

**ANALYSIS OF SECURITY OF TENURE UNDER
THE CUSTOMARY LAND TENURE SYSTEM OF
LESOTHO**

by

None Mokitimi

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CHAPTER I

INTRODUCTION

1.1 Background

In Lesotho agriculture is the key sector and a major source of employment within the country. Approximately 85 % of the population lives in rural areas and derive livelihood from agriculture. One of the major problems facing Lesotho is low agricultural production and productivity. Trends over the years indicate that agriculture sector's contribution to Gross Domestic Product (GDP) is declining, from approximately 60 % of the GDP in 1966 when Lesotho attained independence. In the period 1996 to 2001 the sector's contribution to GDP averaged 17 %. The low and declining contribution by the agriculture sector to GDP is also attributable to other emerging and growing sectors, e.g. textiles. Within the agriculture sector the crops sub-sector contributes a larger proportion than the livestock sub-sector. In 1966 the share of the crops sub-sector in agricultural output was 60 % with the livestock sub-sector share being 40 %. The share of the livestock sub-sector increased to 52 % by 1973/74. The share of livestock reached a peak of 84 % in 1992/93 when crops failed because of drought and has since been more than the livestock's share from that time.

The contribution of agriculture to rural households' income has decreased substantially while dependence on migrants' remittances and foreign aid has increased. In 1978/79 agriculture contributed 49 % of rural households' income but by 1986/87 this had decreased to 34 %. Migrant workers remittances contributed 30 % of rural households' income in 1978/79 and this increased to 47 % in 1986/87 (Bureau of Statistics, 1988). Recent political changes in Republic South Africa (RSA) have affected the practice of oscillating labour migrant system between Lesotho and RSA. In addition, the price of gold has fallen forcing a number of mines to close down. This has resulted in retrenchments of Basotho mine workers. The retrenched mine workers have to live on agriculture because Lesotho has limited natural resources. Although no statistics are available it can be assumed that the contribution of remittances from people working in textile industries contributes a significant proportion of rural households' income.

Crop agriculture is characterised by a high proportion of subsistence farming with over 80 % of the production being kept for home consumption. Lesotho's agricultural production has been declining by 0,7 % per year in the period 1980-1990 (World Bank, 1992). As a result of the low and declining agricultural production, Lesotho is increasingly relying on imports and foreign aid to feed its population. Commercial imports of maize (the staple) and wheat increased by 5 % annually for the period 1980-1992 (Bureau of Statistics and Ministry of Agriculture, 1994). It is estimated that between 9-13 % of the total land area is suitable for cultivation. This means there is shortage of arable land, which is coupled with increasing soil erosion. At the same time, Lesotho's population is increasing rapidly. Between 1976 and 1986 the average annual population growth was 2.6 % as compared to 2.3 % between 1966 and 1976.

1.2 Statement of the Problem

Lesotho faces a shortage of arable land as a result of the mountainous terrain, increasing population and soil erosion. In 1976 arable land was estimated to be 13 % of the total land area. According to the 1986 Population Census arable land constituted 9 % of the land area in 1986. It is postulated that this percentage is decreasing as a result of establishment of residential allocations on arable land (Kingdom of Lesotho, 1987). Most of the arable land is situated in the Lowlands where approximately 60 % of the population lives. This has put pressure on arable land. In 1986, the average population density on arable land was 560 persons/km². From 1985 to 1991 population density on arable land increased from 493 persons/km² to 650 persons/km² (Bureau of Statistics, 1994). Population growth is expected to increase the demand for land. In countries with freehold land tenure systems where land can be sold, the demand for land caused by population pressures is usually reflected in increasing land prices.

The increase in population pressure on arable land has put pressure on the laws and customs, which in the past assured farmers to be, allocated arable land. The customary land tenure system in Lesotho entitles all households to have access to land for residential and agricultural (arable) purposes. With increasing population pressure landlessness has been increasing. Landless households accounted for 7.2 % of total households in 1949/50 (Douglas and Tennant, 1952). This

increased to 8.5 % in 1960/61 (Morojele, 1963). According to the 1970 Census of Agriculture landless households accounted for 13 % of the total population in that year; this increased to 20.7 % in 1980 (Bruce, 1987). The 1986 Population Census provides a figure of 25 % of households as being landless (Bureau of Statistics and Ministry of Agriculture, 1990). It was projected that by the year 2000 landless households will account for 50 % of the total households (Kingdom of Lesotho, 1987).

It has been postulated that there is low agricultural production and productivity in Lesotho because of lack of security of tenure under the customary land tenure system (Eckert, 1980). The argument is that tenure is insecure and as such there is no incentive for farmers to invest in agriculture. The primary objective of the Land Act 1979 is the enhancement of increased security of tenure, which was thought to be lacking under the land tenure system. One of the alleged results of lack of security of tenure is low agricultural productivity. Lesotho's crop agriculture has experienced a continuous decline since 1978/79 but recovered in 1985/86 because of good rains. Crop production suffered in 1992/93 and 1994/94 because of drought. The overall index of crop production, encompassing the five major crops of maize, wheat, sorghum, beans and peas, indicates that from 1973/74 to 1984/85 production on average declined by about 5 % per annum. Causes of the declining crop production include drought, low yields, low fertiliser application rates, hail, frost and soil erosion.

One of the causes of low crop production in Lesotho is the poor yields realised. Between 1973/74 and 1988/89, the average yields were 775 kg/ha for maize, 767 kg/ha for sorghum, 738 kg/ha for wheat, 404 kg/ha for beans and 493 kg/ha for peas (Bureau of Statistics and Ministry of Agriculture, 1990). The average yields in RSA for maize, sorghum and wheat are 2 000 kg/ha, 1 900 kg/ha and 1 000 kg/ha respectively for the period 1974/75 to 1983/84 (Bureau of Statistics and Ministry of Agriculture, 1990). As a result of the low crop production Lesotho is able to meet about 50 % of its total maize requirements and 20 % of its wheat requirements. The shortfall is usually imported from RSA while donations are mostly from the EU and USA.

The Governments of Lesotho has since 1967 made various attempts to enhance agricultural productivity through land tenure reform. In 1967 the government passed the Land (Procedure) Act, the Land Act and Deeds Registration Act. These were followed by the Land Husbandry

4 Analysis of Security of Tenure under the Customary Land Tenure

Act, 1969. In 1973 the Administration of Lands Act and the Land Act 1973 were passed. The most important land tenure reform law introduced in Lesotho is the Land Act 1979 which became operational in 1980. The major objective of the 1979 Land Act is to introduce leasehold system of land tenure. The reforms are aimed at providing security of tenure through titling. It is hypothesised that there is no security of tenure in Lesotho and the introduction of titling will reduce this tenure insecurity. The Land Act 1979 has mostly not been implemented due to opposition from chiefs and lack of political will on the part of government.

The issue of security of tenure was also given priority in the Land Policy Review Commission (2000). One of the terms of references to be addressed by the Commission was to review each type of land tenure system in Lesotho and in the light of relevant regional and international experience evaluate its appropriateness or otherwise in relation to equitable access to productive resources, security of tenure, improved land productivity and efficient administration.

1.3 Objectives of the Study

The overall objective of the study is to analyse if there is security of tenure under the customary land tenure system of Lesotho and how this affects agricultural productivity in the country.

The specific objectives are:

- (i) to describe the changes that have occurred under customary land tenure system of Lesotho,
- (ii) to analyse the reasons for government intervention in the land tenure system,
- (iii) to analyse if there is security of tenure under the customary land tenure of Lesotho,
- (iv) to analyse how the tenure security affect agricultural productivity in Lesotho,
- (v) Make policy recommendations with regards to security of tenure in Lesotho.

The study will focus on arable land and not cover rangelands.

1.4 Hypotheses

- (a) There is low investment in agriculture because there is no security of tenure in Lesotho,
- (b) There is no security of tenure in Lesotho because farmers do not have exclusion and transfer rights on their land,
- (c) There is security of tenure in Lesotho if we consider the length of time land is held by an individual.

1.5 Scope and Outline of the Study

Chapter II provides a brief description of the customary and statutory land tenure systems in Lesotho. The concept of security of tenure under a land tenure system is covered in Chapter III while Chapter IV reviews literature on security of tenure in Lesotho and other African countries. Results from the study are presented in Chapter V and summary, conclusions, recommendations and suggestions for further research are presented in Chapter VI.

THE LAND TENURE SYSTEMS OF LESOTHO

2.1 Customary Land Tenure

The land tenure system prevalent in Lesotho is usually termed "communal" and this is mainly to distinguish it from individual freehold and leasehold systems. It should be noted that communal does not correctly describe the customary land tenure system of Lesotho. This is because landowners have exclusive rights during the crop-growing season only. After harvest the land becomes communal as everybody can graze animals and collect resources like dung and wild vegetables. An attempt is made here to provide a brief description of the prevailing land tenure system in Lesotho. There are many detailed descriptions of the system elsewhere (Sheddick, 1954; Williams, 1972; LASA Team, 1978; Makhanya, 1979; Eckert, 1980; Mashinini, 1983 to mention a few). It should be noted that the land tenure system in Lesotho is dynamic as changes are continuously occurring such that some of the views from the literature may no longer be valid.

In describing customary land tenure system of Lesotho most analysts refer to the Laws of Lerotholi (*Melao ea Lerotholi*) which were first published in 1905. Basotho customs were unwritten until missionaries and colonialists arrived in Lesotho. In 1903 the Basutoland National Council (BNC) was established and one of its first tasks was to compile and write down Basotho laws. This came about because of uncertainty inherent in customary law as it then stood had resulted in arbitrary, unjust, and uncoordinated decisions emanating from the chiefs courts (Letuka, et al, 1994). The BNC compilations came to be known as the Laws of Lerotholi which were named after the Paramount Chief of the time.

According to Sheddick (1954) the examination of the BNC records of the discussions relating to the Laws of Lerotholi makes it clear that the Council was concerned more with framing statements of the law as the chiefs and particularly the Paramount Chief wished it to be, rather than in making any serious attempts at recording Basotho law and custom. The Laws of Lerotholi were intended for the guidance of Basotho courts and were recognized by the British Administration as correctly representing the native law. In 1946 the colonial government published a revised

version of the Laws of Lerotholi (1946). Sheddick (1954) observed that the first code of Laws of Lerotholi (1905) reflected the opinions and wishes of the Paramount Chief, the revised code of 1946 reflected the opinions and wishes of the colonial government. It has to be recognized that the Laws of Lerotholi (1946) as revised from time to time, can in no way purport to be in its entirety a record or codification of Koena law and custom (Sheddick, 1954). Sheddick further argues that Basotho land and custom as approved by the colonial government does not always run in accord with Koena land law. It is apparent that Sheddick equates Bakoena to Basotho, which is not case. Bakoena is a Basotho clan from which most of the traditional leaders (chiefs) come from.

In Lesotho grazing land can be termed open access (communal) but not arable land. Henceforth the Lesotho land tenure system will be termed customary land tenure. In Lesotho land belongs to the Basotho nation and the King holds it in trust for the nation. The underlying concept of the land tenure system is that land is a national and social asset to be utilised for the benefit of the nation. The system entitles all households to have access to land for residential and agricultural (arable) purposes. The administration of land is by chiefs and headmen on behalf of the King.

To be allocated land an applicant has to be a married male Mosotho, accept the superior and overall authority of the King and be a taxpayer. The condition of paying tax is no longer in applies as people now pay sales tax/value added tax. According to the original provision in the Land Act 1979 a person could be allocated land if he/she was either a citizen of Lesotho or holder of a permit of indefinite residence. The Land (Amendment) Order of 1986 changed this to Lesotho citizens who are Basotho are entitled to hold land in Lesotho and the Minister of Home Affairs is the one to determine who is a Mosotho. The Land Policy Review Commission of 1987 recommended the amendment as a result of many Basotho arguing that too many foreigners were holding land which should be held by Nationals. It has been pointed out that this amendment discriminates on grounds of race, colour or national origin which is prohibited by the Lesotho Constitution as well as international human rights instruments as there are many Lesotho citizens of Indian origin who have been in Lesotho for generations (Rugege, 1998). However, the Land Policy Review Commission 2000 has recommended that this amendment be done abolished.

To be allocated a residential site an applicant must show good behaviour and loyalty to the chief. To be allocated arable land the applicant must have a residential allocation made. This is important because without a residence there can be no claim to arable land, grazing, reeds, thatching grass etc. Once land is allocated, the recipient has certain rights to use the land for his lifetime. Cultivation of arable land is one of the requirements for retaining use of the land. If the allottee either fails to cultivate his fields for two successive years or cultivates his fields improperly, the chief reallocates the land; this is however, uncommon in practice.

Every adult male, which means every married male, has the right to be allocated a portion of arable land to provide for his subsistence and that of his family and dependants. Each household used to be allocated three fields, which in most cases were situated in different locations around the village. It is thought the fragmentation of fields originated in the traditional doctrine of equity and the realization that the chance of total crop loss from natural resources would be reduced (Williams, 1972). In addition fragmentation meant that a household's fields were not located in poor land by spreading over poor and good soils. It has been hypothesized that each field was for maize, sorghum and wheat (Williams, 1972). The other explanation for the allocation of three fields is that the first field is for paying tax, the second for the home and the third for the children (LASA, 1978). In polygamous households the man or the head of the household was allocated three fields with two more fields provided for each additional wife.

Each household is entitled to three fields although this no longer happens because of population pressure. The average arable land per household is 1.2 hectares (Mochebelele and Mokitimi, 1992). Even though there is increasing pressure on arable land, land under cultivation declined from 450 000 ha in 1960 to 301 369 ha in 1988/89 (Bureau of Statistics and Ministry of Agriculture, 1990). Coupled with this is increasing fallow land. Between 1973/74 and 1988/89 fallow land averaged 20 % of the total arable land per year (Bureau of Statistics and Ministry of Agriculture, 1990).

A landholder's rights to arable land are seasonal. When the land is cultivated the owner has exclusive rights to that land. After the crop is harvested the land becomes open access whereby anybody can exercise secondary rights of grazing animals, under the practice of *Mohoang*. *Mohoang* involves cattle from one area grazing on stover and crop residues. The practice of *Mohoang* is becoming less prevalent.

Nowadays it is common for landowners to cut the maize or sorghum stalks for their private use. In addition anybody can collect the stover for fuel, wild vegetables, dung for fuel and plastering etc. This shows that the rights to arable land change from exclusive to communal according to the seasons. Thus in summer and autumn rights to arable land are exclusive and in winter and spring they are communal.

One common feature under the customary land tenure system is that residential sites are fenced while arable lands are not. Williams (1972) reports that although no law exists against the fencing of arable land, chiefs discourage it because it would make communal grazing difficult and might lead to the claim of individual title to land which may lead to farmers having political independence from the chieftainship. It can also be argued that the fragmentation and the small size of arable lands also discourage fencing because it is uneconomic to do so.

2.2 Statutory Land Tenure

Statutory land tenure has operated side by side with customary land tenure. According to the Basutoland (Constitution) Order of 1959, land in the country was vested in the Paramount Chief in trust for the Nation. Basutoland Order 1965 reaffirmed this view. In 1965 the Land (Advisory Boards Procedure) Regulations were promulgated. The Regulations introduced Land Advisory Boards which were to be made up of five members selected in a *Pitso*. The Boards were to advise chiefs in allocating land. One important feature of the Regulations was the introduction of certificate of allocation known as Form "C". The Land (Advisory Board) Regulations were followed by the Deed Registry Act 1967 which introduced the registration of title deeds. The Land (Procedure) Act No.24 of 1967 formalised land application procedures while the Land Husbandry Act was passed in 1969. The main purpose of the Land Husbandry Act 1969 was to control and improve in respect of agricultural land, the use of land, soil conservation, water resources, irrigation and certain agricultural practices. The Administration of Lands Act of 1973 introduced the lease system and was applicable in urban areas only. This Act repealed the Land (Procedure) Act 1967. There was strong opposition to the Act by chiefs who saw it as eroding their powers in land allocation. The Act was replaced by the Land Act 1973 which gave chiefs powers to allocate land after consulting Land Committees. The Land Act 1973 was essentially Land (Procedure) Act 1967. The

Land Regulations 1974 operationalised Development Committees established under the Land Act 1973. Development Committees were to assist chiefs in the allocation of land.

The Land Act 1979 is the most important land law in Lesotho. This is because whereas the previous attempts at land reform tackled the issues superficially the Land Act 1979 introduced some far-reaching reforms. The Land Act 1979 introduced three forms of tenure; allocation, licence and lease. The Land (Amendment) Order (No. 26 of 1986) abolished a licence as a user right and introduced the need for compensation of lost land. Land (Amendment) Order No.6 of 1992 gave Village Development Councils powers to allocate land in place of Development Committees. Development Councils (Amendment) Act 1994 removed chiefs as *ex officio* chairpersons of Village Development Councils and District Development Councils. Members of the councils elect their chairpersons. The Land (Agricultural Lease) Regulations 1992 introduced procedures for converting customary title to leases. The Local Government Act 1997 was passed by parliament in 1997 but is not yet operational. The Local Government Act makes provision for the establishment of Local Authorities.

THE CONCEPT OF SECURITY OF TENURE UNDER A LAND TENURE SYSTEM

Land tenure means terms on which land is held and this includes the rights and obligations of the holder of the land (Bruce, 1993). There are different types of land tenure regimes. Under freehold tenure land is held free of obligations to the monarchy or state. Leasehold tenure is one under which land is held by someone other than the owner for a specified period only, for rent. The concept of security of tenure has had several interpretations such that it means different things to different people. Sheddick (1954) defined security of tenure as the degree to which an individual may expect uninterrupted and, within certain limitations, unrestricted use of a particular cadastrally definable parcel of land. According to Barrows and Roth (1990) tenure security narrowly defined is the landholder's perception of the probability of losing land within some period. It can also be defined more broadly as the landholder's perception of the likelihood of losing a specific right in land such as the right to cultivate, graze, fallow, transfer or mortgage.

Place, Roth and Hazell (1994) define tenure security as the individual's perception of his/her rights to a piece of land on a continuous basis, free from imposition or interference from outside sources, as well as his/her ability to reap the benefits of labour and capital invested in land, either in use or upon alienation. Tenure security has three components; breadth, duration and assurance according to Place, Roth and Hazell (1994). By breadth is meant the rights held by the individual allocated or owning the land. The rights include the right to use, transfer and exclude. If all other factors are held constant, the greater the number of rights associated with a parcel of land, the greater the economic value of the parcel. By duration is meant the length of time for which a given set of rights is legally valid. The time horizon should be sufficiently long to enable the holder of the land to recoup with confidence the full income stream generated by the investment. Assurance implies that rights are held with varying degrees in the present and future. Bruce (1993) argues that security of tenure can be used to indicate that the landholder's tenure is secure, in the sense that his/her possession or use of land will not be interfered with by the state or other private individuals. He indicates that that even if tenure is secure for the lifetime of the holder, and inheritable

by the children of owner, it may be considered insecure under this use of the term for example if it cannot be bought or sold.

On the other hand Place, Roth and Hazell (1994) indicate that tenure insecurity from an economic perspective is a function of (1) inadequate number of absolute rights, (2) inadequate duration in one or more rights, (3) lack of assurance in exerting rights and (4) high costs of enforcing rights. The causes of insecurity are diverse and sometimes may have little to do with the rules of customary tenure systems. Insecurity of tenure may arise from abuse of power by traditional land administrators or from their ineffectiveness in enforcing rules in political or economic circumstances which have undermined their authority. Insecurity of tenure may also be caused by arbitrary government action such as taking land without compensation. It should be noted that high levels of tenure insecurity may exist even with the landholder having a legal title. If the government lacks the will or the means to enforce landholder's rights or the registration process fails to properly identify and record the complete set of rights, tenure insecurity will be the outcome.

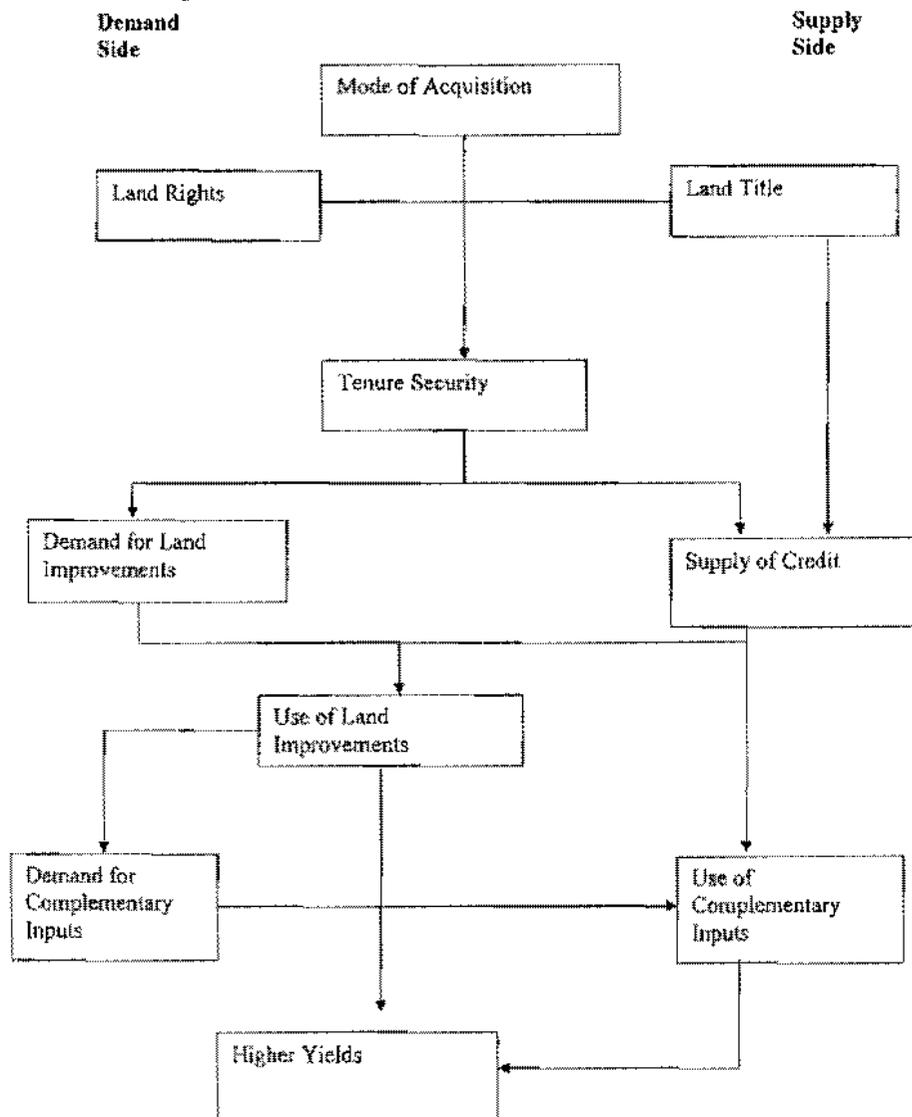
The question of security of tenure is important in agriculture. This is because security of tenure is associated with greater investment in agriculture, which leads to increased productivity. Insecurity of tenure is associated with low investments in agriculture, which results in decreased productivity. There is widespread believe amongst development specialists that tenure security is an important condition for economic development. Economic theory suggests that tenure security is expected to:

- Increase credit use through greater incentives for investment, improved creditworthiness of projects, and enhanced collateral value of land;
- Increase land transactions facilitating transfer of land from less efficient to more efficient users by increasing the certainty of contracts and lowering enforcement costs;
- Reduce the incidence of land disputes through clearer definition and enforcement rights; and
- Raise productivity through increased agricultural investment.
(Place, Roth and Hazell, 1994)

Figure 1 depicts a theoretical model relating tenure security and agricultural performance. Tenure security has both the demand side and

supply side effects which consists of incentives to farmers and incentives to lenders respectively. On the demand side, an enhancement in tenure security increases demand for medium-to-long-term land improvements and, to a lesser extent, for mobile farm equipment (Place, Roth and Hazell, 1994). The increase in demand is from greater tenure security, which increases the likelihood that the land operator will capture the investment returns. In addition the increase in demand as a result of increased tenure security is expected to reduce the incidence of disputes, freeing resources that otherwise would have been used for litigation.

Figure 1: Conceptual Model Linking Title and Tenure Security with Agricultural Performance



Source: Place, Roth and Hazell (1994)

VIEWS ON SECURITY OF TENURE UNDER THE CUSTOMARY LAND TENURE IN LESOTHO

The literature on security of tenure under customary land tenure systems in Africa is mainly divided into two opposing views. On one hand there is a view that there is security of tenure under customary land tenure and on the other hand is the view that there is no security of tenure under customary land tenure. These two opposing views are also applicable to the customary land tenure system practiced in Lesotho.

4.1 Views that there is no Security of Tenure

It should be noted that some of the views, which indicate that there is no security of tenure under the customary land tenure of Lesotho, have been overtaken by events as significant land tenure changes have occurred since they were made. Mashinini (1983) and Ault and Rutman (1979) point out that African land tenure systems are dynamic and evolve with changing times. The most often raised concern with the customary land tenure system is that it does not provide sufficient security of tenure to encourage farmers to make investments in their land holdings. It is argued that a farmer will not make long-term investments in his holding unless he is secure in his expectation of reaping the benefits of his investment (Bruce, 1987). Proponents of the view that there is no security of tenure under the customary land tenure system of Lesotho include Quiron (1958), Williams (1972), and Eckert (1980). As early as 1958 the issue of the change in the land tenure system in Lesotho was discussed in the Basutoland National Council (Basutoland Department of Agriculture Annual Report (BDAAR), 1958). The concern was that the present land tenure system in the country was the basic cause of the drawbacks in the proper utilization of the land. In 1959 it is reported that most of the land problems whether be soil erosion, lack of proper use of arable and grazing land were born by the land tenure system (BDAAR, 1959). It was pointed out that it was imperative that the system of land tenure needed revision so that people could have security on the land they occupy as an incentive to them to improve their holdings.

In the early 1960s several economic missions including the Morse Mission (1960), the Chacko Mission (1965), and the Porter Mission (1965) visited Lesotho (then Basutoland) and expressed the view that the system of land tenure in Lesotho was an obstacle to economic development (Cowen, 1967). The missions indicated that there was no security of tenure, which was a precondition for economic development. For instance the Chacko Mission sponsored by the United Nations noted that there was no freehold or leasehold title to any of the land in the territory and concluded that no legal security over land could be obtained (Cowen, 1967). Cowen (1967) also reports that the British Ministry of Overseas Development's Economic Survey Mission led by R.S. Porter stated on the outset of their report that the land tenure system was a man-made obstacle whose removal was a pre-condition for economic growth. The Mission laid emphasis on alleged absence of security of tenure for lack of economic growth in Lesotho. The Basutoland Constitutional Commission of 1963 argued for the revision of the traditional laws to provide more equity in distribution of land and greater security of tenure as the basic condition for improving agriculture in the country (Stevens, 1970). It is also reported that the then Prime Minister of Lesotho, Chief Leabua Jonathan, declared in 1968 that "the farmer could not safely invest in the land that he occupied for fear of being deprived of it and this insecurity in regard to the land which they occupy must be swept away" (The World, July 15th, 1968 as reported in Williams, 1972).

One view is that there is lack of security of tenure because of chiefs' right to reallocate land for reasons of rights to surplus needs. Section 7(2) of the Laws of Lerotoli provides that every chief and headman shall inspect land regularly and take away lands from people who in his opinion have more lands than are necessary for their families' subsistence and grant such land to his/her subjects who have no land or have insufficient land. Williams (1972) argues that this penalises farmers who have surplus produce because of their increase in efficiency and productivity. He notes that once a surplus is evident a farmer subjects himself to the scrutiny of his/her chief who may decide that the farmer's efficiency shall be rewarded by decreasing the size of his holding.

The Laws of Lerotoli in Section 7(3) further states that a chief can take away land which has not been cultivated for two years or improperly cultivated. Williams (1972) contends that this section is vague because the farmer does not know what is meant by improper cultivation. He

concludes that a farmer therefore must not cultivate "too badly" or "too well".

The system of placing of chiefs is also attributed to causing insecurity of tenure. The tradition of "placings" whereby an increasing number of chiefs was placed within the existing hierarchy also produced considerable uncertainty and insecurity among farmers because the followers of the newly "placed" chiefs had to be provided with land, often at the expense of the existing landholders (Williams, 1972). The system of placing of chiefs was curtailed with the 1938 Administrative Reforms and is no longer practised.

An allottee of land has tenure of residential title being dependent on good behaviour and loyalty to the chief. Some analysts have argued that the violation of this subjects the offender not only losing his residential title but also his arable land. The absence of a working definition of the measure or nature of disloyalty aggravates the farmer's uncertainty of investments in land.

It is also argued that there is no accurate demarcation and registration of land to which people are entitled. The boundaries of fields are usually made in the presence of witnesses conversant with the area in question. In some cases the lack of accurate demarcation and registration of land has led to long and costly litigation especially in cases where the witnesses' memories have faded. The Land Act 1967 introduced a certificate to be issued attesting to the land allocation and gave chiefs the responsibility for the maintenance of a land register. It has been found out that most chiefs do not maintain a land register.

One other cause of insecurity of tenure is that there is no compensation when land is expropriated for public purposes. For instance land taken for public purposes cannot be compensated according to the Land Act 1979. However, this was changed with the Land Regulations (Amendment) 1986 which stipulates that the land acquired for public purposes was to be compensated. Related to this issue is that customary law permits the landholder to remove his physical improvements but does not allow him to claim their value. Immovable improvements such as dams and soil betterment, therefore go uncompensated in the event of land deprivation (Williams, 1972).

It is further argued that there is insecurity of tenure because land is not inheritable (*mohu ha se lefa*). Upon the death of the landholder land usually reverts to the relevant chief for reallocation, although preference is usually given to the deceased eldest son. It is argued that this practice

discourages long term investments for fear that such land improvements could be enjoyed by other people who might be re-allocated the land after the death of the parents.

Since Lesotho attained independence in 1966 the issue of lack of security of tenure under the land tenure system has been a thorny one. This resulted with the introduction of the 1967 land Act which introduced title deeds and Administration of Lands Act 1973 which introduced the leasehold system in urban areas only. The Administration of Lands Act 1973 conferred upon central government exclusive powers of land administration within all designated urban areas (Leduka, 1995). There was strong opposition to the Act by chiefs who saw it as eroding their powers in land allocations. As a result of the opposition by chiefs the Act was never implemented. The opponents of change even went further in undermining the reform proposals by drafting the Land Act 1973 (Mosaase, 1987). In 1979 the Land Act was passed and its main purpose was to address the perceived problem of lack of security of tenure. The primary objective of the Land Act 1979 is the enhancement of increased security of tenure, which was thought to be lacking under the customary land tenure system. The Land Act 1979 introduces leasehold tenure system which provides the landowner with security of tenure. Under leasehold tenure system land is considered the property of the state which allocates it to farmers on leasehold. The state is the owner and allocator of land (the lessor) and the land is farmed by individual households as leases (Bruce, 1987).

4.2 Views that there is Security of Tenure

The opposing view is that there is security of tenure under the customary land tenure system (Ashton, 1952; Douglas and Tennant, 1952; Sheddick, 1954; Makhanya, 1979; Mashinini, 1983). The argument is that because under the customary land tenure system land is held in perpetuity and can be inherited there is security of tenure. There is evidence that in practice land remained under use by the same family for generations because preference is given to the sons of the deceased when fields were reallocated (Mashinini, 1982). For instance Robertson (1987) findings are that eldest sons inherited 45 % of the land holdings, 11 % went to other sons, 6 % went to widows, and 16 % went to chiefs for reallocation. Robertson (1987) also reports that there is an increase in sharecropping arrangements whereby the father sharecrops with sons as a means of

ensuring inheritance by the son. Douglas and Tennant (1952) findings are that the mean period during which land had been continuously held by one individual was 18 years. This period is considerably longer average tenure than prevails in the United States of America (LASA, 1978).

Sheddick (1954) argues that there is security of tenure if the following conditions are met:

- Continued utilisation;
- Continued good behaviour on the part of the family;
- The rights of expropriation possession by the administrative authorities;
- The seasonal duration of the various production units themselves;

When all these conditions are satisfied then it may be said as a generalisation that the degree of security of tenure of usufructuary rights over production units is very considerable in Basutoland (Sheddick, 1954).

Proponents of the existence of security of tenure under the customary land tenure argue that there is a difference between formal regulations vis-à-vis practice. The argument being that although the Laws of Lerotholi indicate conditions under which land can be revoked, in practice the clauses are not practised. With regards to revocation of land Phororo (1979) and Mashinini (1983) argue that chiefs did not make unilateral decisions to revoke land, but arrived at such decision after close consultation with their Council of Elders in the community before the Land (Procedure) Act 1967 and since then in close consultation with Land Allocation Committees. Mashinini (1983) further argues that an exhaustive inquiry and successive warnings were often done before fields could be revoked. Gattinara (1984) findings are that it was very rare that fields were revoked. Under communal tenure a man has security of tenure provided he pays his taxes, makes use of the land, and obeys the law, he is assured the use of the land for the duration of his life (de Wet, 1987). Anyone wishing to dispossess a household of their land must show very good cause for doing so (Low, 1986).

The proponents also argue that Lesotho used to be called "the granary of South Africa" and exported grains to the mines in RSA. In addition in the 1950s and 1960s the Basutoland Department of Agriculture encouraged "progressive farmers" to produce more than their family needs and market the produce. In some cases the "progressive

SECURITY OF TENURE IN LESOTHO: EMPIRICAL EVIDENCE

5.1 Methodology

Lesotho is divided into four ecological zones namely, the Lowlands, the Foothills, the Senqu (Orange) River Valley and the Mountains. The Lowlands are mainly situated in the west of the country while the Mountains are to the east. The Lowlands are below an elevation of 1,981 metres above sea level and occupy a narrow strip of land along the western border. This zone covers 17 % of the total area and has the highest population density and is also where most of the country's urban centres are located. The largest proportion of arable land is situated in the Lowlands. The Foothills consist of land between elevations of 1,981 and 2,286 metres above sea level and situated between the Lowlands and the Mountains. The Foothills cover 17 % of the total land area. The Mountains cover elevations of above 2,286 metres above sea level and 65 % of the land area. Livestock farming is the major agricultural activity in the Mountains. The Senqu (Orange) River Valley is geographically situated within the Mountains but has lower elevations because it cuts across mountains. The Senqu River Valley covers 1 % of the total land area.

The three northern districts of Berea, Leribe and Butha Buthe were selected as the study area. These districts were selected because they produce the bulk of the agricultural produce in the country. For example in 2000 the three districts together produced just over 50 % of the grain (maize, sorghum and wheat) production in the country. In addition the most fertile arable land is found in these districts. Data collection was done through a structured questionnaire administered to respondents by Research Assistants under close supervision. A sample of 300 respondents was covered. Only the Lowlands and Foothills were covered as arable agriculture is mostly practised in these ecological zones. The respondents were equally distributed between the two zones, i.e. 150 were from the Lowlands and 150 from the Foothills. A three-stage sample method was applied, each enumeration area, as designed by the Lesotho Bureau of Statistics, was taken as the primary sampling unit. The villages the secondary sampling units, and land-owning households

the third stage sampling units. The primary sampling units were selected with probability proportional to size (PPS) while villages and farm households were randomly selected. Ten enumeration areas (EAs) were selected in each ecological region. In each enumeration area, two villages were selected and 25 land-holding households selected in each village. This means that 50 land-holding households were selected in each enumeration area. The survey was undertaken in winter (June, July and August) of 1999. Table 5.1 provides the summary of sampled ecological zones, districts and villages.

Table 5.1: Sampled ecological zones, districts and villages

Ecological Zone	District		
	Berea	Leribe	Butha Buthe
Lowlands	Lebina	Levis Nek	Qholagho
	Tsekelo	Letsoela	Mothuntsane
Foothills	Sebetia	Matlameng	Tamaseka
	Makoaela	Lipetu	Lepatoa

5.2 Demographic Characteristics of Respondents

The average age of respondents was 49 years and approximately 66 % were females. The high percentage of female respondents is mainly due to the fact that most males are working in the mines in the Republic of South Africa (RSA). The average household size was 5.9 persons. Leduka (1998) found the average household size of 5.8 persons in the Foothills and Lowlands of Maseru district. Majoro et al (2000) also found the average household size of 5.8 persons for the mountain districts of Mokhotlong, Thaba Tseka and Qachas Nek. The national average household size in 1996 was 5.0 persons (Bureau of Statistics, 1998). Rural households tend to have larger household sizes than urban households. Average household size in urban areas was 3.9 while in rural areas it was 5.2 (Bureau of Statistics, 1998). The 1999/2000 Agricultural Census estimates are that the average household size for rural agricultural households was 4.5 persons. This is a marked decrease from the 5.2 persons found in 1996. The decrease might be caused by urban migration as a result of employment opportunities in urban areas. There was no significant difference in household size in the two ecological zones. Approximately 64 % of the respondents were married, 29 % widowed

and 3 % single. Fifty-four (54) percent of the respondents had some primary school education with 14 % having completed primary school education. Sixteen (16) percent of the respondents had no formal education.

Twenty-two (22) percent of the respondents indicated that the head of the household was unemployed. Approximately 24 % indicated farming as the occupation of the head of the household while 23 % of the heads of household were housewives. The implication of this is the majority of the people living in rural areas depend on farming as a source of livelihood. Ten (10) percent of the head of households were employed as miners in the RSA. Beer brewing was also mentioned as an important occupation. Approximately 40 % of the household members were wage employed with 10 % wage-employed in Lesotho while 30 % were wage-employed in the RSA. It is evident that the majority of people wage employed are mostly employed in RSA mines. Most family members wage employed in Lesotho are young females working in textile industries.

5.3 Land Inventory and Operations

All the respondents interviewed had access to arable land. By access to arable land meant whether the household "owned", sharecropped or rented land. Thirty-seven (37) percent of the households operated one field with the same percentage operating two fields (Table 5.2). This means 74 % of the households operated two fields or less. Leduka (1998) reports that 43 % of the households had two fields or less. This is unlike customary law, which allocates three fields to a household. Each household used to be allocated three fields, which in most cases were situated in different locations around the village. According to the 1989/90 Agricultural Census, 21 % of rural households operated one field while 35 % operated two fields. This means 56 % of the households operated two fields or less. The 1999/2000 Agricultural Census reports that 29 % of the households operated one field with 55 % operating two fields. Thus 84 % of the households operated two fields or less. Morojele (1963) found the average number of fields per household to be 2.4. The number of households reporting 2 fields comprised 1/3 of households, and those with 3 fields 1/4. It is clear that more households are getting access to less arable land mainly because of population pressure.

Table 5.2: Number of fields operated by households

Number of fields	Number of households (%)	
	Lowlands	Foothills
1	40	35
2	38	37
>2	22	29

Source: Survey

In comparing the number of households and the number of fields by ecological zones, it was found out that households from the Foothills tend to have more fields than people from the Lowlands. This is despite a large proportion of Lesotho's arable land being located in the Lowlands. It was found that respondents from the Foothills had smaller-sized fields than the respondents from the Lowlands. It is thus evident that people from the Foothills have many smaller-sized fields as opposed to fewer bigger-sized fields in the Lowlands. This is understandable given the topography of the Foothills as people have small patches of fields on mountain slopes.

In comparing the number of fields and age, younger households tended to have less number of fields (one) while older households had more than one field. This shows that it is now difficult for households with younger members to access arable land. The irony is that they are the ones who tend to have resources to operate land as opposed to the older households who do not possess resources to operate the land.

According to the Constitution of Lesotho the power to allocate land is vested in the King. The King allocates land through chiefs and headmen. According to the Laws of Lerotholi every adult male, which means every married male, has the right to be allocated a portion of arable land to provide for his subsistence and that of his family and dependants as mentioned earlier. It is apparent that inheritance is the most common form of acquisition of land followed by allocation by chief (Table 5.3). The NUL Based FAO Research Team (n.d) findings show that 50 % of the respondents acquired their first land holding through inheritance. The reason for inheritance to be the dominant mode of land acquisition is that there is no virgin land to be allocated to new households. Land acquisition through allocation by chiefs tended to be common in the Foothills. This is mainly because chiefs allocate people

arable land on marginal lands on mountain slopes whereas in the Lowlands no virgin arable land is available. The law prohibits the selling and buying of land but there were some respondents who indicated that they had bought land. It is an open secret that the selling and buying of land is common in the country. This is more prevalent in peri-urban areas where chiefs and landowners co-operate in selling land. Landowners wishing to sell land usually approach chiefs to issue the buyer with a Form C and the chief is given a portion of the money.

Table 5.3: Mode of Land Acquisition (%)

Mode of Acquisition	Field 1	Field 2	Field 3	Field 4
Inherited from parents /relatives	50	55	48	52
Allocated by chief	45	43	45	45
Allocated by VDC	1	1	1	2
Purchased	1	0.3	0.3	0
Others	4	0.7	4.7	1

Source: Survey

In recent times the selling of land is becoming common in rural areas. Landless people who have access to financial resources acquire land through such means as paying school fees for children of poor people with access to land. Some respondents indicated that they would rather be landless and invest in children's education. This is more so as the more educated the child is the higher are chances of getting formal employment. They further pointed out that in most cases the production from the land is not enough such that they have to purchase food from shops. In some instances the landless people pay for funeral costs of poor people with land who in turn give them their lands. Some people have raised concern that it seems rich people are amassing large amounts of lands through such means. This is mainly so in the situation that most males are no longer working in the mines in the RSA. One other factor is the increased number of deaths due to the HIV/AIDS pandemic.

In most peri-urban areas, people sell their agricultural land (fields) to other people for residential sites. There is evidence that even in rural areas informal land market is taking root. In urban areas a standard plot of 100 Ft by 100 Ft (30m by 30m) costs between M2000 and M5000. In

rural areas a standard plot costs between M300 and M500 (Kasanga, 1999; Kingdom of Lesotho, 2000). An interesting issue with the selling of land is that the buyer and the seller reach an agreement and then the allottee approaches the chief to issue a Form C. The seller usually tells the chief that he/she has given (*sehela*) a relative his/her land. This means the allottee in turn allocates the land to someone and the chief blesses it by issuing the certificate of title. The buyer of the land also claims that he/she has been allocated land and not sold the land. The interesting thing is that chiefs are involved in these illegal acts mainly because it is alleged they get some portion of the money exchanging hands. Furthermore chiefs are fully aware that an allottee cannot transfer land through selling except through inheritance. Village Development Councils were established to assist in allocating land and stop corrupt practices by chiefs and yet the status quo continues. The guise of allocating land to a relative is simply to use the inheritance clause in transferring land.

In comparing the mode of land acquisition between the ecological zones more people from the Lowlands access land through inheritance as compared with the Foothills where more people access land through allocation by chiefs. This is mainly due to the fact that in the Foothills people are continuously being allocated virgin lands on marginal lands located on steep slopes. This is one of the causes of soil erosion in the country.

The majority of households inherited land from parents with a smaller proportion inheriting from grandparents. There were some respondents who inherited land from relatives e.g. uncles. These are cases where uncles did not have children or had no sons. In the case where the relatives have daughters only it is expected that the daughters will get married and access land through their husbands.

The 1999/2000 Agricultural Census results show that 61 % of the fields were allocated by chiefs, 21 % inherited from parents and 16 % were given by relatives. The percentage of fields allocated by chiefs is still higher if the percentage of inherited and given by relatives are added together. The difference might be caused by the fact that this study covered only the Lowlands and Foothills whereas the Agricultural Census also covered the Mountains and the Senqu River Valleys. In the Mountains and Senqu River Valley as earlier mentioned chiefs tend to allocate households new fields on marginal lands on mountain slopes. Approximately 1 % of the fields were purchased (Bureau of Statistics, 2000). Most of the selling and buying of land are found in the districts of

Maseru and Leribe. These districts are experiencing greater urbanisation because of establishment of factories and this has led to greater demand for residential sites.

According to the Land (Procedure) Act 1967 once a person is allocated land he/she was given a certificate of allocation signed by the chief and witnesses in which the location and size of the field were described. The majority of respondents had no certificate of allocation while a small proportion held Form C /Form A (Table 5.4). The Form C was introduced in 1967 through the Land Procedure Act. The boundaries of fields are usually made in the presence of witnesses conversant with the area in question. Thus the witnesses and neighbours can attest that a person has been allocated particular land or his parents have been using the land for a number of years. The absence of certificate of allocation is one of the major causes of land disputes especially in cases where the witnesses' memories have faded or witnesses have died. In some instances one of the parties involved in a dispute bribes witnesses. What is interesting is that it is now more than 36 years since the certificate of allocation was introduced and yet many people do not have such documents. The average number of years a household operated own land was 18 years which is the same as found by Douglas and Tennant (1952).

Table 5.4: Certificate of allocation (title) held (%)

Certificate of allocation	Field 1	Field 2	Field 3	Field 4
No certificate held	54	53	55	60
Form C/Form A	30	25	35	25
Letter signed by chief/ VDC	10	12	5	8
Other	6	10	4	6

Source: Survey

With regards to field sizes, 21 % of the respondents did not know their field sizes. This is despite the Ministry of Agriculture's Extension Agents being mandated to measure farmers' fields as part of their work. For the households knowing their field sizes the average size was 0.5 hectares. If on average a household operates two fields, this means a household operates approximately one hectare of land. Ninety percent of the households had field sizes of less than one hectare. Households from the Lowlands tended to have larger field sizes than households from the

Foothills. The average field size in the Lowlands was 0.8 ha while in the Foothills it was 0.4 ha. The 1999/2000 Agricultural Census reports the average field size of 0.48 ha. It is evident that the average arable land holding per household is decreasing. The average arable land per household was 2.35 ha in 1950, 2.06 ha in 1960 and 1.98 ha in 1970 (Morojele, 1963 and Lesotho, 1972). In the mid-1970s the average Lowland farmer held 1.94 ha and the farmer in the Foothills held 1.42 ha (Van der Wiel, 1977). The implications of these are that as arable land is decreasing productivity has to increase. However, crop productivity as measured by yields has shown declining trends in Lesotho.

5.4 Crops Grown

Maize is the dominant crop grown in the study area. For the years 1998 - 2000 the three northern districts of Berea, Leribe and Butha Buthe accounted for 50 % of Lesotho's total maize production. It is evident that maize is grown by the majority of people (Table 5.5). Sorghum is the next important crop. The other important crops include beans, wheat, and peas. Intercropping was practised with maize and beans being the most popular mixture. There was a significant number of households growing cannabis (*Matekoane*) in the Foothills of Berea district. The 'Makhoarona area in that district is famous for growing cannabis. This is despite the crop being declared illegal in the country. The other crops grown include fodder and potatoes.

Table 5.5: Crops grown in 1998/99 (%)

Crops grown	Field 1	Field 2	Field 3	Field 4
Maize	58	32	50	55
Sorghum	9	13	10	8
Maize + sorghum	20	4	5	4
Beans	2	2	1	1
Wheat	1	1	1	1
Fallow	2	5	1	2

Source: Survey

Fallow land constitutes a significant proportion of arable land in Lesotho. The national estimate of fallow land per annum is 25 % (Bureau of

Statistics and Ministry of Agriculture, 2000). The reasons for fallow land included lack of resources to plough fields, lack of resources to purchase inputs, no sharecropping partner, and field being waterlogged. The resources include animal draught power, and money.

5.5 Use Rights on Arable Land

A person is allocated arable land for a lifetime to grow crops. Many respondents understood that they were not given but allocated arable land and as such they did not own the land. They pointed out that the land belongs to the Basotho Nation, which has loaned them for a lifetime. This is very important because the Sesotho word for allocation is *abetsoe* as opposed to *fuaa*. Most respondents reported that they had the right to plough throughout the whole year. In the past farmers had to wait for the chief to declare the time for ploughing (Sheddick, 1954). In some instances farmers could not plough when there was a death in the village which is *Ho ila* in Sesotho. They could only plough after the burial. It should be noted that during those days a person was buried after 2-3 days after dying. Furthermore farmers could not plough on Sundays. Nowadays such restrictions are no longer in place. Respondents also indicated that they had the right to hoe at any time. In some rural areas it was found out that hoeing had to be done at certain times of the day, stopping around 10.00 – 11.00 in the morning and resuming around 2.00 – 3.00 in the afternoon. The reason given for hoeing at such times was that hoeing during the middle of the day would cause hail, which damages crops. Chiefs had people who policed the hoeing times. This practice also happened with the drying of clothes (laundry).

All the respondents said they had the right to cut crop stover. Similarly 98 % indicated that they could let only own livestock graze on crop residue/stover. In the past the cutting of crop stover was not practised instead the *mohoang* practice prevailed. This means farmers could not cut stover as this was considered communal property. Similarly farmers could not let own livestock to graze on crop stover to the exclusion of neighbours' livestock. If a farmer let only his livestock graze his livestock was excluded from grazing on other farmers' stover. Such a farmer was considered an outcast in the society. Nowadays most farmers do not practice *mohoang* but cut the stover which is fed livestock at home. Sixty four percent of the respondents cut and removed stover from

fields and used it as fodder while 23 % left the stover on the fields for communal grazing.

One peculiar aspect of the customary land tenure system of Lesotho is that arable land is not fenced while residential land is fenced. Williams (1967) argues that although no law exists against fencing chiefs discourage it mainly because the farmer would claim individual title to land and perhaps claim political independence from the chieftaincy. Other analysts have argued that the field sizes are too small to make fencing economic. One other reason advanced for lack of fencing is that after harvest the land becomes communal and fencing would go against this. It is interesting to note that 93 % of the households indicated that they had a right to fence arable land and yet they did not do so. The reasons for not fencing included fear of vandalism and lack of funds to erect fences. The few households who indicated that they had no right to fence arable land pointed to the fact that they did not own the land but were given use rights. As a result they could not make investments on the land they did not own. These households clearly perceive that they are not secure on the land they have been allocated. It is interesting to note that the few households growing vegetables had land fenced. Perhaps vegetables are more valuable than traditional field crops. Residential sites tend to be fenced and most households indicated that this is so because residential sites can be sold thus the owner gets back what he has invested. This is unlike with arable lands where the allottee is required to remove the improvements.

Table 5.6: Use Rights on Arable Land (%)

Right to	Yes	No
Plough throughout the year	98	2
Grow any crop	99	1
Hoe at any time of the day	89	11
Cut crop stover	100	0
Fence fields	93	7
Let only own livestock to graze on crop residue/stover	98	2

Source: Survey

Several respondents mentioned the issue of other people's livestock grazing on crops as a deterrent to growing crops. They indicated that sometimes a whole field is grazed more so crops like wheat. In addition crop-theft by people is on the increase. Some respondents indicated that crop-theft is approaching the magnitude of stock-theft in the country.

5.6 Exclusion Rights on Arable Land

An allottee of land in theory has exclusion rights when there are crops growing on the fields. Once the crops are harvested the land reverts to being communal. Other people can gather wild vegetables, cow dung (wet and dry) and stover (*litlhaka*) as well as cutting thatch grass and reed. More households said they had exclusion rights to these resources being gathered by other people and yet in practice the opposite was found to be true. What is true pertains to exclusion rights during crop-growing season. Landowners do not have exclusion rights on fallow land. Arable land not under cultivation becomes communal property and other people can graze their animals on and collect resources like wild vegetables. There are wild vegetables like *Amarnathus thumbergil* (*theepe*) which are gathered during the crop-growing season. Landowners have exclusion rights on people collecting wild vegetables when their crops are on the fields. There are wild vegetables like *Wahlenbergia androsacea* (*tenane*) which are gathered after harvest. Thus the landowner can exclude other people from gathering wild vegetables during the crop-growing season but cannot exclude them from gathering wild vegetables after harvest.

The weed/fodder called *Parucum maxima* and *Sefaria pallide-fusc* (*lehola*) makes an interesting case. *Lehola* is usually cut during the crop-growing season and as such other people are excluded. Some households indicated that not very long time ago other people could cut *lehola* on fallow land but nowadays they are excluded. Instead people are now selling the *lehola* on fallow land. Some households indicated that they make more money by letting their fields fallow and selling *lehola* from the fallow fields. This was found to be common in the Foothills. The buyers of *lehola* were usually dairy farmers coming urban areas. Horse owners were also found to be buyers. In addition other people can graze their livestock on fallow land after the *lehola* has been cut. What emerges is that during the crop-growing season an allottee of land can exclude other people from gathering wild resources from his/her land. Once the crops are harvested the land becomes communal and everybody can use

it. The case of *lehola* on fallow land is interesting because it shows a resource, which was communal but has evolved to a point where owners are excluding other people from freely accessing it. Furthermore the resource is now being sold. May be in future we will see other people being excluded from using the land after harvest and resources like wild vegetables, and cow dung (wet and dry) will be sold to other people. One old woman related how in the olden days people were neighbourly and shared use of resources freely. She noted that people used to borrow donkeys from neighbours for running household errands like shopping or going to the millers. People even borrowed cattle to go and thresh crops like wheat. Nowadays donkeys and cattle are hired! She exclaimed that it seems everything nowadays is money.

The issue of majority of respondents indicating that they have exclusion rights on fallow land is peculiar because once land is fallow anybody can graze livestock and gather other resources. Perhaps this was mainly with respect to *lehola* on fallow land. The same thing applies to excluding people from gathering cow dung on fallow land.

Table 5.7: Exclusion Rights on Arable Land (%)

Right to exclude	Yes	No
People from gathering wild vegetables	65	35
People from gathering cow-dung (<i>bolokoe/khapane</i>)	60	40
People from cutting weed (<i>lehola</i>)	85	15
People from gathering stover (<i>litlhaka</i>)	79	21
Other people's livestock from grazing on crop residue/stover	78	22
Livestock from grazing on fallow land	61	39
People from cutting thatch reed (<i>lehlaka</i>)	97	3

Source: Survey

5.7 Transfer Rights on Arable Land

As earlier indicated under the Laws of Lerotholi arable land cannot be sold. Similarly under the Land Act 1979 arable land held under allocation cannot be sold. Such land can only be transferred through inheritance. It can only be sold if it is registered as a lease under the Land Act 1979. Most respondents indicated that they have rights to lend, rent, hire, mortgage and register arable land (Table 5.8). Most respondents indicated that they had no rights to sell residential land, sell arable land and give out land. The response with regards to residential land is interesting because according to the law residential land can be sold as the owner has invested in the land. Laws of Lerotholi also state that residential land can be sold while arable land reverts to the chief for reallocation. Another interesting issue is that although the Land Act 1979 calls for registration of arable land as leases very few households have done so. According to the Land Act 1979 arable land can be declared a Selected Agricultural Area (SAA) and registered through a lease. The Land (Agricultural Leases) Regulations 1992 provide for procedures to be followed in converting customary land to leasehold. Most households indicated that they did not understand how the concept of SAAs works. For those who understood they perceived the process as taking a long time and expensive. Indications are that very few people have registered agricultural land as leases.

Table 5.8: Transfer Rights on Arable Land (%)

Right to	Yes	No
Sell residential land	34	66
Sell arable land	22	78
Lend arable land	92	8
Rent out arable land	94	6
Hire land	94	6
Give out land	43	57
Bequeath arable land	94	6
Mortgage arable land	96	4
Register land (lease)	98	2

Source: Survey

Approximately 69 % of the households indicated that they needed someone's approval to transfer land while 23 % said they did not need such approval. Seven percent gave no response. Most of the households who indicated that they had rights to transfer land indicated they sought permission to do so mainly from chiefs (Table 5.9). This is understandable because chiefs have to provide certificate of allocation. Some people have questioned the involvement of chiefs in providing certificate of allocation to people who have been allocated land by other people. Some chiefs claim that if an allottee no longer needs arable land the land reverts to the chief who re-allocates it to someone else. The new allottee happens to be someone chosen by the previous allottee.

Table 5.9: From whom Permission Sought to Transfer Land

From whom permission sought	Percent
Chief	28
Chief and family	15
Spouse	8
Eldest son	3
Chief and husband	2
Chief and VDC	1
No response	31

Source: Survey

5.8 Investments in Arable Land

The use of improved inputs in farming is an indication of investments farmers are willing to undertake. Farmers with secure land are expected to invest in it in the form of improvements like fertilisers, terraces, dams, etc. Most respondents used hybrid seeds, inorganic fertilisers, pesticides and organic fertilisers (Table 5.10). Farmers use more organic fertiliser (kraal manure) than inorganic fertilisers mainly because of lack of resources. The forty percent of the respondents who did not use hybrid seed used seed saved from the previous harvest. Results from 1999/2000 Agricultural Census show that 90 % of the farmers used ordinary seed retained from previous harvest while 9 % used hybrid seed. It possible that farmers in the study area use more hybrid seed than the national average which has resulted in high productivity levels in the area. The

three sampled northern districts have higher productivity levels than the rest of the country and it is evident that one of the contributing factors is the use of inorganic fertilisers.

Table 5.10: Use of Inputs (%)

Inputs Used	Yes	No
Hybrid seeds	60	40
Chemical fertilizers	68	32
Pesticides	65	35
Herbicides	10	90
Kraal Manure	84	16

Source: Survey

The use of credit by the respondents was minimal. Thirty percent of the respondents indicated that they had used credit in purchasing inputs. The sources of credit include money lending clubs, neighbours, and informal credit associations. The respondents indicated that the major problem in accessing credit was that the absence of institutions that offering credit. Some respondents indicated that they were afraid of being in debt and that they feared their houses and other assets would be repossessed if they defaulted in repaying the loan. The respondents indicated that the liquidation of Co-op Lesotho and the Lesotho Agricultural Development Bank posed problems in accessing credit. They also indicated that Lesotho Co-operative Credit Union League used to assist them with credit but is now dormant. The issue of collateral required by credit institutions was another problem. A significant majority of the respondent indicated that in order for agriculture to improve in this country credit institutions like the LADB should be established and previous mistakes which led to their collapse be avoided.

5.9 Sharecropping

Sharecropping has been a common feature of agriculture in Lesotho for many years. The Lesotho sharecropping arrangement is quite distinct from the conventional model, in which a large landholder enters into farming-by-shares contracts with landless and generally asset-poor tenants (Lawry, 1987). In Lesotho sharecropping (*Seahlolo*) is generally a

relationship between a resource poor landholder co-operating with a landless household with other resources. In most cases the landholder contributes his/her land and the latter contributes the rest of the inputs which include fiancé for ploughing, planting, seeds, fertilizers, and pesticides. The contributions of each party in the sharecropping arrangements differ from household to household. Robertson (1987) provides details about the various forms of sharecropping arrangements prevalent in Lesotho. The crop-sharing relationship is agreed before planting and is often on equal basis hence the word *halefote* in the output sharing arrangements. In most cases the output is shared equally even though the contributions of inputs by the two parties are not equal.

Approximately 44 % of the households were involved in sharecropping. Of these 50 % sharecropped with people with whom they were not related with while 35 % sharecropped with relatives and 6 % sharecropped with parents. Sixty seven percent of the sharecropping households indicated that they owned the field while 33 % sharecropped fields belonging to their partners. Indications are that sharecropping is on the increase. Sheddick (1954) reported that about 25 % of all arable land in Lesotho was cultivated according to sharecropping contracts. Morojele (1963) estimates are that 18 % of all arable holdings were sharecropped. According to Robertson (1987) about one-third of the landholding is under sharecropping arrangements in any given year. Results from the 1989/1990 Agricultural Census indicate that 7 % of all fields were operated under sharecropping arrangements as compared to 71 % of the fields in the 1999/ 2000 Agricultural Census. The major reason for the increase in sharecropping arrangements being population pressure as new households cannot be allocated arable land. The reason given for the dramatic increase in sharecropped fields between 1990 and 2000 is that most people do not have draught power and as a result sharecrop with tractor owners who provide ploughing services and other inputs.

Lawry (1987) asked chiefs whether they believed sharecropping was on the increase and most of them believed that it was becoming more frequent. The reasons given by the chiefs for the increase in sharecropping included less land for allocation to newly established households; more widows and female-headed households with little cash to farm on their own; declining livestock ownership and fewer available oxen for ploughing and increasing farming costs. The reasons for sharecropping are presented in Table 5.11 below.

Table 5.11: Reasons for Sharecropping

Reason	Percent
Do not have resources	73
Do not have own fields	6
Do not have resources but own fields	5
Others	14
No response	2

Source: Survey

The concept of renting in/out arable land is a recent phenomenon in the country. Five percent of the households indicated that they were either renting out or renting in land, which suggests that trends in arable land rentals are increasing. Three percent of the fields were rented out according to the 1989/90 Agricultural Census. The 1999/2000 Agricultural Census indicates that 3 % of the fields were rented in with 2.5 % being rented out. Lawry (1987) points out that entrepreneurial farmers have found mechanisms of accessing arable land in the absence of a market for arable land through renting arable land. Most of the entrepreneurial farmers find sharecropping to be unsatisfactory, as they want to have full control of operations on the arable land. They dislike the output sharing arrangements even though in most cases they provide more input than the landowner. Arable land rental is in most cases paid in kind, which include paying for children's school fees, paying for funeral costs and construction of a house for the lessor. The practice of paying for funeral costs and in turn using the arable land for several years was found to be the most common method of land rental.

The practice of renting arable land although on the increase seems to be problematic. Some farmers have indicated that in some cases land owners demand back their land before the agreed time. This usually happens when the landowner sees the lessor having higher productivity. In some cases land owners claim that their sons want the land before the expiry of the contract term. Other cases include landowners wanting to use their rented land when government gives subsidies on land preparations and agricultural inputs. Farmers who have experienced problems with renting of arable land indicate that they prefer outright purchase of land. This is prevalent on the Thuthe Plateau where some farmers have purchased arable land and established small farms.

5.10 Inheritance of Arable Land

Inheritance of arable land in Lesotho is a contentious issue. According to the Laws of Lerotholi arable land reverts to the Chief for reallocation on the death of an allottee but preference is given to members of his family as already mentioned earlier. This principle was expressed in the Sesotho saying that "*Ts'imo/mobu hase lefa*" which means land is not inheritable. This led to many disputes as to which members of the family should inherit land in case of the death of an allottee. The major problem being that because there were competing interests of widows, minor children, adult children and the Chief. In some cases Chiefs abused their land allocating powers by allocating land to non-members of the deceased family. In the 1920s there was a call for straightforward law dealing with inheritance of arable land. Poulter (1976) indicates that in 1948 the Basutoland National Council (BNC) attempted to make arable land inheritable by amending the Laws of Lerotholi. The clause read "on the death of a person who has been allocated the use of property consisting of land.... His heir shall be entitled to the use of such property". However, the amendment was found to be invalid in the case of *Letsitsi vs Mafa* as the Council was not a legislative authority (Rugege, 1998). Section 7(5)(b) Part I of the Laws of Lerotholi was then amended to read that arable land will revert to the Chief for reallocation on the death of the previous occupier but preference should be given to the sons of the deceased. This was the case even when the mother was still alive. This is because under the customary law a woman is a minor. Section 8(2) of the 1979 Land Act states that the first son was to inherit arable land where an allottee has died. This has led to many disputes between first sons and widows. The 1992 Land (Amendment) Order changed the status of inheritance of arable land by widows. According to the Order a widow takes over the land allocated to her deceased husband in her own right. The heir, normally the first son, has to wait until the mother (widow) dies. However, it has been found that the Laws of Lerotholi continue to be practised despite the enactment of the 1979 Land Act and its amendments.

Approximately 86 % of the respondents indicated that if a husband dies the wife inherits arable land while 9 % indicated that it is the eldest son who inherits the land. This shows that there are some people who are not aware of the latest amendments to the law with regard to inheritance of

arable land. Thirty eight percent of the respondents indicated that their sons would get access to arable land through allocation by Chief/VDC. The same percentage indicated their sons would access arable land through the father dividing fields among them. Seventy four percent of the respondents indicated that their daughters would access arable land through their husbands. This shows that women cannot access arable land unless doing so through their husbands.

5.11 Land Disputes

The issue of land disputes is also a common feature under the customary land tenure system. One view is that if land disputes are rife, landowners are not in a position to make substantial investments in their land holdings. Approximately 15 % of the households were at one time or another involved in land disputes. The most common types of land disputes included field boundaries, double allocation, inheritance rights, and sharecropping arrangements. Cantour (1987) reports that 22 % of the landowners were involved in land disputes. She further points to the fact that 11 % of them lost land through land disputes. Leduka (1998) reports that about 6 % of the households with arable land were involved in land disputes. The NUL Based FAO Research Team (n.d) indicates that 93 % of the respondents reported no disputes on any of their land holdings. Land disputes are at two levels; village and field levels. Village boundary disputes arise because of multiplicity of chieftaincy (Rugege, 1998). Boundary disputes in most cases arise when ungazetted chiefs, who have no power of land allocation, allocate land and gazetted chiefs allocate the same piece of land. This results in double allocation of land. Rugege (1998) reports that about 1/3 of the 60 High Court cases he analysed were in respect of allocations. The interesting issue is that in cases involving double allocation the aggrieved party sues the individual allocated land mainly because they fear to challenge the Chiefs who allocated them the land. In some cases one chief claims land under jurisdiction of other chiefs and this results in chiefs fighting amongst themselves. Village boundary disputes usually end up with damage to property, houses/huts being burnt and human lives lost. This seems to be common in the Mafeteng district. Field level disputes usually involve individual field's boundaries. The issue of village boundary disputes is important such that an ad hoc Boundary Committee made up of chiefs has been established under the Ministry of Local Government.

The most common dispute with regards to arable land concerns who inherits the arable land previously held by a deceased person. This is despite the several laws, which have been promulgated. Fifty percent of the disputes were concerned with inheritance of arable land. It should be noted that inheritance disputes also involve a person fighting for their uncles' land in cases where the uncles have no sons. Most of the land disputes were between relatives, chiefs and neighbours. The most common land dispute resolution mechanism involved relatives, chiefs/VDC, and local courts. Usually if there is a land dispute within the family the dispute is first resolved within the family with the older members of the family involved. If the dispute cannot be resolved within the family it is taken to the chief/VDC level. The dispute will be taken to the higher level of local courts if the chief/VDC cannot resolve it.

5.12 Perceptions on Security of Tenure

The respondents were asked about security of tenure on their land holdings. Most respondents (85 %) felt that they were secure on their land and nobody would take the land from them. "This is my grandfather's/father's land and nobody can take it from me", "the law protects us from someone taking the land from us" and "this land belongs to the Basotho nation and nobody can take it from me as I am a Mosotho" were some of the common responses. A few respondents indicated that chiefs think the land belongs to them and they are free to expropriate the land whenever they wish. Leduka (1998) also reports that generally people felt that they were secure on their land holding and nobody could take away the land. Eighty one percent of his respondents indicated that they had never heard of someone who had his land expropriated by the chief/VDC. The reasons of expropriation of arable land by chief/VDC include the land holder no longer living in the village and not cultivating it for several years, the deceased had no sons to inherit the land, the land was not cultivated for several years and the chief said he had lend the allottee the land and not given him.

Some respondents indicated that there is more security of tenure nowadays as compared with olden days when the inspection practice was practised under the Laws of Lerotholi. In those days Chiefs used to inspect fields and expropriate them if they thought farmers were producing surpluses. The land was also expropriated if a field was left

fallow for two consecutive seasons or not "properly cultivated". What is interesting is that the same practice is included under the Land Act 1979. According to the Land Regulations 1980 land can be revoked for abuse of land holding through overgrazing, refusal or inability to fight soil erosion, and lack of cultivation of arable land over three years. It seems people are not aware of these clauses because they are not being implemented.

An interesting issue is that most respondents believe that a lease is more secure than a Form C and therefore prefer a lease to a Form C. They indicated that if a person has a Form C he/she is likely to be involved in disputes which is not the case with a lease. They indicated that they cannot register their land as leases because firstly they do not understand the procedure for obtaining a lease, secondly they are told that it is very expensive and lastly it takes a very long time.

A question was asked if there was security of tenure why Basotho farmers were not investing in their land holdings. The majority of respondents indicated that security of tenure was not the issue but there were other reasons why Basotho farmers do not invest in land. The reasons include lack of resources (financial), lack of access to credit, lack of markets, and the land tenure system, which allocates discrete small land parcels.

Respondents were asked what happens to the arable land if they migrated to elsewhere. Forty four percent of the respondents indicated that they give the land to their relatives, 26 % retained the fields, 13 % gave the land to chiefs and 6 % sold the land. Some respondents indicated that in the olden days if a person migrated he sold his residential place and the arable land reverted to the chief who reallocated the land. The person was given a letter showing that he/she has migrated (*jengolo la phallo*) by the chief indicating that the person needed to be allocated residential and arable land in the new area as he has given up his where he used to reside. They indicated that nowadays people do not migrate but have several residential places and arable land. For instance if a person's home is in the rural area and he decides to settle in an urban area, he still retains his residential site and arable land. This is one cause of increasing landlessness in the country as a few people have multiple land holdings.

5.13 Agricultural Productivity

The purpose of this study was to analyse if there is security of tenure under the customary land tenure system of Lesotho and how this affects agricultural productivity. Data on crop yields was collected but was found to be not good. This resulted in the yield data not being presented and discussed here.

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

6.1 Summary

The issue of security of tenure under the customary land tenure system practised in Lesotho has been discussed for a long time. The argument being that there is low agricultural productivity because there is no security of tenure and as such farmers cannot make investments on their land because of fear of losing the land and not reaping the benefits of their investments when transferring the land. Most analysts indicate that there can be no agricultural development in Lesotho if the current land tenure system is not changed to either leasehold or freehold. The opposing view is that there is security of tenure under the customary land tenure of Lesotho mainly because an individual can use the land for a life-time and land can be inherited by relatives.

The various governments of Lesotho have been under pressure from donors to change the customary land tenure with a view of enhancing security of tenure. The various government initiatives in land reform were mainly to address the perceived problem of lack of security of tenure. The most important land law in Lesotho, the Land Act 1979, aims to introduce leasehold tenure and introduce security of tenure which is expected to lead to increase in investments in agriculture thus leading to higher productivity.

The purpose of the study was to analyse whether there is security of tenure under the customary land tenure system of Lesotho and how this affects productivity. The study area was the Lowlands and Foothills of the three northern districts of Berea, Leribe and Butha Buthe. These districts were chosen because they produce the bulk of the agricultural produce in the country. A sample of 300 respondents with 150 from the Lowlands and 150 from the Foothills was covered.

The findings of the study are that more households have access to less arable land mainly because of population pressure. The majority of households had 2 or less fields as opposed to three fields stipulated under customary law. Most households had approximately one hectare of arable land. The average field size is 0.5 ha with the Lowlands being 0.8 ha and Foothills 0.4 ha. People from the Foothills tend to have more fields than people from the Lowlands. It was found out that respondents from the

Foothills had smaller-sized fields than the respondents from the Lowlands. It is thus evident that people from the Foothills have many smaller-sized fields as opposed to fewer bigger-sized fields in the Lowlands.

Younger households tended to have less number of fields (one) while older households had more than one field. This shows that it is now difficult for younger households to access arable land. The irony is that it is the younger households who tend to have resources to operate land as opposed to the older households who do not possess resources to operate the land.

Most households have use rights on the holdings as they do not have any restrictions on when to plant or what to plant. Exclusion rights are exercised during the crop-growing season. Households do not have exclusion rights after crops are harvested thus arable land becomes communal property. Households have limited transfer rights, as they cannot sell the arable land. They can only transfer the land by inheritance or sell the land if it is registered under a lease. Indications are that very few land holdings are registered under lease.

Inheritance is the most common form of acquisition of land followed by allocation by chief. There were some respondents who indicated that they had bought land, an illegal practice under the law except if the land is registered as a lease as stipulated under the Land Act 1979. The majority of respondents had no certificate of allocation while a small proportion held Form C /Form A. The common crops grown are maize and sorghum with some intercropping of the two crops with beans. There was a significant proportion of fallow land. The reasons for fallow land included lack of resources to plough fields, lack of resources to purchase inputs, no sharecropping partner, and field being waterlogged. The use of credit is very minimal in the study area. The major sources of credit are informal channels consisting of money lending clubs and neighbours.

The findings of the study are that most households have use rights on their holdings as they do not have any restrictions on when to plant or what to plant. Exclusion rights are exercised during the crop-growing season but not after crops are harvested. After harvest the arable land becomes communal property as anybody can graze his animals and collect resources like wild vegetables.

The use of fertilisers and improved seeds is relatively high in the study area as compared with the rest of the country. This might be the reason why there is higher productivity in the area. Indications are that

sharecropping is on the increase mainly because of lack of resources by people who have access to arable land. In most cases sharecropping arrangements involve households with resources coming together with poor households owning land. The concept of land rental is also on the increase although there are some problems, as it has not been formalised. Most farmers prefer outright purchase of land than sharecropping and land rental.

Land disputes are a common feature under the customary land tenure system. Common land disputes include inheritance, double allocation, and field boundaries. Most respondents felt that they are secure on their land holdings. They believe that nobody could take away their land. The majority of respondents indicated that security of tenure was not the issue but there were other reasons why Basotho farmers do not invest in land. The reasons include lack of resources (financial), lack of access to credit, lack of markets, and the land tenure system, which allocates discrete land parcels. The issue of agricultural productivity has not been covered as the data collected was found not usable.

The findings of the study indicate that the customary land tenure system of Lesotho is evolving and this is mainly caused by increased population pressure on arable land. The increased population pressure on land has put pressure on the customary land tenure system towards more individualistic tenure. Farmers have more exclusion rights than previously as shown by the *mohoang* practice and the case of *lehola*.

The other findings are that the customary land tenure system of Lesotho meets some of the breadth criteria used in determining security of tenure. The land tenure system does not meet all the criteria of breadth. For instance the land tenure system meets the criteria of use rights but does not meet the criteria of transfer rights. It also meets some of the criteria of exclusion rights.

6.2 Conclusions

The major conclusion of the study is that there is no security of tenure under the customary land tenure system of Lesotho when the criteria of breadth is considered. This is because the customary land tenure system fails the criteria of breadth and assurance on several points, e.g. transfer rights. Other analysts have argued that because land can be held for a lifetime and passed on to relatives through inheritance. This is supported by Feder and Noronha (1987) who argue that there is security of tenure

under the customary land tenure system in Africa when 'security of tenure' is defined as the ability to use land for a certain period and for a defined purpose. It is argued that even if a landowner can hold land for a lifetime if he/she cannot have transfer rights on the land there is no security of tenure.

The study confirms the hypotheses that customary tenure rights evolve toward stronger, more alienable individual rights as population pressure on land increases, technologies change, and agriculture become more commercialised (Feder and Noronha, 1987). The most important questions is whether the evolving customary tenure system is able to cope or keep up with the changes or is there a need for intervention of some sort to speed up the process? This is because in some instances customary tenure system evolves very slowly such that it cannot cope with new developments. An example can be made of the selling of land which is already occurring.

It is also concluded that the Land Act 1979 if implemented can address the issue of security of tenure which has been found lacking. The major problem with the Act is how to implement and simplify the leasehold tenure system which is argued to have the following advantages:

- (i) the landholder is given a time period to utilize the land,
- (ii) the landholder has a legal title,
- (iii) the landholder pays rent for the land which leads to less fallow land; and
- (iv) land rental becomes easier as sub-leasing is allowed.

6.3 Recommendations

The following recommendations which emanate from the findings of the study are made in order to improve security of tenure in Lesotho:

- Revisit the Land Act 1979 and find ways and means of implementing and simplifying the leasehold tenure system introduced by the Act.
- Simplify procedures for land leases as the current ones are cumbersome and costly
- Implement the recommendations made by the Land Policy Review Commission (2000) as some of them have a bearing on land tenure security in the country

- Repeal older land laws when new land laws are introduced. An example is the Laws of Lerotoli which has not been repealed when the Land Act 1979 was enacted.
- Mount educational campaigns when new land laws are introduced. It is evident that most people do not know much about the Land Act 1979.
- Register arable land so that people have certificate of allocation. This will lead to fewer disputes.
- Find ways and means of how people with resources can access such land, e.g. through sub-leasing as most of the arable land is in the hands of elderly poor people and orphans.
- Pass a Crop Theft Act similar to the Livestock Act as crop-theft is becoming a problem and this has led to increase in fallow land as people see no benefit of growing crops.
- Everybody whether in urban or rural areas be required to have a building permit before building as residential sites are encroaching on arable land at an alarming rate.
- Impose fines on fallow land so as to encourage people to utilise land.
- Establish agricultural credit institutions and previous mistakes which led to the collapse of previous institutions be avoided.
- Address the issue of ungazetted chiefs allocating land which leads to disputes.

6.4 Suggestions for Further Research

Although there is significant literature on land tenure issues in Lesotho, further research still need to be undertaken in order to understand how the system works, how land can be utilised efficiently and agricultural productivity enhanced in order to eradicate poverty. The following are suggested areas which need further research:

- The impact of land institutions on agricultural production
- Analysis of the functions, powers and operating procedures of institutions involved in land matters
- The impact of HIV/AIDS on agricultural production
- Analysis of land tenure disputes
- The impact of stock theft on agriculture
- The comparative analysis of sharecropping and land rental

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