to involve himself or herself in matters which are the subject of technical regulation should

take steps to inform himself or herself of the law, and he or she could not claim to have been unavoidably ignorant. In practice, therefore, only meritorious de-fendants could be expected to take advantage of this provision.

Commentary: section 14

A mistake of fact is currently a defence under Roman Dutch law. If A gives B a bottle which he or she believes contains lemonade, whereas in reality it contains weed killer, he or she is not criminally liable for B's death if B drinks the weed killer and dies. His or her mistake here is one of fact; namely, he or she believed, mistakenly, that the liquid in the bottle was lemonade.

There has been some discussion in Roman Dutch law, as in other systems, of the question as to whether the mistake of fact needs to be a reasonable one. The weight of authority appears to be in favour of the view that a mistake need not be reasonable, as long as it is bona fide(honestly held). This section follows that view. If, in the example given above, the accused thought that the bottle contained lemonade even though no reasonable person would have reached that conclusion, it is still open to him or herself to claim the defence of mistake. The reasonableness, or otherwise, of a mistake will still play a part in the determination of whether the accused actually believed what he or she states that he or she believed. It may, in practice, be easier for an accused person to convince a court that he had made a mistake which the reasonable person might have made than for him or her to convince the court that he or she had held a belief which no reasonable person would have held.

Commentary: section 15

A claim of right exists where a person believes that he or she is entitled, in terms of the civil law, to do something. If it later transpires that he or she was in error in relation to the civil law right, he or she has a defence under this section. An example would be where A, believing that property belongs to him or her, dis-poses of it or destroys it. If he or she acted in the belief that he or she was the owner, he or she has a claim of right which entitles him or her to a defence. It should be

noted that the defence only applies in relation to property. Claim of right has no effect in respect of other offences.

Commentary: section 16

The issue of whether an intoxicated person should be held responsible for crim-

inal acts performed during a state of intoxication raises several major problems of policy. Firstly, there is the question of fairness to the accused. An intoxicated person may do things which are quite out of character and he or she may not fully realise the implications of what he or she is doing. Secondly, there is the question of public protection: if the courts were to accept a defence of intoxication, then accused persons may falsely claim intoxication in order to avoid conviction or may even become intoxicated before committing an offence in order to claim the benefit of the defence. The high proportion of violent offences in which intoxication plays a part would also suggest that the acceptance of a defence of intoxication could significantly affect conviction rates in this area.

For a long period, Roman Dutch law did not accept that intoxication could be a defence to a charge of a crime requiring only basic intent (such as assault); in the case of specific intent crimes, however, (for example, murder) intoxication could be a defence. More recently, Roman Dutch law accepted intoxication as a defence even in a case where the intent required for the offence was a basic one.

The section above accepts (1) that intoxication can be a defence where it amounts to insanity (this would lead to disposal in the same way as if the offender was insane); (2) that intoxication may have prevented the accused from forming the requisite intention for an offence and that therefore the accused should be acquitted. Intoxication is therefore a defence to any criminal charge, the matter to be determined in each case in which intoxication is an issue being whether the accused was capable of forming the requisite intention. In a case of assault, for example, the issue would be whether the accused was so intoxicated as not to know that he or she was assaulting the victim.

This admission of the defence of intoxication does not mean that intoxicated offenders will escape the attention of the criminal law. Subsection (6) provides that a person who commits an offence while intoxicated will be punished - not for the offence which he or she commits while intoxicated, but for the act of becoming intoxicated in the first place. It therefore becomes a crime to become intoxicated and to commit a criminal offence in the intoxicated state.

An example of the application of this new provision would be as follows: A becomes drunk. In his or her drunken state, he or she is involved in an argument with a friend and he or she stabs him or her. When he or she recovers his or her sobriety, he or she is alarmed to find

out what he or she has done and regrets it deeply. From the moral point of view, A is not as worthy of condemnation as one who stabs another in sobriety and is fully aware of what he or she is doing.

That he or she should not be punished for murder is obvious, and indeed this would be the effect of the current law; that he or she cannot escape some form of punishment is equally obvious, as this would, among other things, weaken public confidence in the system of criminal justice. Under the proposed section, the court would have power to punish him or her, but not as seriously as he or she would be punished if he or she were to be convicted of murder or possibly of culpable homicide.

Commentary: section 17

The defence of sudden emergency effectively deals with those situations which are covered by the defence of necessity in modem Roman Dutch law. A person who finds that he or she has to act illegally in order to protect an interest which is superior to that which he or she compromises by acting can claim to be justified. An example of the operation of this defence would be where a person has to destroy properly in order to rescue life; provided that he or she has acted as a reasonable man would have acted in the circumstances, the defence of sudden emergency is open to him or her.

Commentary: section 18

The defence of compulsion is currently recognised in Roman Dutch law, as it is in other legal systems. The provision above embodies the current law, subject to one modification, which is discussed below. The essence of the defence is that if a person is threatened with death or serious injury unless he or she performs an illegal act, then, subject to certain conditions being satisfied, he or she will not be held responsible for what he or she does to avert the threat.

(a) The nature of the threat.

The threat must be one of death or serious bodily harm. A threat to inflict minor harm on the accused will not be regarded as sufficient to justify breaking the law. The purpose of this requirement is to limit the application of the defence to those cases where the accused felt that he or she really had no alternative but to comply with the order given. The threat must be specific and immediate. A vague threat of some future violence will not be sufficient.

(b) The responsibility of the accused.

The accused must not have put herself or himself in a situation where

he or she is likely to be threatened in this way. This excludes the defence in cases where the accused has voluntarily joined a criminal gang.

(c) Avoidance of the threat.

The defence will not succeed where it can be shown that the accused could have escaped from those who were threatening him or her. The threat must therefore be an immediate and thus inescapable one.

(d) The requirement that the accused was actually compelled to act as she or he did.

The present law requires that the threat must have been one to which a reasonable person would have responded in the way in which the accused did. This means that if a reasonable person would have reached the conclusion, for example, that the person making the threat did not actually intend to carry it out, then the defence would not be available. This would exclude the defence from a case in which an accused genuinely thought that he or she was faced with a threat of death or serious bodily harm that would actually be carried out if he or she did not comply. This result would be avoided by the provision above.

Commentary: section 19

The defence of superior orders is one which is generally rejected in criminal law. If it is allowed, then persons carrying out wrongful acts in an official context could claim that they were obliged to do so by their superiors. To accept this is to accept that those lower in a chain of command have no moral or legal responsibility for what they do, a conclusion which could have unfortunate results.

There are circumstances, however, where the complete exclusion of a defence of superior order could lead to a harsh result, and for this reason a compromise position has been worked out in some legal systems. This allows for a defence of superior orders provided that a reasonable soldier or policeman or woman would have had no course to question the orders. If the defence is available, then, the orders in question must not be manifestly illegal. This means that if a junior member of the relevant forces obeys an order which is not, on the face of it, illegal, she or he will be able to claim a defence. If, then, a superior orders a soldier to shoot a civilian, other than in circumstances of riot or disorder, this will be a manifestly illegal order and the soldier in question would have no defence to a criminal charge. If, however, the order is one that could be legal - such as

to use force to apprehend a person- then there would be a defence against a charge of assault.

Subsection (1) caters for the need to focus on the actions of the superiors as well and subject them to criminal sanctions if they issue illegal orders to their subordinates.

Commentary: section 20

There is a general legal presumption that every person

is sane and is therefore accountable for his or her actions. Some offenders, however, suffer from mental disorders, the effect of which is to relieve them of responsibility for their actions. To achieve this objective, the defence of insanity exists.

The current defence of insanity is available in cases where the accused, as a result of disease of the mind, is incapable of knowing the nature and quality of his or her act or is incapable of knowing that it is wrong. This test, the McNaghten test, has been widely applied in Commonwealth legal systems but has also been the subject of considerable criticism. The main ground of criticism has been the emphasis which the test places on cognitive aspects of insanity, namely, the knowledge of the accused. A person may well know that what he or she is doing is wrong but may lack the ability to control his or her actions. Such a person would not satisfy the requirements of the McNaghten test.

In the test proposed above, the cognitive element is preserved, but to it is added a test which is based on ability to control actions. If, therefore, a person who is suffering from a mental disorder is unable to conform to the provisions of the criminal law because of the effect which that disorder has on him or her, the defence will be available.

Subsection (2) provides that the person seeking to establish a defence of insanity must prove, on a balance of probabilities, that he or she is insane. The onus of proof therefore rests on the accused, as was affirmed in R.V. Tsukulu Makaba 1977 Lesotho Law Rep. 229.

Subsection (3) provides for the compulsory hospitalisation of a mentally disordered person in respect of whom a special verdict of insanity is returned. This is necessary for the protection of society.

This section follows the lines of the existing defence of self defence. The attack on the accused must have been unlawful, which excludes the defence in cases where the authorities use lawful force in order, for example, to effect an arrest or carry out a judicial sentence. The accused must have had no means of escaping from the attack. This does not require retreat in every circumstances, as all that is required is that the means of escape should have been reasonable. The accused need not, therefore, take great risks to avoid the threatened harm.

The use of excessive force to repel an attack will not be justified. A person, therefore, who responds to a minor attack with a very severe response would not be entitled to the benefit of this defence. Two practical points should be made here. Firstly, the courts do not usually apply too fine a test in assessing whether the right amount of force was used by the accused; obviously a lenient view will be taken. Secondly, where excessive force results in the death of the attacker, in practice the courts will find that there was provocation, and this will reduce the seriousness of the charge. For these reasons it has not been thought appropriate to

introduce the plea of excessive defence which has been developed in certain other legal systems (for instance, the Australian system).

The provisions on the use of force to protect property admit the possibility of the defence being raised in such cases, but impose the general restriction that the conduct of the accused must have been reasonable. It is likely that the courts would not regard as reasonable the use of lethal force to protect property; mantraps and other such devices would therefore be likely to be held unlawful under this section.

This section allows for the use of force to prevent the other legal interests where there is no other means of preventing the attack. This would cover a situation where a person uses moderate force to prevent an unlawful attack on his reputation (for example in expelling a person from gathering), in circumstances where there is no other means of preventing the continuation of the defamation.

Commentary: section 22

Judicial immunity is available to judicial officers to protect them from unfounded harassment and to protect and preserve their independence.

Criminal attempts which fail to achieve their objective are punished in the same way as are completed crimes, although the measure of punishment may be slighter than that which is imposed in the case of completed crimes. The difficulty which is faced by criminal justice systems in this respect is that of deciding at what point an attempt is committed. The formula adopted above identifies the relevant stages as being that point where the accused has progressed beyond the merely preparatory. The question of whether a particular step is more than merely preparatory is one that will require to be ascertained by the court in each case. This formula is deliberately flexible.

Attempts to do the impossible are punishable under subsection (2). An example of where this might apply would be where a person attempts to cause death through poisoning but uses a substance which is totally harmless. In spite of the impossibility of causing death through the administration of a harmless substance, this would still be attempted murder and punishable under this section.

Commentary: section 24

Counseling (or incitement) is the giving of advice either to commit a crime or as to how a crime might be committed. Some communication must be made to the other party, although it is not necessary that counseled person should have acted upon the advice. The person who counsels or incites another to commit a crime is subjected to the same punishment as the one who would/ has actually committed the offence.

Commentary: section 25

This section provides for the punishment of all those who play a part in the commission of an offence and includes not only those who are most directly responsible for it but also those who play a secondary role. The act of the accomplice in aiding and abetting the criminal offence need not play a causal role in the final offence; what is required is that the accused should have done something which was directed towards the assistance of the main perpetrator in his or her criminal purpose. In order for a conviction to be secured, the accused need not know the precise nature of what it is that the perpetrator intends to do, but he or she must know that the purpose was unlawful.

The requirements of the offence of conspiracy in Roman Dutch law are that there should have been an express or implicit agreement to commit a crime. No other act need be committed, provided that agreement is reached, nor need there be agreement as to the way in which the offence is carried out. That there is some fact which, unknown to the parties, would prevent the offence being carried out is irrelevant. If, therefore, A and B conspire to rob a wages clerk on his or her way back from the bank on a Friday, they may be convicted of conspiracy even though it would have been impossible for them to carry out the robbery in the way they had envisaged.

Commentary: section 27

The doctrine of common purpose or shared intention has been a controversial matter in modem Roman Dutch law. The provision above allows conviction in those circumstances where the accused person should have foreseen that the criminal offence in question would be committed by those with whom he or she has entered into a common purpose.

If A and B agree to rob a store together and A knows that B intends to use a gun to threaten the storekeeper, then if the storekeeper is in fact shot by B, it will not be open to A to claim that he or she did not foresee the possibility of the storekeeper's death. A reasonable person in his or her position would appreciate the possibility of the loss of life in the course of an armed robbery.

Commentary: section 28

This embodies the existing law on the subject. It is important to note that the person charged with offence of being an accessory must have done something or refrained from doing something in order to assist the perpetrator of the main offence. A person does not become an accessory merely by inaction (unless there is legal duty to act in the particular case). Conviction of this offence requires knowledge of the fact that an offence has been committed; this requirement will be catered for by the provisions of subsections 13 and 17, which impose a legal duty to act and require intention to perform a criminal act respectively. A person who does

not know that what he is doing amounts to helping an offender to escape justice cannot be said to be assisting a person to escape arrest or apprehension as he does not intend to perform such an act.

This section embodies the directing mind theory of criminal liability in relation to the acts of companies and similar bodies. The degree of culpability and nature of punishment is left to be governed by the relevant statute.

Commentary: section 30

All systems of criminal justice exclude the defence of consent in cases where the victim is subjected to an unacceptably high degree of violence. It is therefore impossible legally to consent to one's own killing, and the same applies to the infliction of serious physical damage. The question of what is serious physical damage is one to be determined by the courts, which will be guided by social conceptions of what is unacceptable. Physical contact sports are generally seen as acceptable, although any violence which they entail must be such violence as is within the rules. The above provisions would enable a prosecution to be brought against a football player, for example, who deliberately injured another player in the course of the game; the deliberate injuring of another player is not a purpose recognised by the law. Subsection (2) also covers cases in which consent is given to medical treatment. Provided that the treatment falls within the scope of what is considered lawful, the patient's consent will justify the intervention.

Commentary: section 31

Assault in Roman Dutch law involves the unlawful and intentional application of physical force to the person of another, or the making of a threat of such application in circumstances where the threatened person believes the threat will be carried out. This latter aspect of the offence has been received into Roman Dutch law from English criminal law.

It is proposed here to distinguish these two situations and to treat threats of unlawful physical violence as a separate offence. The reason for doing this is that assault is commonly thought by the public to be a physical matter; threats are clearly seen as another sort of offence. The current confusion of the two concepts in criminal law is purely the result of historical quirk.

Subsection (2) provides for domestic violence as a special species of common assault which should not be swept under the carpet as a matter for domestic res-olution.

Roman Dutch law currently recognises the following categories of assault: common assault; assault with intent to do grievous bodily harm; assault with intent to commit another offence; and indecent assault. These are all separate crimes, and have come into existence

as a result of the influence on Roman Dutch law of English law. It is proposed here to simplify the law by creating only two forms of non-sexual assault - assault and aggravated assault. This would have the effect of fusing two of the existing categories (assault with intent to do grievous bodily harm and assault with intent to commit another offence) into the single category of aggravated assault.

It is not necessary that the accused should actually have caused serious physical harm or disablement; what matters is the intent to do so. Serious harm is a concept that cannot be further defined in a Code without committing the courts to a possibly awkward and restricting definition. Whether or not serious harm was intended to be committed will depend on the circumstances of the attack.

An assault on a police officer will be an aggravated assault only if the officer was acting in the execution of duty: in those other cases where an assault becomes an aggravated assault because of the status of the victim, this requirement is not present. The reason for this is that the increased harmfulness of such assaults is the insult to the dignity of the office in question, a factor which is present whether or not the victim is performing official duties.

Commentary: section 33

The law protects the individual only from those forms of force which are unlawful. Lawful force is force which is applied in circumstances where the person applying the force has the legal right to do so. An official administering a sentence of corporal punishment uses lawful force, as does a police officer using that force which is necessary to make an arrest. Another example of lawful force is the force used by a person who is defending himself against unlawful attack.

Parents and those exercising quasi-parental authority over children are entitled to use moderate force in chastising children under their control. The amount of force used must not be excessive: no parent is allowed to beat a child in a way which causes damage. The chastising of a child must be administered in good faith and proportionate to the misconduct, and not for any reason unconnected with discipline.

The purpose of this section is to punish those acts which endanger the physical safety of others. The scope of such a provision is potentially wide. It may be used to punish a person who wrongfully removes a road sign and thereby imperils public safety on the road; it may be used to punish those who handle explosives or other dangerous substances in a reckless fashion. The subjection of others to the risk of injury must be intentional, rather than negligent. According to the definition of intentional conduct given in section 16, this includes reckless conduct. There must therefore be an awareness of the risk of injury coupled with a lack of concern over whether or not another is injured.

The risk of injury must be unjustified. This means that legitimate activities are not punishable merely because they involve a risk of injury. Many forms of conduct involve some risk of injury to others, but only those which are regarded as unacceptably risky should be held to be criminal.

Commentary: section 35

Conduct of the sort proscribed in this section would currently be punished under Roman Dutch law as an assault. For the reasons stated above, it has been thought appropriate to use the term assault only in respect of those acts which involve the physical application of force. Acts threatening violence are nonetheless properly regarded as criminally threatening. In conformity with the existing Roman Dutch provisions, the essence of this offence is that the victim should have been put in a position where he or she fears harm to his or her person. It is immaterial that the accused might have been incapable of carrying out the threats in question, although if a reasonable man would have formed the impression that the carrying out of the threats was impossible, then an element of the offence will be lacking.

The current law punishes as assault threats of immediate violence. The Roman Dutch common law was inadequate in not providing a sanction against threats of a non-immediate nature; a situation remedied by statute in other jurisdictions but not covered in Lesotho. This provision would fill this gap, making it criminal, for example, for A to say to B that he will harm him or her at some vague point in the future.

A person who takes his or her own life or attempts to do so commits no crime according to modem Roman Dutch law. The policy behind this rule, which is today accepted in most jurisdictions, recognizes that there is no point in punishing this sort of act, even if suicide is disapproved of by society. At the same time, there are strong reasons for discouraging people from enabling others to commit suicide: section 43 therefore punishes those who counsel others to commit suicide or who assist in the commission of suicide. Under the current law, this is already punishable as culpable homicide.

Commentary: section 39

The provisions on suicide pacts recognises the special position of the survivor of a such a pact. The fact that such a person would escape liability of murder is a recognition of the fact that those who enter into suicide pacts are likely to be of a state of mind which should properly not be regarded as meriting the attribution of full responsibility.

Commentary: section 41

This section is of great importance in that it states the law on murder, a topic which usually produces great difficulty for the courts. Under modem Roman Dutch law,

the mens reaof murder is that which is stated above, namely, the intentional causing of the death of another. There are three forms of intention, however, any one of which is sufficient for the purposes of establishing that the mens reaof murder was present: direct intention (as where A shoots B with the intention that B should die); indirect intention (as where A sets fire to a house in order to claim the insurance on it while knowing that B is in the house and will die as a result. He does not want B's death, but he realises that the death of B is an inevitable result of his action. Here he has an indirect intention to kill B. Finally, there is what is known as dolus eventualis.This is a form of recklessness, and involves the doing of x in the knowledge of the possibility of yoccurring as a result of doing x. This form of intention is recognised by the courts as being sufficient for the mens reaof murder.

Section 46 punishes the reckless causing of death as murder. It is necessary, however, that there should have been a high degree of possibility of death resulting before liability for murder will be imposed: this is stated in the definition of intentional conduct stated in section 17.

This section states existing practice in relation to punishment on conviction for murder. No attempt is made to list the extenuating circumstances which may be taken into account by the court: these are numerous and it would be unhelpful to tie the hands of the court in enumerating them. It could be argued that, with the concept of extenuating circumstances, the courts in Lesotho already have the means of showing leniency in such cases. This is so, but it is important to note that such offenders will still be convicted of murder, even if they do not suffer the normal punishment for murder. It is submitted that it is preferable that the difference in guilt should be reflected in the difference in seriousness of the offence in respect of which a conviction is obtained.

Commentary: section 42

Liability for culpable homicide under Roman Dutch law is imposed in those circumstances where death results from the doing of an unlawful and negligent act or omission. Not every unlawful act or omission can lead to a conviction of culpable homicide where it could not be foreseen that an act could result in serious harm the relevant form of negligence cannot be inferred. (The section speaks of criminal negligence; this is to make it clear that the standard of negligence here is different from that which is applied in the civil law). Under section 45 the only circumstances in which there may be conviction for culpable homicide will be where the accused knew, or ought to have known, that his action could cause serious injury or death. A person who slaps another across the face, to find that the victim falls over and fatally injures his head, could not be convicted of culpable homicide as it is not reasonably foreseeable that a slight slap should result in serious harm. There must therefore be a dangerous act on the part of the ac-cused: this is in accordance with the modem view that

there should not be any form of homicide conviction in those cases in which the victim's death is a surprising or unlikely consequence of unlawful but non-dangerous behaviour. Acts of negligence which do not involve the application of physical violence may still be punished as culpable homicide provided that there was or should have been an awareness on the part of the accused of the possibility of serious harm resulting.

Commentary: section 43

The effect of a plea of provocation is to reduce the crime of murder to that of culpable homicide. It recognises that in certain circumstances people will lose their self-control and act in a way which they would otherwise not wish to act. The above provisions merely embody the existing law, as stated in the Criminal Law

(Homicide Amendment), Proclamation No. 42 of 1959.

There has been some discussion before the courts of the question of whether the provocation plea is available where a killing is intentional. Proclamation 42 makes it clear that the plea is available in such cases, and this availability is emphasised by the wording used above.

Commentary: section 44

There is some doubt as to the scientific basis for this reduction to infanticide, but the provision is retained as a concession to the fact that female person who kill after childbirth frequently do so in a state of depression. Such a state of depression may be difficult to prove, and therefore the presumption achieves this result without the necessity of psychiatric evidence.

Commentary: section 46

Abortion involves the deliberate premature termination of pregnancy. This may be done at any stage in the pregnancy, although it is usually performed at a relatively early stage in order to avoid the medical difficulties and moral qualms associated with later abortions. Under Roman Dutch law, applicable in Lesotho, abortion is legal in order to save the life of the mother and arguably also to prevent grave harm to her health. In Lesotho, relatively few cases come to the attention of the police and the prosecution authorities. An abortion performed in a hospital - to save the life of the mother - is clearly not criminal as the law stands at present.

The issue of abortion is an extremely controversial one, involving deep religious and moral convictions. The law needs to be clear on this point, and therefore it is probably useful to have some provision in the Code stating the position. An innovation are the provisions that provide for termination of unwanted pregnancy for social and economic reasons and immoral conceptions like incest and rape. These provisions underscore the female person's right to self-determination in sexual matters and the protection of her bodily integrity.

Commentary: section 47

The common law crime of abduction of minors in Roman Dutch law was designed to protect the interests of the guardian. Today an alternative rationale exists the protection of the minor against exploitation.

The unlawfulness of the removal is based on the failure to obtain the consent of the guardian; the consent of the minor is irrelevant. Where a guardian has given up control over the minor, the offence will not be committed, as the minor cannot be said to be in the custody of the guardian.

The common law offence is extended here to also protect persons of unsound mind and provide punishment for guardians who collude in the abduction.

Commentary: sections 49 and 50

All young persons under the age of eighteen are protected by these provisions against any form of sexual interference. The consent of such children is irrelevant to guilt.

It is an offence for any adult to have sexual intercourse with a child. In some jurisdictions this may be an offence of strict liability in certain circumstances, with no defence open to the man. Section 51 allows an accused person a defence if he or she was of the belief that the child had in fact reached the age of eighteen. This belief must be one which a reasonable person could have held in the circumstances. This is an objective requirement, the justification of which is that it is important that people are put on enquiry in relation to the age of younger sexual partners.

Section 50(2) is designed to deal with those situations where there is no actual physical contact between the offender and the victim, and where an act is performed in the presence of a child with the intention of deriving sexual gratification from the fact that the child is forced to witness the indecency.

Commentary: section 51

Such an offence is the worst form of rape because a child under the age of twelve has not reached the stage of puberty. This section is also geared towards curbing pedophilic behaviour.

Commentary: section 52

The provisions on indecent assault are deliberately brief and yet they embody the essence of the offence as it is currently defined in Roman Dutch law. Indecent assault in Roman Dutch law is not necessarily an assault in the sense of a physical attack. The application to the victim of any physical force - however mild -

is the starting point of the offence. The other major

requirement is that there should be an element of indecency in the application of the force in question.

The wording used above expresses the elements of the offence in a clear and readily understood manner. What the law penalizes is a non-consensual touching, which may range from a stroking or patting to a violent physical battering. The indecent element may take the form of the part of the body which is touched, or it may take the form of the context in which the touching occurs. A touching may be indecent even if it does not involve contact with the sexual parts of the victim. A man who puts his hand on a woman's upper thigh and at the same time uses indecent language may be said to be indecently assaulting her.

The test of what is indecent is an objective one. It is possible that a man might perform an act which would have the external appearance of an indecent assault but his intention might be merely playful and therefore non-sexual. Under the terms of the provision above, such a person could be convicted of indecent assault in spite of the fact that he has no sexual intention or motive. The justification for this is that whether an assault is an indecent assault is a legal question which it is quite proper for the law to determine on objective grounds. It would also be unacceptable for victims of such acts not to have their sense of what has happened to them reflected in the charge brought. [There would appear to be two schools of thought on this question. In F 1982(2) SA 580 the court took the view that the intention of the accused was what made an assault indecent. It would therefore be possible for an accused to commit an act which was, objectively speaking, not indecent, but nonetheless amounted to an indecent assault because of the intention with which the act was committed. The alternative view, supported by cases such as Abrahams 1918 CPD 590, holds that the nature of the act itself requires that the act itself determines whether there is an indecent assault. English law requires that the act should have an externally observable indecent nature in order to qualify as an indecent assault. In Thomas (1985) 81 Cr App Rep 331 it was held that an accused who had touched the hem of a skirt might have done that with an indecent intention but that this could not make an indecent assault out of an act which was, on the face of it, an innocent act].

Commentary: section 53

The offence of unlawful sexual act is relatively simply defined. Unlawful sexual act is committed where there are coercive circumstances or the sexual act takes place without the consent of the victim. The accused must know that the victim does not consent or at least must be reckless as to the possibility that he

or she does not consent. A mistake on accused’s part as to consent would be a defence, even if the mistake was not one which a reasonable person would have made. This conclusion is derived from the general provisions in the Act on the defence of mistake of fact.

Coercive circumstances and recklessness in relation to consent will exist only where there was some reason for the accused to have been aware of the possibility that the woman was not consenting. There must therefore be something in the situation which should make him ask himself whether she is consenting. If, in such circumstances, the accused fails to take reasonable steps to ascertain whether or not the victim consents, the recklessness manifest in the accused's attitude justifies a finding of criminal guilt.

This section creates a new offence of unlawful sexual intercourse by a husband or wife. A husband or wife who uses violence to have non-consensual intercourse with his or her partner will be charged with the offence of unlawful sexual act. This development is in line with reforms which have been instituted in many other jurisdictions.

Commentary: section 54

These provisions on incest embody the current law. There is, however, a change suggested in subsection (3) in that it relieves of criminal responsibility a party if the relationship was one in which the other "took advantage" of him or her. Many cases of incest involve the abuse by a male or female of his or her.

position of dominance within the family structure and this subsection recognizes this fact.

Commentary: section 56

Prostitution itself is not a crime in Roman Dutch law, at least in the sense that the prostitute herself does not commit any offence by accepting money for sexual intercourse. Activities associated with prostitution, however, are illegal, and the above sections achieve the purposes of penalizing:

(a) soliciting in public, which constitutes a public nuisance;

(b) the activities of those who lure others into prostitution or who live on the proceeds of their work as prostitutes irregardless of

whether the act of prostitution is done in Lesotho or elsewhere;

(c) the running of brothels; and

(d) the detaining of others for immoral purposes, whether in the context of prostitution or otherwise.

Commentary: section 57 -62

Sections 57 -62 deal with the crucial question of the actus reus and mens reaof theft. Existing definitions in

Roman Dutch law are based on an act of contrectatioaccompanied by an intention permanently to deprive the owner of his property. These concepts are embodied in the definition above, although the wording is somewhat different from the wording found in the principal textbooks of modem Roman Dutch law and may also be different from the wording of the relevant provisions in many Commonwealth penal Codes.

Actus reus.

Theft requires there should be some form of taking. In the past there was a requirement of physical touching of the property in question; this is no longer the case. The essence of the act is that there should have been a removal of the property from the control of the owner. Before this is achieved, the offence committed is that of attempted theft.

Another way of putting it is that the person stealing the property should have acted as if he or she were the owner of the thing, that is, that he or she should have attempted to perform acts which are normally incidents of ownership, such as an attempt to sell property. It is not theft for somebody to claim to be the owner of property if he or she has not acted in a way which actually deprived the owner of control.

It should be noted that theft can be committed by a person who is lawfully in possession of property, but who does some act calculated to deprive the owner of that property.

Mens rea.

The thief is required to have acted with the intention of permanently depriving the owner of his or her property. It is therefore not theft to interfere with prop-

erty, if the interference will not have this specific effect. It is not theft to conceal the property of another, as this does not involve an intention to deprive the owner of his or her property on a permanent basis.

The taking of the property must be unlawful. This means that a person does not commit theft if he or she takes the property under the impression that he or she is entitled to take it. If A, believing that he or she is the owner of a thing belonging to B, takes that thing, he or she does not commit theft if the thing is, in fact, the property of another. The person who rides off on the wrong bicycle does not steal that bicycle.

A belief in the fact that the owner consented to the taking will be a defence to a charge of theft. Some of the older cases required that such a belief should be reasonable, but this would not appear to be the current requirement of Roman Dutch law (S. Modise 1966 (4) SA 680; S. V. Barnet 1973(4) SA 430.)

The taking of fungible, or consumable property is theft even if the person taking such property intends to

replace the property taken with its equivalent. This is the rule of the existing Roman Dutch law and is embodied in section 64(2)

(c) . Thus, if A takes a gallon of petrol belonging to B, uses it and then replaces it with a gallon of petrol at some later stage, he or she has stolen a gallon of petrol from B. This will only be the case, of course, if he or she does not believe that B would consent to his or her action. It is possible that such a person could also believe that he or she was legally entitled to "borrow" a consumable, provided that he or she returned it. This belief, if accepted by the court, would be a defence under section 64(3) (b).

Section 58(4) deals with those cases in which a person who is the owner of property takes that property from another who has lawful possession of it and who has what is termed a "special interest" in it. A special interest of this sort exists where, for instance, the property is pledged or where there is a lien over the property. For example, if a garage owner is retaining a vehicle until such time as the owner repays his bill, the garage owner has a lien over that property and it will be theft if the owner drives the car away. The driver will have to be aware, of course, of the existence of the lien.

Section 58(2) (c) covers cases where a person takes the property of another and interferes with it substantially before giving it back.

The special problem of those who convert money which is given to them by oth- ers for particular purposes is dealt with in section 58. The existing law, which is embodied in this section, provides that a person who is given money to hold as trustee, commits theft if he or she uses that money for any purpose other than the trust purpose. A person who receives funds from another for the purchase of a house, for example, commits theft if he or she applies that money to his or her own purpose. He or she can, of course, use the actual money handed over to him or her for other purposes if he or she has the equivalent funds at his or her disposal; the ability to pay is therefore the test of whether the use is unlawful. However, an employee who takes money from his employer, in the face of a prohibition, will commit theft under section 63 (2) (b). This would cover the case of a Government employee who “borrows” money from a Government fund; even if he or she has the funds to pay this back, he or she still commits theft.

The seriousness of theft of use depends on the circumstances. The principle that the law does not concern itself with trifles should cover those situations where a person has borrowed an item from a friend and then uses it outside the purpose of the original loan but who does not harm it in any way. By contrast, a case where somebody makes extensive and possibly damaging use of another’s property deserve to be treated as an offender and would be so treated under this section. Section 63 (2) deals with computer crime, and in particular with the person who wrongfully take

information from a computer or disrupts or destroys the electronic information of another.

Section 58 embodies the law contained in decisions such as S. V. Macpherson 1972 (2) SA 348. If A gives money to B to pay for the future purchase of an item which B is in the business of selling, and B then uses that money to settle a bill which he or she himself owes, B cannot be held to have stolen the money if he subsequently cannot purchase the item on A's behalf and is unable to pay him or her back. A's remedy in such a case is a civil one; he or she is merely a creditor of B.

Commentary: section 63

The offence of the use did not exist in Roman Dutch common law. Most jurisdictions, including Lesotho, have statutory provisions dealing with those cases where people take the property of others and then use it for an unauthorised purpose. This form of conduct clearly needs to be penalised, and yet is obviously not theft, on the grounds that it does not involve any intention on the part of the accused permanently to deprive the owner of his property.

Section 63, subsection (1) deal with cases where the property is taken by the user, as in a case where a person take the vehicle of another to go "joy-riding". It also deals with the case where the person unlawfully using the property already has lawful possession of it. An example a situation covered by this subsection would be a case where a mechanic, entrusted with a vehicle for the purpose of repair, uses the vehicle for his private purposes.

Commentary: section 64

The above section does more than embody the existing law on stock theft. Procedural matters, which feature prominently in the relevant legislation on this subject, are left there.

Commentary: section 65

The wording of section 65 is drawn, with some modification, from the Penal Code of Botswana. It changes the existing law in the following way:

At present Roman Dutch law does not regard the use of violence to retain property already stolen as robbery. This has, however, been judicially questioned (S. V. Mogala 1978 (2) SA 412) and the opportunity has been taken to introduce this extension.

Commentary: section 66

Under the current law, the offence of housebreaking is constituted not in the actual entry into the premises but in the entry into premises with the intention of

committing a crime within the premises. Usually the crime contemplated by the housebreaker will be theft, although there may be other forms of crime intended by such a person. The act of housebreaking is distinct from any act of theft which takes place within the premises, and so a housebreaker who steals property once he or she has broken into premises may be taken to have committed two crimes, both of which may be charged.

Not all structures are covered by the existing law, but it is clear that any structure which is used for human habitation is covered by the law, as is any structure which is used for storing property. The definition of premises contained in subsection (2) excludes vehicles and cupboards, but could include a tent. The same subsection makes it clear that a part of a building will be covered. For example, if A is in premises to which he or she has not effected forcible entry but

comes across a locked room and forces the door into the room, he or she commits unlawful entry in respect of that room. This is in accordance with the existing law on this matter.

Any act which has the effect of making it possible to enter premises can constitute the offence. Pushing open a door would be covered, as this involves displacing a part of the structure. The offence is not committed if a person gets into a building merely by entering through an already existing opening in the building, such as an open door. This is in accordance with the current law.

Commentary: section 67

This section codifies the current law and ensures that the criminal law assists in the protection of privacy.

Commentary: section 68

The offence of receiving stolen property requires that the accused should have actually acquired control over the property. It is not the offence of receiving stolen property merely to agree to take control of such property at some stage in the future. The mens reaof receiving stolen property is either (1) knowledge on the part of the accused that the property was stolen or otherwise unlawfully obtained (for example, obtained by fraud) or (2) a belief that there was a strong possibility that the property was stolen. For example, if A is offered a vehicle at a ridiculously low price, he or she is likely to suspect that the vehicle is stolen. In such a case if he or she buys the vehicle, making no further enquiry as to the mode by which the seller had acquired it, he or she has the mens reaof this offence. It should be noted that the test is subjective; namely, did the accused actually believe in the strong possibility that the property was stolen it is not enough to obtain a conviction for the prosecution to show that a reasonable person in the circumstances would have suspected that the property was stolen.

Section 68 makes it easier for the prosecution to convict

in cases of receiving. Without such a section, it would be difficult to obtain convictions for the offence of receiving because of the difficulty of establishing knowledge of the fact that the goods were stolen. The effect of this section may be to put on their guard those who acquire property in an unconventional way. A strong case can be made out for justifying a requirement that those getting bargains from people they do not know should be put on enquiry as to the source of the property.

Subsections (3) and (4) state circumstances in which the burden will be upon a person to explain how he or she came by the property. This will only arise where there are reasonable grounds to believe that property in the possession of the accused is stolen or otherwise unlawfully obtained.

Theft by false pretences: it is not proposed to have a separate offence of theft by false pretences in the Code. This offence, as currently defined in Roman Dutch law, involves the obtaining of a thing by making a false representation to another. There has been considerable academic and judicial criticism of this offence, and it is apparent that any person who commits it could equally well be charged either with fraud or theft.

Commentary: section 69

The crime of fraud in Roman Dutch law is fairly widely defined. The wording in section 69 makes an important change in the current law, in the light of criticism which has been voiced of the unduly broad nature of this offence as it stands today. The change is discussed below.

The misrepresentation which forms the basis of fraud can consist of a false statement or of any other act which conveys a state of affairs to another. An omission to disclose a fact may be criminal in some circumstances. Whether or not there will be a duty to make a disclosure will be decided by the court in the light of the relationship between the parties and in the light of any legal duty which exists. For example, if it is apparent to A that B is relying upon a mistaken inter-pretation of a statement which he or she (A) has made, then it may be incumbent upon him or her to correct B's impression in order to prevent he or she being prejudiced by this mistaken reliance.

A problem case might be where A, a businessman, knows that another is planning to lend him or her money on the basis of a misreading of his or her accounts. Is he or she obliged to inform the lender of the fact that he or she has misread the accounts? It is possible that a court might interpret section 74 in such a way as to impose this duty. Section 69 requires that there should have been actual loss on the part of the person to whom the misrepresentation has been made. This departs from the current law, which will allow for conviction for fraud where the loss is only potential in that in such a case all that is really committed by the accused is the act of attempted fraud. A thief who does not succeed in obtaining the property he or she seeks to steal commits

the offence of attempted theft. The same should be said of a person who attempts to secure the detriment of another but who does not succeed the offence is an attempt.

Commentary: section 70

The threat made to the victim of extortion may be of bodily harm or it may take the form of a threat to inform the police of criminal conduct on the victim's part or to otherwise harm his or her interests. The use of the word "intentionally' ensures that the threat should have been made with the intention of obtaining the advantage. It would not be extortion for a person to make a threat to another and then to find that the threatened person gives him or her some advantage to which he or she would otherwise have been entitled in the first place.

There has been some debate as to whether the advantage should be of a proprietary nature. There is strong judicial authority to the effect that the advantage can be of another nature. This provision follows this approach, not requiring that the advantage be of a proprietary or financial nature.

Conviction of extortion requires that the accused should not have known that the advantage was one to which he or she was not entitled. This means that it will not be extortion for one who is owed money by another to threaten to take him or her to court in respect of the debt if he or she does not pay the sum owed.

Commentary: sections 73 and 74

Sections 73 and 74 embody the existing law on malicious damage to property and arson. It would be possible to treat arson merely as an instance of unlawful damage to property but the seriousness with which the setting of fire to buildings is viewed merits the existence of a separate offence with a more severe punishment. It would be possible to create, if required, a special offence of setting fire to crops.

The term unlawful damage to property is a new one, the existing name for the crime being malicious injury to property. The new name, however, stressed the unlawfulness of the act rather than the malice present in the mind of the accused: a person destroying property may, in fact, be motivated by considerations other than ones of malice.

The property need not belong to another. Currently the offence may be committed in relation to the property of the accused himself, and the

sections now provide for the protection of the interests of others in the same property e.g co-owners or possessors and partners.

A lawful excuse, which would relieve the accused of liability here, would be, for example, the fact that the destruction was carried out in circumstances of ne-

cessity. An official such as a policeman or woman could also be said to be acting with lawful excuse if he or she damages property in order to carry out his or her duties and provided that the damage was reasonable in the circumstances.

Commentary: section 75

The offence of treason is committed by those who act with the intention of challenging the very existence of the state. This offence is therefore more serious than sedition, the crux of which is action which is directed towards compromising the state's authority. The offence encompasses more acts than are included in subsection (2), although this subsection states the main ways in which treason is likely to be committed. Espionage, for example, could constitute treason.

The common law on treason required that the accused should have owed allegiance to the state before treason could be held to have been committed. There is now included in this category foreigners who hold Lesotho passports. A foreigner, therefore, could also be convicted of treason in appropriate circumstances provided he or she enjoys the protection and privileges of His Majesty’s government that go with the passport.

It should be noted that the Government is treated as synonymous with the state. It is therefore treason to do anything directed towards the overthrowing of the Government, even if one takes the view that the state is a separate and distinct concept. The requirements of the common law of treason have been pronounced upon in a number of Lesotho decisions, including R.V. Makalo Moletsane and Others 1974-75 Lesotho Law Rep. 316 and Rv Mofelehetsi Moerane.

Commentary: section 76

This section provides for punishment for those people who remain inactive in the face and knowledge that treasonable acts are afoot. A civic duty is imposed for citizens to act in a patriotic manner.

Commentary: section 77

The law on sedition as stated above attempts to strike a balance between the right of the individual to comment on political matters and the right of the Government to govern. The essence of the offence is the subversion of authority,

which is quite distinct from the questioning of the way in which authority is exercised.

Commentary: Section 78

The national flag and anthem present the kingdom with her dignity, unity and territorial integrity. Their protection from disrespect, abuse and desecration play an important part in fostering the attainment of unity, dignity and territorial integrity. The offence is a

justifiable limitation on the right to freedom of expression.

Commentary: section 79

This section addresses the problems of hate speech, racism, xenophobia, sexism etc.

Commentary: Section 80

A high respect for the monarch and others belonging to the Royal Family is important for national unity. Members of the Royal Family should reciprocate by according the subjects the dignity they deserve in order to avoid bringing the Royal Family into disrepute. This section draws the necessary balance between the need to respect the Royal Family and an individual's right to dignity.

Commentary: section 81

The corruption of public officials is an offence which is sometimes difficult to establish. Subsection 4 addresses this problem by transferring to the official the burden of proof in respect of any gift received from those persons who may seek to obtain some advantage from him or her. This is a tactic which is used successfully in many countries.

Commentary: section 82

This section deals with the payment to and receipt by agents or employees of bribes in the private sector. The reason why this is considered criminal is that the interest of principals and employers are affected by the taking of bribes by agents and employers or employees. The bribed agent or employee may allocate a contract or deviate from standard conduct or business affairs on a basis other than

that of the best interests of his or her principal or employer.

The giving or receiving of a bribe must be done corruptly. This means that it will not be illegal for an agent or employee to accept a present of which his or her own and any other principal or employer involved has been informed.

Commentary: section 83

Insider trading provisions are a notoriously difficult area of the criminal law. The above section represents an attempt to create a fairly limited insider trading provision which would penalise those who use confidential information they have obtained in the course of their work to profit at the expense of others. For example, if a bank employee hears of a commercial proposal which will raise the value of a business and he or she uses an intermediary to buy a share in that business, he may obtain that share at a much cheaper

price than he or she would have done had the seller known the information in question. This represents an unfair gain at the expense of the seller.

Commentary: sections 82-86

The offences under these sections deal with situations where the abusive or threatening conduct of a person is capable of causing distress to the public or provoking general disorder, commotion and violence.

Commentary: section 87-89

These sections provide for offences against the administration of justice and effective conduct of enquiries into matters of public concern.

Commentary: section 91

This section is not meant to shield judicial officers from valid and bona fide criticism or exposure of misbehaviour of maladministration in courts. It serves to prevent criticisms based on untrue facts and unwarranted attacks on courts.

Commentary: section 94

This offence incorporates the definition of genocide as reflected in the Statute in its entirety. The Rome Statute has adopted the definition word-for- word as it appears in the United Nations Convention for the Prevention and Re-

pression of the Crime of Genocide of 1948.

The offence is based on the commission of one or more of the acts listed in paragraphs (a) to (e) with the specific intent to eliminate the whole group or large numbers of the group. Where specific intent is lacking the acts may still be punishable for an offence amounting to crimes against humanity or war crimes. Therefore genocide cannot be committed by negligence. Knowledge of circumstances will usually be addressed in proving genocidal intent and this will be decided by the Court on a case - by - case basis. It is irrelevant how many people are actually killed. It can be one or more as long as the genocidal intent is present.

The term "destroy" as it appears in the offence should be given a progressive dynamic interpretation. For example, a group could be destroyed by prohibiting its language, or relocating it from one area to another[1].

Commentary: section 95

Like genocide, this offence incorporates the definition of crimes against humanity as reflected in the Rome Statute in its entirety. The definition in the Rome Statute differs but is borrowed from many sources of international law, including the Nuremburg Charter, Statutes of the International Criminal Tribunals for the

former Yugoslavia and for Rwanda and various human rights treaties such as the Convention Against Torture.

The offence requires participation in the acts with the knowledge of the attack, and the attack could be at war time or peace time done by an organization or a state. The perpetrator need not know all the characteristics of the attack or the details of the State or organizational plan or policy. As long as the intention is to further the attack the crime is committed .

Commentary: section 96

This offence, like the other two, incorporates the definition of war crime under the Statute in its entirety. War crimes have traditionally been defined as violations of the most fundamental laws and customs of war but the Statute is said to have developed international law in that it criminalises acts that have never in inter-national law been codified, like war crimes committed during non-intemational armed conflict. The offence includes sexual and gender-based offences, conscription and enlistment of children under fifteen years of age and attacks against

humanitarian personnel as war crimes. However, not all of serious violations of international humanitarian law committed during non-international conflict like international starvation of civilians are considered as war crimes under the Statute[1].

1. International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR), 2003 Manual for the Ratification and Interpretation of the Rome Statute, 2nd Ed, Vancouver Canada, at P. 117.

2. ICCLR, 1 bid at P. 118

[1] ICCLR, Supra at P. 120