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LEGAL ASPECTS OF LABOUR MIGRATION FROM LESOTHO TO THE SOUTH AFRICAN MINES

by

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Note: Working Papers are preliminary material circulated to stimulate discussion and critical comment.

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A. FOREWORD

This is the fortieth paper to appear in the World Employment Programme working paper series of the research project on Migration for Employment. The aim of the project is to investigate the implications of international migration movements from low-income to high-income countries for economic and social policy making.

This is the fifth paper to come from the UNFPA/ILO supported Lesotho team of researchers. (The other four are working papers no. 17, 19, 35 and 38 - see appended list.) It places the legal regime of labour migration from Lesotho to South Africa into its socio-economic and political history, traces the origin and development of state involvement, examines the inter-governmental recruitment agreement of 1973 as well as the social welfare legislation concerned with migrants, and attempts to make an appraisal of the role of the legal structures in the process of migration.

December 1978

W. R. Böhning

B. LEGAL ASPECTS OF LABOUR MIGRATION FROM LESOTHO TO THE SOUTH AFRICAN MINES

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I. HISTORICAL BACKGROUND TO LABOUR MIGRATION IN LESOTHO

(a) Early economic self-sufficiency of the peasant economy

Initial participation by the Basuto in the money economy in the early 19 century was not through wage employment but through the selling of wool, mohair and their surplus of grain to South Africa. Basuto for a long time supplied the grain requirements of the Free State and the Cape Colony and Lesotho came to be called "the granary of South Africa" (Germond, 1967). The missionaries appear to have played a significant role in promoting this prosperity by encouraging the peasants to concentrate on more exportable products like wheat (in preference to sorghum), fruit and vegetables and, of course, the rearing of sheep and goats for wool and mohair. The missionaries also encouraged the use of the steel plough for efficient production and the use of the ox-wagon to facilitate transportation of their products. The missionaries encouraged earning money mainly because it enabled the Basuto to buy European clothing to look like good christians, as well as to acquire a way of life practiced by the missionaries themselves.

This self-sufficiency and prosperity was severely hit by the Boer wars in the early 1860s. Much of the fertile land was expropriated by the Boers and grain and stock looted after pushing the Basuto into the mountains. Trade was also seriously hampered. After persistent calls by Moshoeshoe (the founder of the Basuto nation) to the British for protection, the British in 1868 assumed control and put an end to the Boer encroachment.[1] With the relative peace that followed British administration, Lesotho recovered its prosperity, agriculture flourished and trade resumed. It is said that the 1870s were a time of "boom". However, it was not merely because of the absence of war that Lesotho regained its position of a supplier of grain and even exceeded previous output. The opening up of the Kimberley diamond mines provided a new market for wheat and maize.[2]

These indications of the relative economic independence and prosperity of the Basuto in the 19th century are not intended to give the impression that there was no migration for wage employment from Lesotho to South Africa at the time. The intention is to recall that (unlike today where about half the population of Lesotho depends on migrant earnings to satisfy their subsistence requirements) up until the early 20th century subsistence was satisfied by the peasant economy itself and in fact left a surplus for sale to the industrial sector in South Africa. Danmas alludes to the fact that by 1850 a number of Basuto sold their labour to the white farms in South Africa (Germond, 1976, p. 250). In 1859 Dr. Casalis wrote (see Williams,1971, p. 149): "The country of the Basuto furnished the Cape Colony every year with a great many workmen who easily found employment owing to the confidence inspired by their reputation for loyalty and honesty." This implies that for some years Basuto had worked on the Cape farms and established a reputation. It is said that these farm labourers were sometimes paid in muskets.

This migration for work was not done to satisfy subsistence requirements. The main motivation seems to have been to purchase guns and horses (the former could not be acquired with money or by barter inside Lesotho). The Basuto under Moshoeshoe had learned the hard way that firearms and horses mattered - the guns of the Boers almost annihilated them. Even some of the chiefs went to the diamond fields to earn the money to purchase guns.[3] The Basuto trust in and attachment to the gun was demonstrated in their defiance of the prohibition to purchase guns without a permit under the Cape Annexation Act of 1871 and subsequently in the "Gun War" of 1879, when the Basuto beat the Cape Colonial Government.

In addition to the purchase of guns and horses, the cash obtained by Basuto from selling their agricultural surplus and labour was used to satisfy wants of European origin which had been introduced by missionaries, traders and the British administrators. Among these were education (mainly religious), European clothing, cutlery, foodstuff and sugar. The Basuto were also encouraged to build stone-wall iron-roof cottages and to abandon the traditional mud and thatch huts. The presence of Europeans and their way of life created new wants (for fuller treatment see Ellenberger and MacGregor, 1912, pp. 293-6).

Whether through the sale of produce or labour, participation in the money economy was, at the time, a "discretionary" rather than a "necessary" act in the sense discussed by Arrighi in his analysis of a similar phenomenon in the late 19th and early 20th century in Rhodesia. "Participation in the money economy whatever its form was 'discretionary' in the sense that it was not essential to the satisfaction of the subsistence requirements of the African population" (Arrighi, 1973, p. 192; see also Bundy, 1972).

(b) <u>Loss of economic self-sufficiency and the birth of large-scale reliance on sale of labour</u>

Despite the recovery from the near extinction of the Basuto nation during the Boer wars of the 1860s and the apparent prosperity of the 1870s, the economic well-being of the Basuto was not to last. The seeds of perpetual want and dependence had been sown. The peace negotiated by the British had not recovered the fertile lowlands that had been expropriated by the Boers of the Orange Free State. The original occupants of that part of the country had been permanently displaced. They had to squeeze on the remaining land, which the refugees and normal population growth put under population pressure. Thus, the prosperity of the Basutos in the 1870s was bound to be temporary. It was achieved by bringing under the plough all available land and overgrazing the hillsides. This in turn led to exhaustion and severe erosion of the soil. Then came the severe drought of 1885, causing famine.

When Lesotho seemed to be recovering from this setback several South African moves sabotaged the sale of grain to Kimberly. Most important was the policy of releasing large numbers of Africans from the land to work in the mines.

It was made possible by obtaining American and Australian grain cheaply and quickly at a time when Basuto grain had to be transported by costly ox-wagons. Moreover, the Orange Free State and Transvaal imposed a tariff on all grain from outside the Orange Free State, thus under-cutting Basuto prices. The imposition of these tariffs mainly resulted from pressure by the new white capitalist farmers, who felt the competition of African peasant producers. But white pressure could also have been aimed at making African participation in production for the market expensive and thus force them into wage-labour. The 189' outbreak of rinderpest that killed half the stock made transport of grain almost impossible or at least very expensive.

All these troubles forced more and more men, especially the young, to go into wage-labour employment. The peasant agricultural economy could no longer utilise their labour or, what was worse, provide their subsistence needs.

In addition the goods such as blankets or sugar and the services such as education, which had once been discretionary requirements, with time came to be looked upon as necessities.[4] Participation in the money economy was no longer discretionary. Since earning money through the sale of produce was no longer profitable, or was too expensive in terms of effort and yield compared with wage-labour, only migration to South Africa promised a solution.[5]

The situation has worsened to the e tent that today it is taken for granted that at any one time about 100,000 Basuto will be away on wage-labour contracts in South Africa and that nothing can be done about it.

II. ORIGINS AND DEVELOPMENT OF STATE INVOLVEMENT IN LABOUR MIGRATION

(a) Colonial policy regarding Basuto migration to South Africa

The Colonial Administration, whether directly under the British or indirectly under the Cape rule of 1871-1884, appears not to have actively and officially recruited at any time. However, the administration intended to raise revenue from the country. It was a condition of the British Government's acceptance of the entreaties of High Commissioner Wodehouse on behalf of Moshoeshoe to put Lesotho under British protection, that Basutoland would pay the costs of its administration through payment of Hut Tax.[6] How the money to pay this tax was to be obtained was not the business of the Colonial Administration, but it was initially assumed that this could easily be made from the sale of agricultural produce or stock. But, as already shown, money returns from the peasant farming were progressively decreasing due to the Boer farmer's unfair competition, the diminishing amount of land available to each household, the natural disasters of drought and stock disease, and the exhaustion and erosion of the soil on the overploughed and overgrazed land.

The colonial administration, however, had to have the tax. As an administratively cost-free alternative seemed to present itself, the administration adopted a policy of encouraging migration for wage-labour to South Africa. Thus the Resident Commissioner wrote in 1899; when the gold mines were seriously short of labour (Jeeves, 1975):

> "Though for its size and population Basutoland produces a comparatively enormous amount of grain, it has an industry of great economic value to South Africa, viz. the output of native labour. It supplies the sinews of agriculture in the Orange Free State, to a large extent it keeps going railway works, coal mining, the diamond mines at Jagersfontein and Kimberly, the gold mines of the Transvaal and furnishes, in addition, a large amount of domestic services in the surrounding territories ... To (those) who urge higher education of the natives, it may be pointed out that to educate them above labour would be a mistake. Primarily the native labour industry supplies a dominion want and secondarily it tends to fertilise native territories with cash which is at once diffused for English Goods."[7]

This official attitude clearly indicates what kind of future was intended for Basuto: to be a pool of cheap labour for the British and colonial capitalist interests in South Africa. The policy was not changed in later years of colonial rule. There is no clear evidence of efforts being made to find ways and means of reducing migration or of giving serious thought to the question whether it was consistent with the welfare of the migrants and the country. As late as 1958 a Colonial Official wrote:

> "It would be idle to suppose that the land can ever support the whole working population of Basutoland and we must strive to maintain as many Basuto as possible in employment in the Union in so far as alternative sources of non-agricultural employment cannot be created for them in the territory itself."[8]

Very little alternative employment was created. Back in 1873 Griffith talked of rapid development of public income but also showed how little was spent:

> "The total receipts in 1872 having been £9,853, whilst in 1873 they amounted to £12,806, showing an increase of £2,953. On the other hand, the total expenditure in 1872 was £6,567, whilst that in 1873 was £6,278, showing a reduction of £289. The balance on hand on the 1st Jan. 1874 to credit of the Basutoland Revenue Account, was £14,955."[9]

Over 80% of this revenue was from Hut Tax. Expenditure on improving agriculture remained almost negligible over the years. For instance in 1904-5, 3.3 per cent of total expenditure was spent on agriculture. Ten years later it was 3.6 per cent while in 1934-5 it was 2.6 per cent.[10] It was not considered necessary to have an officer devoted to agricultural matters until 1911; and he was abroad from 1915 to 1920 during which time his work (donga prevention and tree planting) was in abeyance (Pim, 1935, pp. 118-9). Pim (1935, p. 134) reported in 1935 that:

"no provision is made for the greatest need of the Territory, the initiation of measures to deal with the erosion which is steadily ruining the country."

This neglect of the land from the earliest days of the Colonial Administration is at least partly responsible for the apparently insurmountable problem of labour migration today; because the neglect derived from the assumption that, so long as Basuto continued to work in South African industries and farms, there was no need to develop Lesotho. Moreoever, it was assumed by the British Government until about 1954 and by the South African Government until autumn 1963 that the High Commission Territories would be incorporated into South Africa (Halpern, 1965, pp. 433-4). Therefore, separate economic development was never seriously considered. The disastrous experiment of incorporation into the Cape (1871-1884) did not discourage either Britain or South Africa from contemplating Lesotho's incorporation into South Africa.[11]

(b) Colonial legislation facilitating labour migration in Lesotho

Although colonial administrators seem not to have undertaken any recruiting - at least officially - for the mines and farms of South Africa, their policy was to encourage rather than discourage migration. This included legislation that provided a legal/administrative framework enabling South African capital to have access to the Basuto labour pool. Although Hut Tax may have been introduced in Lesotho for a purpose other than to force Basuto peasants to participate in the money economy,[12] it nevertheless had this very consequence. As in South Africa and Rhodesia, however, the major factor was not taxation but landlessness - the defeat of the Basotho in the war with the Orange Free State resulted in substantial losses of agricultural land. This led to the weakening of the peasant's economic relations depriving him and his off-spring of the only means to keep his participation in the money economy discretionary.[13]

The payment of the Hut Tax was made law in 1869, soon after the Proclamation of 1868 declaring Basuto British subjects. It was fixed at 10s per hut with an option to pay in money, grain or stock. But a few years later only cash was accepted. An additional 10s was to be paid per extra wife whether living in the same hut or not, on the ground that a man with more than one wife was more prosperous than the one with only one (but, as Burman (1976, p.9) suggests, this provision could also have been intended to discourage the unchristian practice of polygamy). By Proclamation No. 49 of the Cape Parliament in 1880 the tax was raised to £1. Pim (1935, p. 55) reports that this increase was one of the causes of the Gun War and its reduction back to 10s a condition of the resumption of British rule. The reduction was confirmed by Proclamation No. 2B of 1884. However, in 1898 the Basuto agreed to have the tax raised to avoid a subsidy from the Cape Government that was threatening what was left of their independence, since the Cape Parliament was using it as a basis of claims to interference with the Government of Lesotho (Pim, 1935, p. 22). In 1911 Hut Tax was changed to a £1 Poll Tax. Thus, it could be applied for the first time to unmarried men. This had the effect of sending more young men (who were actually landless) to mines to earn the tax. Taxation increased progressively over the years.

From the early days of the tax, migrants paid it at the district offices where they had to obtain a "pass". When professional labour recruiters came to Lesotho around 1917 (the Native Recruiting Corporation), they advanced the recruit the amount of tax so that he could pay it in advance of migration. The recruiters' advance was later deducted from the migrants' wage. (Payment of a year's tax in advance was and still is a condition of contract.) In 1922 a Lesotho tax office was established in Johannesburg to house the so-called Rand Agents who collected subsequent tax dues, although they did not fully operate until 1932 (Pim, 1935, p. 58). This office provided a link between the interests of the Colonial Administration in Lesotho and mining capital in South Africa.

The other piece of colonial legislation that facilitated the supply of labour to South Africa was the law requiring the acquisition of a pass before leaving Lesotho. By section 13 of Proclamation No. 44 of 1877 (amended Regulations for the Government of Basutoland) the High Commissioner of the Territories (who was also Governor of the Cape Colony) proclaimed:

> "Every resident of Basutoland leaving Basutoland shall be provided with a pass signed by a Resident Magistrate or by his order; any such person leaving Basutoland without a pass shall upon conviction be liable to a fine not exceeding 20 shillings."[14]

This law was modelled on the pass laws of the Cape Colony which were first introduced in 1809 to control the movements of Africans in the Cape.[15] These laws spread to the Transvaal and Natal and today exist in South Africa in a more rigorous and sophisticated form. Their purpose was described by a South African Government Report in 1920 as follows:

> "Pass Laws in the various Provinces of the Union have in the past been considered necessary to secure control over the native population, and to provide a safeguard against crimes such as stock theft. In the earlier days their aim was principally directed against an influx of natives from the neighbouring barbarian tribes and for the protection of the cattle and property of border farmer. As the country became more settled they were utilised for enforcing contractual obligations between natives and Europeans and for detecting deserters. Later when the natives began to seek employment in the larger European urban and mining centres - more particularly the Witsatersrand - these laws, amplified and extended have been used to maintain order, to detect desertion [etc]."[16]

It is difficult to agree with Lord Hailey (1953, p. 14) that colonial pass requirements for Basotho were for reasons of internal policy and that "the necessity for a pass is now reinforced by the Union Regulations regarding the carrying of passes by Natives." The pass laws in the Cape and Natal predated those of Lesotho and therefore the former cannot be seen as having supplemented the latter. Pass laws in the whole of Southern Africa must be seen as a concerted policy of controlling the movements of the Africans in the designated "white areas" of South Africa, and indirectly coercing them to sell their labour in those sectors of the economy which need a large reservoir of cheap labour.

The history of the use of the "pass" for this purpose is given by Neame (1962) as dating as far back as the abolition of slavery in Britain in 1807 and the consequent shortage of labour on white farms in South Africa. The Africans were unwilling to work for white men. As a measure to meet the difficulty, in 1809 the first British civil governor, the Earl of Caledon, introduced a pass law for Africans. Under it all male Africans not employed by whites were classified as "vagrants". Any African proved a vagrant could be punished unless he carried a pass, and he could only obtain a pass to enter into an agreement with a white farmer. The Mosuto's pass, whatever its statistical value at home, was issued for the same purpose in South Africa, i.e. to direct him to unpopular employment on white farms and mines, to restrict him to a particular employer and to identify him for expulsion from the designated areas once his labour-power was no longer needed.

The first legislation directly and specifically involving the administration in recruitment of Basuto for South African capitalist interests was the Basutoland Native Labour Proclamation, No. 27, of 1907. It provided for the levying of a licence fee from labour recruiters and their agents (called "runners") who actually did the soliciting for migrants in the villages. Recruitment was only permitted to licenced labour agents representing certain industries and interests. This allowed the administration the discretion of giving a de factor monopoly of labour importation to one organisation, such as the Native Recruiting Corporation (as happened between the Portuguese and the Witwatersrand Native Labour Association [WNLA] with regard to Mozambican workers around the turn of the 20th century).

An amendment to the Native Labour Proclamation in 1912, which was apparently enacted at the request of the Chamber of Mines, introduced measures to prevent stealing of workers by employers from one another. As articulated in a later amendment, it was unlawful to:

> "induce, or employ or instigate any other person to induce any native to quit the service of his employer in breach of his contract by the offer of more attractive conditions of employment." (Proclamation, No. 60, of 1939.)

Similar legislation was in existence in South Africa and had been enacted as a result of pressure from mine managers through the Chamber of Mines. A most interesting and informative account of the cut-throat competition and "stealing" of labour on the Rand gold mines is given by Jeeves (1975).

In Lesotho, a further measure serving the interests of capital, which more than anything else indentified British Colonial Administration with the interests of capital, was the desertion clause. The Native Labour Proclamation, No. 5, of 1942, which repealed the 1907 Proclamation and consolidated the law of employment, stated in the relevant section that it was a criminal offence to terminate a contract with one's employer without good cause. Such a breach of contract made the offender liable to a fine not exceeding £10 or imprisonment not exceeding two months. This provision was a common feature of Master and Servant Acts of South Africa and Rhodesia which were first introduced by the British in the Cape and Natal in the 1850s "to ensure that African workers were unquestioningly obedient

and respectful to their white masters" (Hepple, 1971, p. 22). The abhorrent essence of desertion provisions was that they converted a civil dispute between the worker and his employer into a punishable criminal offence. The obvious implications was that, if a worker did not want to continue to sell his labour-power to a particular employer, he nevertheless had to for fear of the strong arm of the state being used against him. This, of course, was a version of forced labour and a flagrant demonstration of the subservience of law to economic forces. In concrete terms, once the Basuto contracted to work on the mines they were bound to complete their contracts despite the inhuman living and working conditions and very low wages and in spite of opportunities of better paying jobs in other sectors of the economy like manufacturing.

III. POST-INDEPENDENCE LEGAL FRAMEWORK OF LABOUR MIGRATION

(a) The 1973 Agreement between Lesotho and South Africa

As stated earlier, during the time of the Colonial Administration there was no inter-governmental legal relationship concerning the migration of Basuto workers between Lesotho and South Africa comparable to that which existed for Mocambique since the late 19th century. Local legislation had been sufficient to regulate the flow of labour. In 1963, following the deterioration of British/South African relations over incorporation of the High Commission Territories, South Africa passed the Aliens Control Act which, among other things, required all non-South Africans (including those from the High Commission Territories) to carry valid passports. Until 1963 the Recruiting Agents issued special "passes" to Basotho going to South Africa for work. With the coming into effect of the Alien's Act the special passes were no longer valid and Lesotho authorities had to issue local passports. Other administrative arrangements regarding migrant labour control were apparently made (but were not made public) between South Africa and the Colonial Authorities on 1st July 1963, including the establishment of border control points through which Basotho entering South Africa had to pass.

This situation did not change after independence in 1966. Although the South African Froneman Report had recommended as early as January 1963 that South Africa should enter into formal agreements with all labour supplier countries to regulate the flow of migrant workers into South Africa, and although the recommendation was implemented in 1967 in the case of Malawi,[17] the agreement with Lesotho did not come into force until August 1973. It is not clear why the agreement was concluded at this particular time rather than before (as in Malawi) or after (as in Swaziland - 1975). However, information suggests that in 1973 the tax-collecting Rand Agency was disintegrating and Botswana and Lesotho decided to have separate representatives in South Africa.[18] Thus, the prime factor behind the Agreement can be seen as the establishment of a Lesotho Labour Representative in South Africa. This view is reflected in the Agreement itself, as the office of Labour Representative and its functions occupy the first three Articles, which are given prominence in the preamble. In comparison, the Malawi Agreement of 1967 (the new Agreement on the export of labour-power from Malawi, concluded probably late in 1977, is not

available to the writer) put the emphasis on regularisation and documentation of the large number of Malawian workers illegally in South Africa at the time.[19]

The purpose of the South Africa-Lesotho Agreement can be said to be the following:

(1) the formalisation in a legal instrument of the administrative mechanisms regulating labour migration from Lesotho to South Africa;

(2) the establishment of the office of Lesotho Labour Representative in South Africa;

(3) provision for other matters concerning Basotho migrant workers in South Africa.

(1) The administrative mechanism regulating labour migration

(i) The general provisions

The general provisions clearly indicate the one-sided nature of the agreement in favour of South Africa. They reflect, on the one hand, the strong bargaining power of South Africa due to her dominating economic position and, on the other, the absence of bargaining power on the part of Lesotho due to her virtually total economic dependency on South Africa. They show how capital in South Africa has used the state machinery to put Lesotho's administrative resources at its service in facilitating the purchase of Basotho cheap labour-power in a way suitable to capital. Thus article VI states:

> "(b) The engagement of Lesotho citizens for employment in South Africa shall be subject to the availability of South African labour and may be regulated by South African authorities accordingly".

Thus, far from guaranteeing employment to citizens of Lesotho, the Agreement makes their continued employment uncertain and vulnerable. The clause is liable to be invoked in response to economic or political pressures within South Africa. Whereas it could be said that it is legitimate for a receiving state to insert such a clause in inter-state agreements with supplier countries to protect the receiving state's own working population against unemployment or unfavourable conditions that might follow from an over-supply of labour, South Africa has shown that she is not concerned about domestic black unemployment. In spite of widespread black unemployment in South Africa, industry (particularly in the mining and agricultural sectors) has continued to recruit foreign African labour.[20] The purpose is in the first instance economic, i.e. to weaken the position of workers in fixing the price of their labour. However, South Africa also had a political motive. The clause is a constant reminder of South Africa's ability to strangle Lesotho economically by denying employment to about 50% of her total workforce presently employed in South Africa if Lesotho does not remain friendly, meaning politically non-hostile.[21] The clause is also in line with the South African apartheid legislation banning Africans from urban areas if not required by capital.

The unpalatable prospect of terminating employment of Basotho under the pretext of self-sufficiency in labour supply would tend to weaken Lesotho's position in any attempt to negotiate for improvements in working conditions and welfare of its citizens working in South Africa.

Article VII requires any past or present arrangements between Lesotho officials and any recruiting organisation to be "subject to approval of the two respective governments". Since Lesotho officials represent the Government, this Article is intended to give South Africa the right to veto any arrangements. Why would she want to veto the arrangements? The main reason would seem to be that such arrangements with an individual or a group might not be in the overall interest of capital in South Africa. This could be utilised, for instance, if the Anglo-American companies tried to come to a more liberal arrangement with Basotho workers in spite of resistence from other employers. Arrangements that infringe apartheid laws and regulations would also be vetoed, superficially as a political matter but ultimately in protection of capital as endangering the process of accumulation and capitalist growth based on the extremely low cost of employing migrant labour.[22]

One question that might be asked is whether it would have been in the interests of Lesotho for the Agreement to stipulate an annual quota of guaranteed employment in South Africa? There are two possible answers. First, the quota might be too low for the growing number of Basotho obliged to seek employment in South Africa. It would, therefore, saddle Lesotho with a greater unemployment problem while any consequent reduction in dependence on South Africa for employment would be insignificant. Second, the quota might be high enough to absorb all or almost all of those who need employment and are willing to go into the mines. This would have the negative effect of further entrenching Lesotho's dependence on South Africa by tending to make Lesotho complacent about domestic employment creation. A quota system is thus undesirable, irrespective of whether it would be a "floor" or a "ceiling".

It is beneficial in the long run that Lesotho should reckon with the possibility of sudden termination by South Africa of the import of Basotho labour. Uncertainty would serve to prepare the country progressively for reabsorption of the workers.

The policy of the Chamber of Mines over the last two years has been to reduce its reliance on foreign supplies of labour and to concentrate on local black labour. This policy has been made increasingly successful by the apartheid policy of classifying South African blacks as foreigners, citizens of the "homelands", and thus maintaining the essential feature of migrant workers - temporary residents of urban areas, who are paid sub-subsistence wages, for whom social costs and the full cost of the reproduction of their labour are not borne by those who utilise their labour but by the impoverished area from whence they come.

(ii) Immigration and documentation

In addition to requiring compliance "with the laws and regulations governing the admission to, residence in and departure from" South Africa (Article VIII), the movement of Lesotho citizens into that country is burdened with a host of legal requirements under the Agreement. The Addendum, which according to Article IX(b) is deemed part of the Agreement, is devoted to immigration. Article 3 requires that, apart from carrying a passport or other travel document recognised by South Africa and an international health certificate (which are general requirements for all people entering South Africa), Lesotho citizens entering for purposes of work must be in possession of a written contract of employment, attested in Lesotho for

a period not exceeding two years. They may not enter South Africa to seek employment. There must be a presumption of employment in the form of a contract signed on behalf of a prospective employer by the recruiting agency.[23] In this way the type of work is predetermined; since the recruitee can only obtain a contract from a recruiting agent and the recruiters represent the mining industry, he has to go to the mines and cannot choose manufacturing or other work.

Once employed the mobility of the migrant in seeking alternative work is not only limited but prohibited. This restriction of labour mobility is only obliquely mentioned in Article 5 of the Addendum: "A Lesotho citizen who was in employment in a special area in South Africa, excluding the Western Cape, ... by 1 July 1963, shall not in such specified area by subject to the restriction of employment by one particular employer or to the two years maximum period of employment which apply in respect of engagements entered into after that date" (emphasis added). Therefore, if the migrant does not like the work in the mines he has to return to Lesotho. (According to the Chamber of Mines the migrant may change mines, he may not however leave the group of mines for another employer.)

Another check on mobility derives from clause (b) of the same Article 5, which requires

> "a duly completed set of finger-prints (to be) taken under the supervision of a Lesotho official in the form agreed upon by Lesotho and South Africa and signed by such official".

Here we have one of the Apartheid state's several coercive mechanisms of controlling black labour to serve mining capital. Finger-prints have been taken from Africans in Southern Africa for over a centry for identification purposes, not because such people were known or suspected to be criminals, but to be able to identify "deserters", i.e. workers who prematurely terminate their contracts to seek better conditions of work.[24]

Although desertion is no longer regarded as an offence either in Lesotho or South Africa, there are other sanctions against deserters which are equally punitive. A deserter is deemed to be in breach of his contract and may therefore be sued for breach; he is illegally in the country and therefore liable under Article 6 to be repatriated and, pending such repatriation, may be detained.[25] He may even be prosecuted under the multiplicity of "influx control" regulations.[26] Thus, the costs of breach of an employment contract are too high to be worth the risk of a better job.

Another instrument of ensuring that Lesotho migrant labour is channeled to where cheap unskilled labour is most needed - the mines - is provided for in Article 4 of the Addendum. It says that except for employers in the gold and coal mines represented by the Mine Labour Organisations, the Natal Coal Owners Native Labour Organisation, or the Anglo Colliers Recruiting Organisation, any prospective employer who wishes to introduce Lesotho citizens into South Africa has to obtain from South African authorities a certificate indicating that he may recruit a stipulated number. The effect of this provision is to give the mines a kind of monopoly over foreign cheap labour.

The limitation of the period of employment in South Africa to two years under Article 5(a) has been viewed as beneficial to the migrant in that it obliges him to return home in order to maintain his ties with his community and thus gives him some time with his family, especially his wife and children. This sociological standpoint may be correct but its noble considerations are not the primary reason why the clause was inserted into the Agreement. The two-year restriction is directly related to the whole philosophy of the migrant labour system. It aims at forcing the African to remain part of the labour reservoir in the peripheral poor areas and preventing him from establishing roots near his place of work. Becoming a permanent urban dweller would mean (a) a loss of his partial dependence on the reserve sub-subsistence economy and (b) a rise in his wages to ensure the reproduction of his labour power. The worker would be inclined to bring his family to his area of work and thus increase the social costs on the state. In this way the prime benefits of migrant labour to capital - payment of a low wage and reduction of the social costs - would be lost. Thus, the Africans, and in particular those from neighbouring states and so-called independent homelands, must be forced to return "home" every now and then to remind them that they do not belong where their productive lives are spent.

Under Article 7 an extension of the period of stay in South Africa may be granted on application to South African authorities. What this means is that if the employer still needs the services of the migrant he will recommend an extension. It is obvious that an extension would not be granted for the purpose of seeking a new job.

In other words the provisions regarding immigration, documentation and stay are not aimed at assisting migrant workers but at "managing" them.

(2) The labour representative

The Agreement covers the creation of a Lesotho Labour Representative's office in South Africa. The preamble states that it is in the interest of both Governments to have such a Labour Representative. Article I(1)(b) permits the Lesotho Government to establish the office and "with the concurrence of the Government of South Africa appoint an official to be designated the 'Lesotho Government Representative' ... stationed in South Africa". This clause implies that the Labour Representative has to be screened and cleared by South Africa. The Article provides further that the Labour Representative may appoint staff to his office "provided that such appointments shall be made only after consultation with the South African authorities" (emphasis added). Needless to say, South Africa will not accept people who she considers likely to be critical of the treatment of blacks under the apartheid system and who might, therefore, stir up trouble or consciousness among the workers.

Article II accords the Representative and his staff quasi-diplomatic status and certain privileges. Their offices are protected against search and seizure and the officials are exempted from prosecution in respect of acts committed in the exercise of their official functions and protection of their residences. However, the immunities are threatened by the following proviso of subsection (iii):

> "... provided that the privileges and immunities set out in this and the two preceeding sub-paragraphs may, upon written notice by the Government of South Africa to the Government of Lesotho, be withdrawn in the case of an official who engages in activities which are, in the opinion of the South African authorities, prejudicial to the security of the Republic of South Africa".

Under this paragraph a Labour Representative who fights discrimination in the mines runs the risk of expulsion , as he would be a threat to the whole ideology of apartheid and to capital. The "security" clause is capable of a very wide interpretation.

Article II(b) further makes it "the duty of officials who enjoy the privileges and immunities referred to in paragraph (a) to respect the laws and regulations of the Republic of South Africa". Thus, if the Labour Representative is conscientious about his job, he runs the risk of losing it if he becomes too active.

On the surface, the functions of the Labour Representative as spelled out in Article III are impressive. Firstly, he can consult with South African authorities on the conditions of employment of Lesotho citizens in South Africa, on welfare and housing. There is no evidence, however, that this consultation ever takes place. Conditions of employment, housing and general welfare are matters that appear not to be negotiable, except between mine management and the South African government. Any moves the Representative might make to the South African authorities as regards, for example, the over-crowded barrack-like hostels and the compound system are likely to be doomed. The Representative is equally impotent as regards wage fixing and other important aspects of migrant employment.

Secondly, the Labour Representative is charged with "ensuring that employees of Lesotho comply with South African requirements concerning entry, identification and documentation" and "assisting the South African authorities with the repatriation of sick, injured or destitute Lesotho citizens who are or were employed in South Africa and of other such citizens whose presence in South Africa is or has become unlawful" (Articles III [a] [ii] and [iv] respectively). These are duties which are essentially the business of the South African authorities and employers who brought the migrants into South Africa in the first place.

Access to mining management for consultation, and to workplaces for first hand information on conditions on the mines, is only by concurrence and arrangement with South African authorities (Article III [a] [vii] and III [b]). This suggests South Africa is anxious that the Labour Representative should not undertake anything that the State is unaware of and does not approve - otherwise the Representative should be able to approach management directly on matters affecting Basotho employees and should approach the government only where he encounters difficulties with management.

The only functions of the Representative that are currently worth Lesotho's expenditure are "administering tax-collections, deferred pay, family remittances ..." and "liaising with the South African authorities on behalf of Lesotho citizens employed in South Africa or their dependants in regard to workmen's compensation and pneumoconiosis claims by or on behalf of such citizens" (Article III [a] [iv] and [ix] respectively). However, whereas the Representative's staff might be fulfilling their traditional role of tax collection efficiently, the

deferred pay administration has been taken from them and is directly handled by the mine management, the Lesotho Bank and recruiting agencies. Family remittances are handled by the mine management and the Lesotho Department of Labour. Dr. Wallis (1977, p. 16) has shown in detail that, small as the Representative's scope of action is, he is not taken sufficiently seriously, especially not by compound managers and mine management generally. He is regarded as no more than a modernised tax collector who has inherited the office and the function of the Rand Agents.

(3) Other matters dealt with under the Agreement

(i) Tax collection

Under Article IV responsibility for payment of tax is put on the individual Lesotho migrant worker. South African authorities only undertake to obtain the cooperation of employers in deducting the prescribed amount of tax and remitting it to the appropriate Lesotho authorities, as well as to ensure that Lesotho tax inspectors are given every assistance. The collection of tax is not an important aspect of the Agreement insofar as it concerns contract workers. As part of the contract workers sign upon recruitment, there is a condition that the annual tax will be paid to the Government of Lesotho as an advance on the employee's wages. The deduction of tax from wages referred to in Article IV is only likely to arise in respect of tax of those who stay longer than one year. The provision could also apply to Lesotho citizens in employment outside mining, but such people tend to avoid identification for fear of being repatriated. They prefer to pay tax to South Africa rather than Lesotho.

(ii) Remittances

Clause (b) of Article IV deals with the deduction from the worker's wages by the employer of monies deductable as specified in the contract and their remittance to Lesotho as required by the Lesotho Government. These remittances may take the form of (1) deferred pay, which is a kind of monthly saving repayable upon the migrant's return to Lesotho at the termination of the contract; or (2) money sent to the migrant's family for its upkeep. The law relating to these remittances will be discussed in a later section under "social welfare".

(iii) Renewal and modification

The 1973 Agreement is valid for five years from the date of signature. It is automatically extended for periods of one year unless it is terminated after a twelve months' notice given by either party (Article XI). It is not known whether in August 1978, when the Agreement's five year term was up, there were any moves to renegotiate and revise the Agreement in order to make it more equitable and meaningful for Lesotho.

(b) The Employment Act, No. 22, of 1967, as amended by the Employment (Amendment) Act, No. 14, of 1977

The Employment Act is a general law regulating labour relations in Lesotho with special provisions included for purposes of controlling recruitment and migration of Basotho to South Africa. These special provisions purport to secure

minimum terms and conditions of service of an international standard based in part on the ILO Convention No. 64 (Contracts of Employment [Indigenous Workers] Convention), 1939, and Convention No. 50 (Special Systems of Recruiting Workers) of 1951. The provisions contained in parts IV and V of the Act clearly demonstrate the continued role of the State in facilitating the recruitment of labour for South African mines. As indicated in Part II of this paper, recruitment regulations were first introduced in 1907 and have changed little since, despite numerous amendments.

Section 26 of the Act requires that the contracts be drawn up in writing by the employer or his agent and be presented to a Lesotho Government official for attestation and registration. The contracts are to be signed by both the recruiting agent and the recruitee in the presence of the officer, a fee being paid for the attestation and registration. It also requires the attesting officer, before attesting the contract, to satisfy himself that the recruitee has fully understood and freely consented to the contract and that his consent has not been obtained by coercion or undue influence or as a result of misrepresentation or mistake. Moreover, section 40 makes it an offence to recruit or help in recruiting any person "by illegal pressure, misrepresentation or fraud". These requirements, though commendable in strictly legal terms and in conformity with ILO standards regarding recruitment, are of little consequence in practical terms. The man who goes to the mines probably knows the often degrading conditions which he has to put up with in the mines. Economic necessity forces him to go. The question of full understanding and free consent does not arise except in the purely formal, legal sense. Moreover, the man lining up for days waiting to be interviewed for recruitment never asks and is never told in any reasonable detail what is contained in the small print standard form that constitutes the contract. He is glad to be told that he is hired, the duration of contract and his remuneration. Understanding and consent had significance in the early days of full-scale recruitment during shortages of labour on the mines when chiefs, colonial police and parents were bribed, persuaded or forced by representatives of mining capital to make the young men go to the mines. These conditions no longer exist today. In a literal, formal sense signing for the mines is voluntary.

Section 20 enjoins the attesting officer not to attest the contract unless he is satisfied that it contains certain conditions specified in section 19, i.e. that it is not in conflict with the Act or Lesotho law in general. He must also be satisfied that the medical examination requirement has been fulfilled.[28]

The medical examination requirement is contained in section 59 where it is stated:

> "Every employee who enters into a contract of foreign service shall be medically examined before the contract is attested. Such examination shall take place at the place of recruitment or attestation as the case may be;
>
> Such medical examination shall have relation to the fitness of the employee or recruit to undertake the work he has contracted or been recruited to do."

On the one hand this provision is in the interest of the potential miner in the sense that if, being unfit for mining, he was taken on to work underground, his

health would deteriorate which could lead to his death. On the other hand the system of medically proving physical fitness and health makes sure the mining industry obtains Lesotho's healthy and able-bodied men, thus leaving her with only those who are aged, sick or otherwise unable to contribute to the development of the country. What is more, the healthy and able-bodied men who are allowed to sell their labour-power to South African and international mining capital, are employed until they are physically unproductive, suffering from occupational diseases, incapacitated by accidents or simply too old and exhausted, when they are dumped on the Lesotho economy, to be cared for. Because of the limitation on duration of contracts and the compulsory return and re-engagement mentioned earlier, there is constant sifting of the fit and discarding of the unfit to the direct benefit of capital but to the detriment of supplier areas.[29]

Section 19(2) provides that a contract of foreign service shall contain all particulars necessary to define the rights and obligations of the parties to it and shall include: (a) name of employer and place of employment; (b) name of employee and other particulars necessary for his identification; (c) nature of employment; (d) duration of employment; (e) wages, method of calculating it and periodicity of payment; (f) right to repatriation on completion of contract at employer's expense; (g) a condition relating to deferred pay; (h) any special condition of the contract; (i) such other matters as the Minister may by regulation prescribe. This section is not very meaningful. Although all these matters are indeed specified in the miner's contract, neither the Lesotho Government nor the migrant has any control over them because they are regulated by South African law in accordance with the needs of capital.

The Act purports to limit duration of contract to one year,"provided that the Minister may after consultation with organisations of employers and organisations of employees representative of the interests concerned, exempt from the provisions of this section contracts entered into by classes of employees whose interests would be better served by contracts of a longer period."[30] This provision gives the impression that Lesotho has a real say in determining the duration of stay of her citizens in South Africa. As already indicated, the short-term contract given to Basotho (usually 6-10 months), followed by a spell of a few months in the supply area, is intended to maintain the cheapness of the labour power and is therefore in the interest of capital. While the ceiling of the contract period is related to maintaining the migrant labour system, the actual duration and any extension within the overall limit is determined by the short-term requirements of mining capital.

Section 27 specifically authorises the mobility of the worker from one employer to another where the employer and employee mutually agree to change the contract accordingly and this is attested by an attesting officer. This provision would seem to be in conflict with the limitation in the Inter-Governmental Agreement of 1973 discussed above, which says that a Lesotho citizen, except one who was employed in South Africa before July 1, 1963, is only permitted to be employed by one particular employer (Article 5 of Addendum). In practice, the Agreement does not permit the migrant to change is occupation. He can change employers within the

same type of work. (The Chamber of Mines is for this purpose taken to be one employer and it may transfer the worker from one mine to the other, but this does not help him to be employed in a different occupation.) Again, it is not the Lesotho Employment Act that matters but what is permissible under South African law.

Provision for premature termination of "foreign contracts" is made in section 25. It stipulates that the employer may terminate the contract before its expiry if "for any reason (he) is unable to fulfill the conditions of the contract" (emphasis added). On the other hand a migrant may only terminate the contract if "for reasons of illness or accident (he) is unable to fulfill the conditions of his contract." This is obviously one-sidedly in favour of mining capital. Although one might concur with employer termination on grounds of force majeure or state intervention, there is no reason why employers should be given carte blanche. As the law stands, employers are covered when a migrant worker is dismissed who has developed political consciousness or who emerged as a work force leader. "Victimization", as described by Ramahapu (1977) in recounting his personal experiences in the Orange Free State mines, is a common phenomenon. He says: "By victimization I mean summary dismissal for any conduct which appears to threaten the management by the organization or apparent organization in the labour force for collective bargaining... The most effective way of dealing with wage strikes in the compounds is to summarily dismiss the recalcitrant workers and repatriate a few foreigners, and the work situation returns to normal". The migrant is only permitted to terminate his contract prematurely if by reason of illness or accident he is unable to work. He may not, for instance, terminate his contract because of compelling family reasons. Personal matters cannot be allowed to interfere with productivity...

Part V deals with the licencing of recruiters and their agents and the conditions under which such licences are to be granted. Persons or organisations which engage in recruiting Lesotho citizens are required to be in possession of a valid licence (section 30). The licence is to be issued by the Labour Commissioner for not more than a year but is renewable. The granting of the licence is subject to any directives that the Minister may give but is otherwise in the Commissioner's discretion (section 31). However, in exercising this discretion the Commissioner is required to:

> "(4)(a) have regard to the provisions of the recruiting of Indigenous Workers Convention, 1936 (I.L.C. No. 50) and in particular, take into account the possible untoward effect of the withdrawal of adult males upon the population of Lesotho and their health, welfare, morality and development".

This provision and others that follow are probably intended to satisfy ILO standards and requirements but it is clear that, however laudable, they were never taken seriously. We have seen that the Colonial Administration unreservedly promoted the export of Basuto labour-power and there is no evidence of exceptions having been made or reluctance or misgivings expressed with regard to the social and moral costs of migration or the consequences on the productivity of the Basotho peasant economy. Today, such concerns have been expressed but Lesotho is

so caught up in the net of migrant revenue that the obvious social costs have been regarded as part of a necessary evil. Thus, the power given to the Labour Commissioner under section 31 (5), to restrict the number of adult males who may be recruited in any area or to close any area to recruiting, are irrelevant in practice.[31] They will probably become relevant only when Lesotho is able to create enough jobs to absorb potential migrants.

Section 35 provides for the renewal of a licence but also gives the Labour Commissioner the power to cancel the licence or refuse renewal if the conditions of the licence have not been fulfilled. This kind of measure is not likely to be taken at present.

Through section 36 the Lesotho State actually upholds the monopsony of the Chamber of Mines by making it a criminal offence for anybody to recruit or assist in recruiting any person for employment outside Lesotho unless such a person has entered into a "contract of foreign service." This ensures that employers outside the group constituted by the Chamber of Mines and represented by their recruiting agencies in Lesotho, cannot get the cheap labour available to the members of the Chamber. The section, however, also ensures that the Government does not lose the revenue levied on the processing of each recruit through attestation, at present 10 Rand per recruit. Thus, the interests of the supplier state and foreign capital here coincide, although the interest of the State may, with validity, be called recovery of administrative costs.

(c) Terms and conditions of employment: the contract form

(1) Selection and control of the migrants

Upon recruitment for mining the migrants are required to sign a standard contract. The contract form analysed here is the one used by "The Employment Bureau of Africa (Limited)" (TEBA), which has a near monopoly in recruiting mining labour from Lesotho and is the successor of WNLA and the Native Recruitment Commission. The front side of the form is reserved for information of a formal nature as required by the Employment Act of Lesotho. The reverse side gives the terms and conditions of contract. Like many other modern standard forms intended for the unsophisticated public, the reverse side is in very small print and it can justifiably be assumed that these conditions are not intended to be read and understood by the illiterate or semi-illiterate recruits.

Clause I states that the employee agrees to allow himself to be alloted to an employer who is a member of TEBA and, provided he is found medically fit (by the WNLA Depot in Johannesburg or Welcom) for mining work, to proceed to undertake such mining work as may be required of him. This means that the recruitee has no say in deciding which mine to work in or whether to work underground or on the surface. This is in conflict with the principle of freedom to choose one's employer. It confirms the view that mining capital slots the migrant where he will be most productive, irrespective of the worker's own views or needs. The aptitude tests and acclimatization exercises that follow recruitment are used for the purpose of determining the specific classification in which the recruitee will be placed in the production process.

The recruitee also undertakes to work on every working day to the best of his ability and, if called upon, to do overtime work and work on Sundays or public holidays unless prevented by illness or accident (Clause 1[c]). This clause shows further the efforts of mining capital to maximise production and profits by the ruthless utilisation of the workers' labour-power. Neither religious piety nor national pride is permitted to interfere with profit. Elsewhere, foreign workers are at least given the option to absent themselves on their National days.[32]

Under Clause 1(d), the recruitee agrees to "reside in quarters provided by the employer and to abide by the rules laid down by the Employer controlling those quarters." This clause compels the worker to live in the barrack-like bachelor hostels within the walls of a compound. He cannot choose to rent his own accommodation near the place of work. A detailed account of the inhuman conditions in which the workers live in the compound is beyond the scope of this paper.[33] However, it is important to mention the purpose of the compound system. Compounds originated from the Kimberley diamond mines where they were constructed to check theft and illegal dealings in diamonds. Management soon discovered that compounds were also an effective method of social control. The workers could be confined in the compound so that they could not go drinking as they liked, as uncontrolled consumption of alcohol was a danger to the workers' productive capacity. The compounds also served to control labour in times of crises such as strikes, because it is easy to lock up workers in them and prevent solidaity with members of other compounds. Further, the so-called free accommodation is an excuse to keep wages below the cost of reproduction of labour-power. However, the most important factor in retaining and institutionalising the compound system has been to promote the migrant nature of mine labour. The hostels are said to be temporary lodgings for black workers whose residence in the urban or "white" areas is conditioned on their continued employment. Thus, at the end of the contract the black worker has to vacate his slot in the overcrowded hostel and go "home" - either to a neighbouring country like Lesotho or to a nearby black area. On the other hand if the black worker was allowed to live with his family in the neighbourhood of the mine there would be a likelihood of stabilisation and acquisition of permanent or semi-permanent residence. This would mean more social responsibility for the State in terms of amenities and a more forceful claim on capital for increased wages to take care of the worker and his family.

The single men type of accommodation entrenches the labour migration pattern which in turn enables the State and capital to disclaim part of the responsibility for the reproduction of the worker's labour-power and the well-being of his family. Whereas, for example, Belgian employers of Tunisian labour undertake to provide "suitable accommodation" only upon specific request and the Belgian Government undertakes to assist accompanied workers in finding suitable accommodation,[34] South African law permits only 3% of black labour to be accommodated in married quarters with their families outside the compound. The concurrence of South African mining companies in this unnatural housing policy is shown in the fact that even the most liberal mining house, Anglo American, had by 1975 provided married quarters only to 1 1/2 % of its black labour (Plaut, 1976, p. 36).[35]

Moreover, a mine is permitted to build as many housing units as it wishes for those with permanent urban residence rights but mining houses do not encourage this for the reasons already indicated.

The duration of the contract is put at a maximum of two years (clause 1 [e]), which conforms with South African law and the Lesotho - South Africa Agreement of 1973. Normal contracts, however, are initially for six months but are almost invariably extended for another four months. The reason behind the generally short contracts has already been revealed as being related to the maintenance of the cheapness of the migrant's labour-power. What needs explanation is why contract length is initially six months before it is automatically extended. The explanation in the case of Lesotho is that it avoids the transfer of the migrants' deferred pay to Lesotho for the period of extension since the worker is formally employed on a daily basis during those months. The present parliamentary session (1978) intends to remove this discrepancy by an amendment to the Deferred Pay Regulations.

A worker is required under the contract (clause 1 [h]) to give four weeks notice of premature termination. There is, however, no similar duty on the employer to give notice to the worker. The sanction for termination without notice by the worker, though not specified in the contract, would be recovery of 4 weeks wages from the worker's deferred pay or other money, as well as black-listing by TEBA so that he could never again be employed by a mining house using TEBA. This latter sanction, too, offends against freedom of employment. One of the methods of making this sanction effective is the identification of the worker through a finger-prints bank maintained by TEBA's "Central Records Service Department".[36] In addition to black-listing, once the black worker, especially a foreign one like a Mosotho, terminates his contract while his labour-power is still required by mining capital, the State will not permit him to stay and seek or take up employment with another employer. Blacks will have to leave urban areas. A Mosotho would be liable to arrest and repatriation.

The point of compulsory repatriation on expiration or termination of contract is stressed in clause 1 (i) by stating that "upon termination of contract for any reason whatsoever, the employee will allow himself to be returned to Lesotho". On the other hand, as there is no requirement for notice to be given by the employer before dismissing the worker, the worker is liable to be dismissed whenever capital can dispense with his labour-power. Again to compare the situation with that of Tunisian migrants in Belgium, the Tunisian - Belgian Agreement permits Tunisian migrant workers to remain in Belgium after the expiration or termination of their contracts in order to seek new employment in the same sector.[37] South Africa does not permit even its own black people, let alone foreigners, to remain in "white areas" for more than 72 hours without evidence of employment.

(2) The certificate and bonus system

An attempt to stabilise the labour force within the migration system is made in clause 3 (c) and (e), which provide that if the worker's service is considered satisfactory by his employer the worker may be handed a certificate on his discharge. If the holder presents the certificate to a TEBA office within six months the holder is guaranteed reemployment at a substantive wage specified in the certificate. In addition to the reemployment guarantee, the certificate indicates a date on or before which a worker is required to return for re-engagement so as to qualify for the "Early Return" bonus payment shown in the certificate. On the other hand if the worker does not return within a specified period, not only will he lose the benefits designated in the certificate (clause 3 [f]), but he may once more be required to undergo the hated acclimatisation. The "carrot and the stick" are sufficiently strong to ensure that migrants comply with the conditions.

The certification procedure intentionally seeks to induce the experienced miner to return to mining employment. It is an endeavour to resolve the contradiction inherent in the use of migrant labour in South Africa's unique capitalist mode of production. Whereas capitalism requires efficiency, and efficiency reigns where the labour force is stable, the South African economy, particularly mining, has achieved and maintained a high rate of growth on the basis of employment instability, i.e. the migration of black labour-power to and from the reserves both inside and outside South Africa. The reserves, such as Lesotho, survive as agricultural subsistence economies supported as they are by the proceeds of the trade in the labour-power of the bulk of their male population. The reproduction of this labour-power, for which capital should be fully responsible, is subsidised by the reserve economy through a form of forced migration. Thus, mining capital has an interest in that the migrants maintain a connection with the reserve. At the same time this system means a high turnover of the labour force with resultant loss of skill, which means a cost to capital through the training of newcomers and through inefficiency. It is in order to maintain a system that ensures (i) a price of labour-power below the cost of its reproduction and (ii) continued exploitation of acquired skills that mining capital invented the certificate and bonus system. It is not, as may seem from the first reading of the contract, intended for the benefit of the migrant but a kind of insurance premium against the risk of losing the use of his cheap labour-power.

To give the semblance of a favour done to the worker, the granting of a certificate is discretionary. Even if the service has been satisfactory the employer may, but is not obliged to, grant the certificate. The guarantee of re-employment is given by TEBA only on condition that the employer gives the certificate. The discretionary nature of giving the certificate implies that, where the worker is undesirable (for instance, because he is politically militant or conscious of his exploited position in his relations with capital), he will be refused a certificate. The certificate is yet another mechanism of keeping the migrant worker docile.

(3) Other stipulations

A minimum wage of R15,00 per week (underground) and R9,30 per week (surface) is guaranteed by the contract (clause 3[a]). To divert attention from the fact that this is a wage below subsistence requirements the contract states that the worker will be paid "at prevailing mine rates of pay for a full day's work of an able-bodied adult according to the accepted standard of the Employer." This implies that the worker, if he is lucky, may find himself in a mine which pays much more than the minimum. However, practice shows that mining capital is largely united on the question of wages and mining companies do not undercut one another. Only Anglo-American once broke the etiquette by raising wages against the will of the others, but the gesture has not been repeated. Moreover, fixing wages is not merely a matter of the "accepted standard of the employer" but must also conform to the apartheid policy of job reservation, which distributes labour to jobs, not according to suitability but according to race. Fixing wages of blacks through collective bargaining is not permitted. Wages are fixed either by white employees by negotiation and agreement with employers under the Industrial Conciliation, Act No. 28, of 1956, or by a Wage Board, on which the black workers are not represented, under the Wage Act, No. 5, of 1957. The right of black workers to withhold their labour in pursuit of increased wages or better conditions of work is severely limited. The Bantu Labour Relations Regulation Act of 1973 as modified by the Amendment Act of 1977, replacing the Bantu (Settlement of Disputes) Act, No. 48, of 1953 under which strike action was absolutely prohibited, gives black workers a right to strike; but it imposes such pre-conditions as to make the right meaningless (see Davis, 1978).

The contract does not state the conditions of justifiable or wrongful termination of contract by either party. This aspect is governed by the common law of South Africa relating to contract of employment. Under the common law a contract of employment, unless otherwise provided for in the contract, can be justifiably terminated for one of the following reasons: (1) repudiation, i.e. cancellation of contract by one party upon a material breach by the other; (2) insolvency by the employer; (3) incapacity of the employee (Ringrose, 1976, pp. 40-50). However, clause 4 deals with a situation where the employer is unable to provide work "owing to an Act of God, flooding, strike of workmen, stoppage of work, accidents to mine or plant or other cause beyond the control of the employer ..." It states that in such circumstances the worker is to receive half pay. Further, during such periods the worker may be assigned duties on a different class of work and paid at the rate of such work. Since large-scale operations are insured against such hazards, there is no justification for paying the worker less than his regular wage, which is already far too low. The clause also provides that, if the condition of under-employment persists for four weeks, either party has the option to terminate the contract. Such an option is unfavourable to a Mosotho worker since after justifiable termination he would not be permitted to seek employment without first going back to Lesotho.

The contract states that "the employee shall be provided with food, medical attendance and quarters free of cost to himself" (clause 1 [5]). In the same way as "free" accommodation is provided in hostels, the "free" food is provided not as a measure of generosity on the part of capital but in order to contain wage pressure (see also Hepple, 1971, pp. 53-4).

IV. SOCIAL WELFARE: LEGISLATION AND RELATED ADMINISTRATIVE ARRANGEMENTS

(a) Workmen's compensation

Compensation for injuries or death resulting from an industrial accident or disease caused by industrial work falls under the South African Workmen's Compensation Act, No. 30, of 1941 (as amended). Certain diseases such as pneumoconiosis, tuberculosis and other diseases of the cardio-respiratory organs are also governed by the Occupational Diseases in Mines and Works Act, No. 78, of 1973.

The Workmen's Compensation Act owes its origin, like many other in former British colonies and protectorates, to the English Workmen's Compensation Act of 1897. At the time of its introduction in Britain, workmen's compensation legislation represented a considerable success for the workers in their struggle to improve their conditions. Workmen's compensation acts partly satisfied "the need of workers (and where they were killed, their dependants) to have at least the economic effects of the temporary or permanent loss or diminution of their earning power alleviated by pecuniary compensation from their employers (Pritt, 1970, p. 156). The initial advantage gained was not only in having a law that provided machinery for compensation but also in establishing the principle that such compensation should be paid without the necessity that the worker prove fault against the employer, as had been necessary under the claim in tort (delict).

The South African Act requires employers to insure their employees against accident and disease caused by industrial hazards and provides machinery for recovery of compensation. However, there are general limitations to the right of the worker to compensation which reflect the still dominant position of capital as against labour in relation to law and the limitations or difficulties faced by black workers in particular. This underscores the extent to which mining capital exploits black labour.

The general limitations include, for instance, the stipulation that compensation will not be paid where the accident is due to the serious and wilful misconduct of the worker (section 27 [1] [b]). Serious and wilful misconduct is defined in section 2 as (i) drunkenness; (ii) a contravention of any law or statutory regulation made for the purpose of ensuring the safety and health of workmen or preventing accident to workmen, if the contravention is committed deliberately or with a reckless disregard of the terms of such law or regulation; (iii) any other act or omission which the Commissioner having regard to the circumstances considers to be serious and wilful misconduct. This provision makes it likely that the employer will attempt to avoid compensation where the worker has committed a technical mistake.

Although this general limitation does not apply in the case of serious disablement or death, it is a grave limitation since it excludes compensation for many accidents that are not classified as serious disablement though they might disfigure the workman and reduce his productive capacity. It is particularly grave for black workers who do not have any kind of welfare insurance. The section also gives the Workmen's Compensation Commissioner a wide discretion in determining

what is wilful misconduct. Even where it is said that disqualification does not apply because serious disablement has been caused, compensation may be avoided by arguing that the workman's conduct took him out of the sphere of employment and therefore the accident did not arise "out of and in the course of his employment" (see Atiyah, 1975, p. 318).

Another limitation to the right of compensation is the provision that, "if the disablement or death would not have resulted, but for a pre-existing disease condition of the workman known to the workman but unknown to the employer", then no compensation will be paid (section 27 [1] [c]). One can only hope that this does not mean that the burden of establishing lack of knowledge rests with the employee since it would be difficult for him to prove that he did not know. Of course, the burden is nominally on the party alleging the knowledge but the trier of fact will tend to make use of a presumption that the person suffering from the disease is more likely than anybody else to know of its existence. It is arguable that, since the employer carries out detailed medical examination including x-rays, he must be taken to have failed to discover the condition and that there is no reason why the employee should himself be taken to have known it. The proviso that the Commissioner "may in his discretion award such compensation as he deems equitable if in his opinion the accident materially increased the extent of disablement or materially accelerated the death" is in line with the common law but tends to restrict the injured worker's entitlement to compensation.

Compensation is further limited by the fact that Worker's Compensation does not provide for full compensation as would be awarded for the same injury under the law of negligence. Only a percentage of the actual loss or incapacity is compensated, allegedly on the assumption that in principle costs of accidents should be shared between employees and employers. With regard to the English Workmen's Compensation Act of 1897, which started by allocating the costs equally, Atiyah (1975, p. 317) hassaid:

> "This was a somewhat unreal approach; as with the modern law of contributory negligence it simply meant that the employee received much less compensation than he would have earned if not injured, while the cost borne by the employer was passed on (at least so far as the competitive position of the industry made it possible) to the consumers of the products or services provided by the industry."

Of course, the result of such apportionment is a loss to the worker. In case of temporary or permanent but partial disablement 75% of earnings is paid to the injured worker. In case of 100% permanent disablement a lump sum of four years' earnings is payable. In case of death the amount of compensation is what the Commissioner "deems equitable according to the number of dependants and degree of dependency ..." (section 86).

The degree of disablement is a determining factor in calculating the amount of compensation. It is decided by the Mine Medical Officer.[38] Appeal to the Central Medical Board is possible. It is difficult to believe that the Medical Officer would not decide doubtful cases in favour of the mining houses, which employ him. The possibility of appeal by the worker is very remote due to the cost and administrative difficulties involved, as well as the fear of antagonising the employer. Here, too, the lack of black trade unions means that the workers are in an extremely weak situation. Moreoever, only physical impairment is compensated; pain and suffering, loss of amentities and other heads of damage in negligence are irrelevant in workmen's compensation.

On the face of it most of the Act does not discriminate according to race. However, Chapter IX of the Act deals specifically with "Compensation for Natives". Its main effect is to deny periodical payments and pensions to black workers in case of total disablement or pensions to their dependants in case of death, which are given to non-black employees. The rationale for this distinction derives from the apartheid ideology, according to which blacks are not citizens or permanent residents of South Africa and are therefore not entitled to pension or any other social welfare benefits.

The Workmen's Compensation scheme is inherently discriminatory. It is based on earnings which are determined by job categories which, in turn, are based on a discriminatory policy of job classification reserving certain jobs for whites and leaving blacks in the unskilled categories where they earn the lowest wages irrespective of their suitability for other categories of work. As has been stressed earlier in the paper, black wages are based on the assumption that all blacks are migrants who subsidise both the reproduction of their labour-power and the welfare of their families through subsistence production in the labour reserves and that, therefore, their wages need not be calculated to meet basic needs. Black workers are awarded compensation that is not aimed at facilitating the recovery of productive capacity or rehabilitation in society, because this is seen as the function of the reserves themselves. The same philosophy influences the Workmen's Compensation Commissioner in determining the award to the dependants of a diseased worker; what is "equitable" for white dependants with a "civilized" standard of living is considered unworthy of a black family with a "primitive" standard of living. The consequence, here again, is a saving on the part of capital.

In addition, there are practical difficulties that face Basotho in the process of recovering compensation. Section 50 of the Act puts the burden on the worker to give written notice of the accident to the employer within a reasonable time. Section 54 requires him to lodge his claim within six months of the accident or, in case of death, a claim by the deceased worker's family within six months of the death. Such limitations can lead to loss of compensation by ignorant, illiterate or semi-illiterate migrants. Further, interviews with Basotho migrants indicate that compound managers threaten to dismiss workers if they claim compensation, especially in respect of disease or minor injuries. Delaying tactics are used by the various agents of capital to discourage claimants who eventually give up and go back to Lesotho.[39] Evidence shows that a lot of money in compensation awards is left unclaimed every year.[40] Where inadequate compensation is given, the Act provides appeal procedures that are in themselves inadequate but more so in case of the foreign migrant workers, victims of accidents and disease or their next of kin, who do not have the financial and intellectual resources to fight for their rights from outside South Africa.[41] The Labour Representative is powerless to help them and the Lesotho Labour Department is badly informed and cautious. The Labour Representative, as shown earlier (pp. 13-15) is very restricted in his functions and freedom of action. He is permitted to take up matters of workmen's compensation with South African authorities; but his terms of reference do not suggest that he can go as far as instituting, for example, a legal action against the Commissioner.

The actual extent of the loss to Lesotho caused by accidents and occupational diseases in South African mines, and the extent of compensation given, are not known. But the loss is generally felt to be substantial and should cause grave concern. Available records in the Lesotho Department of Labour on such matters are incomplete and therefore unreliable. However, from information given by TEBA to the Department on Basotho fatalities in mines affiliated to TEBA, a calculation made by the writer in April 1978 indicated a death rate of 37.92 a month (roughly 1 death per day over the period November 1976 to January 1978). Statistics from the Chamber of Mines seem to agree with this figure.[42] One of the problems faced by the Lesotho Department of Labour in compiling statistics on causes of deaths is that the information given by the mine authorities is very scanty and sometimes vague. For instance, an accident message states: "cause of death: natural causes". Even where a post-mortem report is sent it says very little or it says it in Africaans. At any rate, the information does not enable the Lesotho Department of Labour to assess the fairness to the migrant's family.

The death reports include many cases of assault and car accidents for which mining capital disclaims responsibility. Since the workers are kept in the compound most of the time, such incidents, which could be a result of fights within the mine premises, should fall within the responsiblity of mining houses which can insure against the risks.* It is hoped that the setting up a a Central Workmen's Compensation Bureau within Lesotho's Labour Department will go a long way in assisting migrants who have suffered losses to ameliorate their loss with adequate monetary compensation.

(b) Unemployment and retirement benefits

The South African Unemployment Insurance Act, No. 30, of 1966 (as amended) explicitly excludes blacks employed in gold and coal mines and foreign migrants from the definition of contributors to the insurance scheme (section 2 [2]). Again this is consistent with the denial of responsibility by the State and by capital for the welfare of blacks as it would reduce the profitability of black cheap labour-power. Unfortunately, Lesotho herself has no unemployment benefit or similar scheme.

The Chamber of Mines operates two schemes: the Long Service Award Scheme and the Mines Bantu Provident Fund Scheme. The Long Service Award does not constitute rights but leaves benefits to the discretion of the mine concerned. It replaced what used to be called the Compassionate Grants Scheme. The award is payable upon retirement due to old age: old age being defined as 60 years for an underground miner and 63 for the surface worker. It is obvious that this scheme was never intended to benefit a substantial number of people since many will not be allowed to continue working until they are 60. Regular repatriation and reengagement of migrants is a sifting process that eliminates those once healthy, strong, young men who have lost their youth and vitality in the mines and whose productive capacity has been reduced to minimum. After the age of 40 they are normally turned away.[43] The requirements that the retiring man should have worked for an aggregate of 15 years, or 10 years in the case of premature retirement due to

* To assume that the dependents of the deceased workman could institute civil action in a situation of financial, intellectual and political constraints would strain credulity.

incapacity, is also difficult to fulfill as the migrant is never allowed to stay more than a year for any one contract. Some of the Indunas (tribal leaders in the compounds) and the Boss Boys (gang leaders at the work situation) are "rewarded" for their opportunism in siding with the management; they stay long enough to receive the Long Service Award.

The method of calculating the value of Long Service Awards is not known. The method used to calculate the Compassionate Scheme illustrates the discriminatory nature of the award:

"Value and Calculation of Grants

The Compassionate grant shall be calculated at the following rates for each year of service or portion thereof:-

(a) in respect of Coloureds and Asiatics - R100 p.a.

(b) in respect of Indunas, Mabalans, Police Boys (tribal representatives), certified Black Hospital Orderlies, Welfare Officers, other non-whites of similar status who are members of the Mines Bantu Provident Fund and underground Boss Boys - R100 p.a.

(c) in respect of other non-white employees:

(i) underground Employees - R65 per annum

(ii) surface Boss Boys and other employees of similar status on surface or underground - R70 per annum

(iii) other surface employees - R50 p.a."[44]

The Mines Bantu Provident Fund Scheme is a contributory scheme and is compulsory for all monthly paid black workers who are engaged in certain designated occupations, earn more than R20 a month and are employed by a mining company. The contribution is R2.50 for the employee and R4 for the employer per month. Benefits are payable only on death or retirement, including retirement due to permanent incapacity. Minimum retiring age (as in the case of Long Service Award) is 60 for underground workers and 63 for surface. Although the Provident Fund Scheme is better than the Long Service Award in that it is not discretionary, it has the same handicap of being subject to an almost unattainable retirement age given the temporary and disjointed nature of employment under the migrant system. The benefits do not amount to much either. For each year of pensionable service (that is only those days on which contributors worked) R100 is payable. This means a total of 20 years service - if the worker manages to keep himself hired until he is 60 years old - would entitle him only to R2,000.

Both schemes are window-dressing and a negligible contribution to the welfare of workers. They cannot be relied upon to take care of the retired or incapacitated worker and his family for any reasonable length of time. In fact, proper retirement benefits can correctly be regarded as part of the money due but unpaid to the worker, considering his very low wages.

(c) Legislation on deferred pay

The deferred pay scheme in Southern Africa is a system of holding over part of a worker's wages every month until the end of his contract when he is paid the accrued amount. The system was introduced by the Chamber of Mines in 1918 to

create a pool of cheap finance capital, with concurrence of the Union Government. The Native Recruitment Commission was appointed administrator. The money was invested with the South African Government Public Debt Commissioners. No individual accounts were kept by the Chamber of Mines on the grounds that such accounts would be cumbersome and expensive to administer. The worker did not receive any interest on his money. Concurrently, a Deferred Pay Interest Fund for deposit of the interest was created. It was to be administered by a board consisting of two South African Government officials and four persons appointed by the Native Recruitment Commission, representing the Chamber. The interest was to be donated to "General Welfare work".[45] Thus, occasionally gifts were donated to countries and organisations in Southern Africa. These included educational materials to schools, X-Ray machines for hospitals. However, the workers, whose money it was, never had a say in the donation. The decisions were made by the Board on recommendation of the recruiting agents. Nor did the gifts go to countries or areas whose inhabitants had contributed most.[46]

It can be argued that the donations were made to give the impression that mining capital was philanthropic and humanitarian. The gifts were made to blind governments and other institutions in the hope of diverting attention from the issues of conditions of work in the mines and the other harmful aspects of the migrant labour system. It is even alleged that politicians were given some of this money.[47] A Select Committee of the Basutoland National Council recommended in 1962 that the interest on Deferred Pay be paid direct to the Government in Lesotho. However, the recommendation was not implemented.

Immediately after independence in 1966 the Lesotho Government started negotiations with the South African authorities to have the deferred money deposited in Lesotho. In January 1974 after talks **which** the Minister of Finance, Mr. Sekhonyana, called "very hard", South African authorities and the Chamber of Mines agreed to have deferred pay remitted to Lesotho. The Deferred Pay Act, No. 18, of 1974 and the Employment (Deferred Pay) Regulations 1974 (Legal Notice No. 57 of 1974) were introduced late 1974 to facilitate the implementation of the agreement. By Regulation 3 of the Employment (Deferred Pay) Regulation every contract for work on mines outside Lesotho, entered into after 1 January 1975, had to contain a clause providing for the deduction of an amount equivalent to at least 60% but not more than 90% of the monthly wage. This amount was to be deposited by the employer with the Lesotho Bank.

The purpose of the law was stated during the Parliamentary Debates. Mr. Sekhonyana said:

> "As from January next year these monies shall be deposited with the Lesotho Bank where interest shall be available... That is the purpose of this law." He went on: "Another point is to encourage our people to save. The habit of savings can protect our nation from unpredictable difficulties."[48]

Mr. Setloboko put the purpose even more clearly:

> "It can be of great advantage to the Basotho miners because their monies shall have interest unlike the old days. Secondly, it shall be safe from being squandered in 'Shebeen' houses (pubs) as before. Thirdly, it shall help to develop our country."[49]

Thus, the purposes of compulsory deferred pay are to help the migrant to save his money with interest and to make available to the State a substantial amount of finance capital for development projects. The last mentioned reason is perhaps the more important one as a justification for State interference with a worker's earnings and their disposal.

The scheme was first resisted by the migrants when it was introduced in 1975, apparently because they did not believe the scheme had been introduced for a good purpose, especially as they had not been consulted. The matter had been handled by Lesotho Government, the Chamber of Mines and the South African Government. It is said that during the 1975 strikes on the Vaal Reef, President's Brand and Bracken gold mines, "the main issue at stake was the 60% compulsory deferred pay clause in new contracts for Lesotho miners" (Kirkwood, 1975, p. 33). The migrants, however, seem to have come to realise an advantage in compulsory savings and now prefer it to the previous cheme.

The idea of compulsorily deferring wages has come under attack on grounds of being unrelated to family needs[50] and, by implication, of infringing the worker's freedom to dispose of his wages.[51] ILO Conventions reaffirm this freedom but also permit the countries of immigration and emigration to make arrangements requiring the repatriation of part of the wages <u>for the maintenance of the family left behind</u>.[52]

The Rhodesian Deferred Pay Scheme has been criticised as confiscatory on the grounds that, if the worker deserts the mine, he forfeits his deferred pay. (We see here a convergence of the interests of capital and of the State resulting in the deprivation of the worker of his wages. This tends towards slave labour.) However, the Lesotho law does not have such an effect. Regulation 4 of the Employment (Deferred Pay) Regulations provides that money paid into the Deferred Pay Fund by the Lesotho Bank shall be refunded to the employee on his return to Lesotho after the completion of his contract. It further states that no premature withdrawal of deferred pay would be permitted except where the employee died or was incapacitated before finishing his contract. This seems to threaten confiscation. However, Regulation 4 (3)(c) permits withdrawal "where for <u>any other reason</u> an employee is unable to complete his contract". The first-mentioned general limitation seems to be aimed at allowing the Lesotho Bank time to plan the cash-flow at the particular times when contracts are expiring. What happens in fact is that the Lesotho Bank hands over to the recruiting agents a large amount of cash one week before migrants are due to return. The agents then pay the money to the migrants on their return. Another reason for the limitation is that the Government of Lesotho would not like to encourage irregular withdrawals of deferred pay as this would interfere with its investment objectives and defeat the purpose of the scheme.

Section 6 of the Deferred Pay Act is perhaps questionable. It provides:

> "(i) Any moneys unclaimed by an employee shall on advice from the employer that it is due and unclaimed, be transferred to a separate account in the Fund. (ii) If such money remains unclaimed after five years from the date of deposit into the separate account, it shall be transferred to the Consolidated Fund."

This section was opposed both at the second reading and at committee stage. The Government was charged with intentions of confiscation. However, the Minister of Finance pointed out that subsection (iii) of section 6 provides that a claim can be made and accepted after five years.

If migrants decide not to return to Lesotho, sub-regulation (2) of regulation 4 allows then to apply for a refund from the Labour Commissioner.

However, there remains the questionable feature that unclaimed deferred pay ends up in Government coffers. Ought not the money be given to the worker's family? It should be easy to trace the family. A migrant who turns up after, say, 7 years has no cause to complain that his money has been given to his family, which it was his task to support. The State has no legitimate claim to the money after five years, even on grounds of using it for development.

What effect has this legislation on a worker's ability to provide for his family? Regulation 5(1) (as amended) permits an employee to authorise his employer to pay from his deferred pay to a dependant family remittance not exceeding 50% of his deferred pay. It is not clear whether this refers to the whole balance in the bank or one particular month's deferred pay. The former interpretation appears unlikely, because the employer would have no access to the whole balance. This speaks for the latter, but in this case the amount would be so small as to be scarcely useful to the family. Whatever interpretation is correct, the procedure which the migrant and his desperate family have to go through is so cumbersome that anybody who tried it once would hesitate to do it again, however pressing the need.[53] Yet, one of the declared aims of the deferred pay scheme is to enable the migrant to save money for his family's needs. Although the inaccessibility of deferred pay is benefical in these terms, the restrictive nature of the legislation makes the scheme oppressive in the short run to some migrant families. Because the monies are given in lump sum, even the savings effect is not guaranteed, as the money may be lost or lavishly spent.

If the scheme cannot be said to be wholly beneficial to the individual migrant, is it nevertheless unimpeachable on the level of benefit to the nation? Deferred Pay monies have been increasingly substantial over the years. In 1933 deferred pay amounted to R58,856 (Pim, 1935, p. 37); in 1965 total remittances amounted to R4,395,000 (Ward, 1967, p. 362); and in December 1976 deferred pay alone was R17,822,431.45. It is expected that, with tighter control over the collection system, it could come to R20 million. In addition, a large amount of migrant earnings flow into Lesotho as remittances to the family, for instance over R8 million in 1976.

As indicated earlier one of the goals stated by the Government for introducing compulsory deferred pay was to obtain a large pool of finance capital for development. In our view, this is commendable. However, one might question whether the objective is achieved. The Government has said that, because of the temporary availability of these funds, they cannot be used to finance long-term projects. Section 5 (a) of the Deferred Pay Act requires investments to be made in such a way that the securities are realisable on demand. The money, therefore, is mainly used in the South African and European money markets to make more money. The migrants receive 5% interest

on their money from the Lesotho Bank while the balance of interest made is administered by a Deferred Pay Trust Fund created under the Deferred Pay Act 1974. This interest is apparently the only part of the migration-derived funds available for long-term investment. Information as to how the interest has in fact been allocated is not available except that it is to be disposed of "in such a manner as the government may direct from time to time". Such information would only be available if section 8 of the Deferred Pay Act was complied with. Section 8 states:

> "(1) The Board shall report to the Minister annually on the state of the Deferred Pay Fund and the distribution of the interest earned. (2) The Minister shall as soon as possible cause a copy of the report and the accounts to be laid on the table of the National Assembly".

It is only after the report has been considered by Parliament that its contents are open to the public.

As of May 1978 no report had been presented to the National Assembly. It would be important to know into what development projects this money has been put. It seems clear, however, that it has not caused a significant increase in job opportunities (see Stron, 1978, pp. 141-2 and 150).

Whatever the net benefits and whoever the ultimate beneficiary, it appears unrealistic and pointless to suggest that the Lesotho Government should stop the deferred pay scheme. The result would be to give greater control of it to the agents of capital in South Africa. It should nevertheless not be forgotten that such cash flows into the country ultimately increase the dependency instead of easing the country out of it.

Meanwhile, the struggle of the workers of Southern Africa against intolerable working and living conditions, and against exploitation, is retarded by the passive support given by independent States to the continuation of the very instrument of exploitation - the migrant labour system. One project which the government could usefully introduce for the miners is a kind of unemployment insurance scheme or pension scheme, using the interest on their deposits of deferred pay as premiums or contributions.[54]

V. CONCLUSION

This paper has attempted to discuss the legal framework within which labour migration from Lesotho to South Africa takes place and to put this framework within its proper historical context.

It has shown that colonial policy and legislation in Lesotho, at first probably unconsciously but subsequently consciously, assisted South African mining capital to obtain the use of Basotho labour-power at a cheap price. In line with contemporary South African policy and legislation to make blacks available to satisfy the growing demand for labour deriving from capitalist development, the Colonial Administration enacted legislation that made Lesotho a labour reserve from which healthy strong men were recruited for the mines on short contracts. Permanent migration to urban areas was not permitted by the

Pass Laws and Native Labour Laws. It would have created a working class capable of organisation, of demands for a more equitable share of the product and for greater responsibility regarding social welfare on the part of the State. To sever the links with the impoverished labour reserve would have completed the process of proletarisation and, therefore, increased the cost of labour as well as of development.

Dispossessed as they were of their most important means of production, land, the Basotho could not effectively resist the institutionalisation of the migrant labour system.

The paper also shows that post-colonial legislation in Lesotho has achieved little to stop the exploitation of the country's citizens. Many indications point to encouragement of the continuation of the system. Thus, the Inter-Governmental Labour Agreement between Lesotho and South Africa unquestionably favours mining capital and South African political interests. It gives the impression of South Africa doing a favour to Lesotho by employing Basotho in the mines regardless of the living and working conditions involved. The deferred pay legislation, which taps the migrants' earnings to create a source of finance for the Lesotho Government, further pulls the country into the quagmire of dependency on South Africa's crude form of capitalism. Still, it may be possible to use these funds for job-creating projects and for post-migration welfare of the workers.

No suggestions can be made as to strategies for change within the present legal framework. Abolition of migrant labour in its present form can only come with the passing of South Africa's form of capitalism with its particular racial ideology of apartheid. This must come about through the struggles of the workers themselves. The struggle for better working and living conditions, accommodation with one's family, social welfare and human dignity is the struggle not only of Basotho or foreign workers but of all blacks in South Africa. The only help the Governments of labour supplying countries can provide is to get together for the purpose of demanding the fundamental right of workers to negotiate for themselves, as well as the other trade union rights which black workers are denied under South African laws.

VI. FOOTNOTES

1. For a record of the negotiations that led to British control of Lesotho see BPP. Lesotho was handed over to the Cape Colony by the British Government to be administered under the Cape Parliament in 1871.

2. Griffith, the Resident Commissioner of Basutoland in 1871 stated: "The discovery of the diamond fields has had a great effect upon the country: money has come into general use and commerce has been much facilitated and increased thereby" (quoted in Burman, 1976, p. 46).

3. At this time the chiefs were disgruntled over the way the British had unilaterally handed over Lesotho to the Cape Colony and deprived them of some of their powers, especially that of allocating land. The situation is best described by Griffith (the Governor's Agent in Lesotho) in his Annual Report of 1873: "The chiefs, finding their power was leaving them, became seriously alarmed and tried to organise a reactionary movement. Outwardly this reaction manifested itself by the simultaneous rush of great many Basutos, at the instigation of the chiefs, to the Diamond fields for

the purpose of procuring arms and ammunition" (Annual Report of Governor's Agent, Basutoland 1873: Cape Parliamentary Papers 1874, Appendix I, Vol.1, G27-74, quoted in Burman, 1976, p. 45).

4. As Arrighi (1973, p.199) says "people get used to what they consume and 'discretionary' consumption items can, in the mere passage of time become necessities whose consumption is indispensable...In periods of rising incomes the subsistence requirements of consumers tend to increase for new goods are added to their budgets and, though in the short run their consumption remains discretionary, in time some of them become necessities."

5. This conclusion is similar to Arrighi's (1973, p. 198-9) for Rhodesia. He focuses on two tendencies which we notice in the Lesotho case: (1) the transformation of "discretionary" cash requirements into "necessary" requirements and (2) an upward tendency in the effort-price of African participation in the peasant economy due to the disequilibrium between means of production (mainly land) and population in the peasant sector and a weakening of the peasantry's competitive position on the produce market.

6. A "Despatch from his Grace the Duke of Buckingham and Chandos to Governor Sir P.E. Wodehouse", No. 149 of July 9, 1868, reads: "You state the resources to be obtained from the hut tax in Basutoland to be ample for the maintenance of the three or four residents you think it necessary to present to place in the territory... Under the circumstances Her Majesty's Government are not disposed to withhold their consent from the scheme which you have proposed of placing Moshesh and his tribe for the present under the control of the High Commission until they become more fitted for Union with one of the Colonies of South Africa on the understanding that no pecuniary or military aid is to be sought from this country". BPP, p. 90.

7. Colonial Annual Reports (C.A.R.) 1898/9 quoted in Leys, 1974, p. 88-89. This statement has a number of implications. First, it tends to imply that by 1899 Basutoland was not destitute, that in fact it still produced a lot of grain - sufficient to satisfy subsistence needs and perhaps for export. However, in the eyes of the British Administrators this self-sufficiency was not the most important factor in the allocation of labour. The more important consideration was the provision of labour to the mainly British owned mines. Capitalist development both in mining and in agriculture in South Africa was in the interest of the British Empire. The use of migrant earnings to purchase English luxury goods, instead of helping to develop local infrastructure for self-reliance, was applauded. The most outrageous part of this statement is that education not serving the needs of South African farms, mines or families should not be promoted.

8. Confidential memorandum on the financial position of Basutoland presented to the Economic Survey Mission Secretariat, Maseru, 17th Oct. 1958, p. 13.

9. Annual Report of Governor's Agent, Basutoland, 1873: Cape Parliamentary Papers, 1874, Appendix I, Vol. i, G. 27-74, pp. 20-27 reproduced in Burman, 1976, pp. 41 and 51.

10. Calculated from figures provided in Pim, 1935, p. 200-202. The Colonial Administration, instead of spending the surplus it received from the peasants on curtailing soil erosion, gave loans to Swaziland, £80,000 in 1909, and donated £50,000 to the loan Fund in 1916 for the purchase of aeroplanes (Colonial Annual Reports 1909/10, 1916/17). In 1935, Pim (1935, p. 133) shows that a further loan of £35,000 was made.

11. For a history of the struggle for absorption of the High Commission Territories into South Africa dating from 1909 (the year of the Union) see Lord Hailey, 1962, and Halpern, 1965.

12. And thus to provide cheap labour to the capitalist sector, as is ably argued by Bozzoli (1977) for South Africa and Arrighi (1973) for Rhodesia. Bozzoli, after pointing out that obtaining black workers implied their removal from the land, organising their recruitment and developing a labour control system, shows how the Mine Managers Association's Committee on Native Labour was set up in 1893 "to inform and pressurise the Chamber on such matters as hut tax,

labour recruitment and pass laws". She quotes the Report of the Committee as recommending that "hut tax will be raised to such an amount that more natives will be induced to seek work, and especially by making this tax payable in coin only; each native who can clearly show that he has worked for six months in the year shall be allowed rebate on the Hut Tax" (quote from "Report of the Committee of the Mine Managers Association on Native Labour Question" in Bozzoli, 1977, p. 10). Arrighi (1973, pp. 193-4, relying on Gann, 1965) discusses the various forms of coercion used by the Government on the African peasant to work for the white man in Rhodesia. First forced wage labour, enforced by Native Commissioners and the police, with its disastrous results, (among other factors a cause of the African rebellions of 1896-7)- abandoned to avoid costly repressive measures. Hut Tax was the next. Payment in kind, although at first accepted, it was soon discouraged "in order to induce Africans to earn their tax by wage labour".

13. Bozzoli states: "The obtaining of black workers implied the removal of black farmers from the land, the establishment of bureaux of labour recruitment, the establishment of labour monopoly, the development of labour control systems and the evolution of crude methods of surplus extraction" (1977, p.10). Arrighi (1973, p. 195) also shows that it was land expropriation from the Africans that ultimately forced the peasants to become permanent migrants dependent for their subsistence on the wage employment in the capitalist sector.

14. Colony of the Cape of Good Hope, Government Gazette, Proclamation 44 of 1877, section headed "Lands, Hut Tax, Pounds and Passes and Co.", quoted in Burman, 1976, p. 35.

15. For a brief description of the development of the pass law system, see Hepple, 1971, p. 15ff.

16. Report of the Interdepartmental Committee on Native Pass Laws, 1920, para. 5 (quoted in Bardill et. al., 1977, p.7).

17. "Agreement between the Governments of the Republic of South Africa and Malawi relating to the Employment and Documentation of Malawi nationals in South Africa", Republic of South Africa Treaty Series No. 10/67, The Government Printer, Pretoria.

18. Although originally serving Lesotho alone, the Agency came to be used by all the High Commission Territories, ostentatiously for the general welfare of the workers but mainly for tax collection.

19. The Malawi Agreement preamble reads:

> "Whereas the Government of the Republic of Malawi and the Government of the Republic of South Africa have taken note of the fact that there is in the Republic of South Africa a large number of persons of Malawi origin who are employed on mines affiliated to the Transvaal and Orange Free State Chamber of Mines or on other mines or in other employment; and
>
> Whereas these persons are either not in possession of identification documents issued by the Malawi authorities or are in possession of documents not recognised by the South African authorities; and
>
> Whereas these persons are therefore subject to repatriation in terms of South African laws; and
>
> Whereas it is the desire of the Republic of South Africa, on the one hand, to establish administrative arrangements to regularize the position of these Malawians, and it is the desire of the Republic of Malawi, on the other hand, to secure continued employment for these Malawians and also additional outlets for the employment of Malawians in the Republic of South Africa;...
>
> Now therefore officials of both countries... have agreed to present to their respective Governments the following proposed arrangements "

20. For an exposition of the reasons behind the continued "apparent paradox" of import of labour amidst conditions of structural labour surplus in South Africa itself, see Clarke, 1977a, pp. 13-16.

21. Dr. Verwoerd expressed this threat to the South African Senate on 5th June 1964 thus:

> "If this is their (High Commission Territories') place of employment, if this is the source of their revenue, if our cooperation in connection with custons revenue is in their interest, then any individual government that is established there must maintain friendship with its neighbour in the interests of its own people" (cited in Halpern, 1965, p. 437).

22. For a discussion of the relationship between apartheid, capital accumulation and cheap migrant labour, see generally Legassick, 1974 and Wolpe, 1972.

23. The contract form signed and attested is not conclusive since the recruitee is subjected to a second medical examination at the WNLA Depot before he is finally allocated to an employer.

The requirements of a contract has a longer history, Pim (1935, p. 36) points out that by 1935 passes issued by the Colonial Administration, though previously unlimited, had come to be restricted at the instance of the Union Government. "Passes for work are not now issued unless the applicant has a definite job to go to."

24. See Jeeves, 1975, p. 11, where he mentions the establishment of special finger-print bureaux in the South African police to detect deserters.

25. The Malawi Agreement of 1967 is more explicit about the consequences of desertion. Article 10 headed "Deserters" states: " A person from Malawi who has deserted from his employment in the Republic of South Africa without just cause shall not be permitted to take up other employment but shall be referred back to his previous employer for completion of his contract of employment. On a second desertion such a person shall be repatriated to Malawi... At the same time such person shall be black-listed for future employment in South Africa".

26. The Bantu (Abolition of Passes and Coordination of Documents) Act No. 67 of 1952; the Bantu (Urban Areas) Act No. 25 of 1945; the Bantu Administration Act, No. 38 of 1927.

28. Section 21 gives the attesting officer power to refuse to attest a contract which does not make adequate provision for transportation upon recruitment or repatriation or which has no provision regarding termination of contract by giving due notice.

29. So concerned is capital to maximise productive potential of labour that contracts (TEBA contract clasue 1 [b]) provide for a second medical examination at the WNLA Depot before the recruitee is actually employed.

30. Section 26 of the Employment (Amendment) Act. Section 27 permits the employer and employee by mutual agreement to have the contract extended by an attesting officer for a period not exceeding 6 months.

31. Equally irrelevant is the power in section 32 given to the Minister to prohibit recruiting in a particular district.

32. Article XVI of the Convention between Tunisia and Belgium concerning the employment and residence in Belgium of Tunisian Workers, 7 August, 1969, U.N. Treaty Series, Vol. 696, p. 73.

33. For a first hand account of conditions in the mines see Ramahapu, 1977 and A.I.M., 1976.

34. Clause XIII of the Specimen Contract annexed to the Tunisia/Belgium Convention and Article XIII of the Convention itself (see footnote 32).

35. In practice only "Boss Boys", the informers of management, are given the privilege of living with their families outside the compound.

36. For this purpose clause 1 (k) provides that the worker agrees to a record of his finger impressions being retained by TEBA at its Central Records Service Department.

37. Article XI of the Convention mentioned in footnote 32. This does not allow the migrant much scope either, but it is better than the threat of immediate repatriation.

38. According to a circular of the Rand Mutual Assurance Company, which insures employees of the mining companies. Chamber of Mines to its members; circular No. 2 of 1975.

39. Wallis, 1977, note 53, has described the frustrating procedure that Basotho migrant workers or their next of kin go through to get compensation. He cites the case, still outstanding, of a man from Mafeteng who lost his thumb while operating a winch. He was denied compensation on the ground that he was injured outside the scope of his employment although he had been a winch operator before and was at the time in a supervisory capacity.

40. In 1971 there were 144,000 awards amounting to R2,016,686 unclaimed. House of Assembly Debates, 1971, Col. 547, quoted by Hepple, 1971, p. 34.

41. In respect of workers under the English Workmen's Compensation Acts, Atiyah (1975, p.318-9) said: "The objective of the employer (or rather his insurer) was always to force a settlement for the lowest possible figure and to use his greater bargaining power to do so; the threat to carry cases to appeal was obviously a good deal more powerful then than it is today under the tort system, partly because trade unions were not so wealthy then as they are now and were less willing to bear the costs of frequent appeals; and partly because (with no other social security payments to fall back on) an injured man or his dependants simply could not afford to wait while a case slowly meandered through the legal process from court to court."

All this is still true of Basotho migrants today especially as they have no trade union support at all let alone a financially comfortable one.

42. Quoted by Böhning, 1977, p. 52.

43. See Clarke, 1977; McDowell, 1976.

44. From a Memorandum of the Chamber of Mines entitled "Annexure B, Compassionate Grants", dated 23/9/74.

45. This historical information is based on the evidence of Mr. Chapman, Superintendant of N.R.C., at a hearing by the Basutoland National Council Select Committee on Labour Organisation, August 1962.

46. During the debate in the Lesotho National Assembly, a member said: "We know that the South African Mining Authorities did not give aid (gifts) to Lesotho alone, yet the monies belonged to the Basotho. They were given also to Botswana and Swaziland and also to Institutions in the Republic itself". Hansard, 2nd Meeting, 1st Session, 26-31 October 1974, p. 10.

47. C.D. Mofeli, M.P. in a speech during the debate on the Deferred Pay Act said: "Deferred pay was banked by mine managements who used the interest thereon as they liked. I also know that there is a politician in this country who received a grant from such interest." Hansard, 2nd Meeting, 1st Session, 28-31 October, p. 24.

48. Hansard, First Meeting, 2nd Session, 17-25 Oct. 1974, p. 252.

49. Ibid, p. 253 (emphasis added).

50. Böhning, 1977, p. 50.

51. ILO, 1978, p. 87.

52. Article 13 (5) of the Model Agreement annexed to the Migration for Employment Recommendation (Revised) No. 86, 1949.

53. For a detailed account of the problem, see Gordon, 1978.

54. Gordon, 1978, makes detailed suggestions as to how deferred pay can be made more useful to the migrant and his family.

VII. SOURCES

A.I.M., 1976 Another Blanket: Report on an investigation into the migrant situation, June 1976 (Horison, Agency for Industrial Mission, 1976).

Arrighi, G., 1973 "Labour Supplies in Perspective: A Study of Proletarianisation of the African Peasantry in Rhodesia", in G. Arrighi and J. Saul, Essays on the Political Economy of Africa (New York and London, monthly Review Press, 1973) pp. 180-234

Atiyah, P.S., 1975 Accidents, Compensation and the Law, 2nd ed. (London, Weidenfeld and Nicolson, 1975).

Bardill, J. et. al., 1977 The State and Labour Migration in the South African Political Economy, with Particular Respect to Gold Mining (Geneva, ILO, December 1977; mimeographed World Employment Programme research working paper [WEP 2-26/WP 19]; restricted).

Böhning W.R., 1977 Black Migration to South Africa - What are the Issues? (Geneva, ILO, June 1977; mimeographed World Employment Programme research working paper [WEP 2-26/WP 10]; restricted).

Bozzoli, B. 1977 "Managerialism and the Mode of Production in South Africa", South African Labour Bulletin, Vol. 3 No. 8 (1977), pp. 6-49.

BPP British Parliamentary Papers: Colonies of Africa, Vol. 46, Lesotho

Bundy, C., 1972 "Emergence and Decline of a South African Peasantry", African Affairs, Vol. 71 (1972), pp. 369-388

Burman, S.B. 1976 The Justice of the Queen's Government: The Cape's Administration of Basutoland, 1871-1884 (Cambridge, African Studies Centre, 1976).

Casalis, E., 1861 The Basutos, or Twenty-Three Years in South Africa, (London, James Nisbet and Co., 1861).

Clarke, D.G., 1977a Foreign African Labour Inflows to South Africa and "Unemployment" in Southern Africa (Pietermaritzburg, University of Natal, Workshop on Unemployment and Labour Reallocation, mimeographed, 18/19 March 1977).

-1977b State Policy on Foreign African Labour in South Africa: Statutory, Administrative and Contractual Forms (Pietermaritzburg, University of Natal, September 1977; mimeographed Development Studies Research Group working paper No. 4).

Davis, D., 1978 African Workers and Apartheid (London, International Defence and Aid Fund, March 1978).

Ellenberger, D.F., and MacGregor, J.C., 1912 History of the Basuto (London, Caxton, 1912).

Gann, L.H. 1965 A History of Southern Rhodesia (London, Chatto and Windus, 1965).

Germond, R., 1976 Chronicles of Basutoland (Lesotho, Morija Sesuto Book Depot, 1967).

Gordon, E., 1978 The Women Left Behind: A Study of the Wives of the Migrant Workers of Lesotho (Geneva, ILO, December 1978; mimeographed World Employment Programme research working paper [WEP 2-26/WP 36], restricted).

Lord Hailey, 1953 Native Administration in the British African Territories, Part V (London, HMSO, 1953).

-1962 The Representative of South Africa and the High Commission Territories (London, Oxford University Press, 1962)

Halpern, J., 1965 South Africa's Hostages (London, Penguin, 1965).

Hepple, B., 1971 South Africa: Workers under Apartheid, 2nd edition (London, International Defence and Aid Fund, 1971).

ILO, 1978 Labour conditions and discrimination in Southern Rhodesia (Zimbabwe) (Geneva, 1978).

Jeeves, A., 1975 "The control of migratory labour on South African gold mines in the era of Kruger and Milner", Journal of Southern African Studies, Vol. 2, No. 1 (1975), pp. 3-29.

Kirkwood, M., "The Mine Worker's Struggle" South African Labour Bulletin, Vol. 1, No. 8, Jan/Feb 1975.

Legassick, M., 1974 "Capital accumulation and violence", Economy and Society, Vol. 3 No. 3 (1974), pp. 253-91

- 1974 "Legislation, Ideology and Economy in Post 1948 South Africa, Journal of Southern African Studies, Vol. 1 No. 1 (1974) pp. 3-35.

Leys, R., 1974 "Migrant Labour and Population Growth in Lesotho," in Report on the National Population Symposium, Maseru, 1974 (Morija, Lesotho Government Publication, 1974), pp. 85-99.

McDowell, M., 1976 "Basotho Labour in South African Mines - An Empirical Study" in Agency for Industrial Mission, ed., South Africa Today: A Good Host Country for Migrant Workers? International Consultation on the Role of the Church among Migrant Mine Workers, 18-19 January 1976 (Horison, A.I.M. 1976).

Neame, L.E., 1962 History of Apartheid (London, Pall Mall, 1962).

Pim, A., 1935 Financial and Economic Position of Basutoland (London, HMSO, 1935).

Plaut, M., 1976 "Report on Anglo-American Corporation Gold Mines", South African Labour Bulletin, Vol. 2 No. 8 1976, pp. 36-45

Pritt, D.N., 1970 Employers, Workers and Trade Unions, book 1 of series Law, Class and Society (London, Lawrence and Wishart, 1970)

Ramahapu, V.T., 1977 Towards a Study of Basotho Labour in the Free State Gold Mines: The Mechanism of Social Control, paper presented at a Conference on the Status of Current Research on Migrant Labour in Lesotho, Roma, National University of Lesotho, 13 January 1977.

Ringrose, H.G., 1976 The Law and Practice of Employment (Cape Town, Juta and Co. Ltd., 1976).

Strom, G.W., 1978 Development and Dependence in Lesotho, the Enclave of South Africa (Uppsala, Scandinavian Institute of African Studies, 1978).

Wallis, M., 1977 Bureaucracy and Labour Migration: The Lesotho Case (Geneva, ILO, November 1977; mimeographed World Employment Programme research working paper [WEP 2-26/WP 17]; restricted).

Ward, M., 1967 "Economic Independence for Lesotho?" Journal of Modern African Studies, Vol. , No. 3(1967), pp. 355-68.

Williams, John, 1971 "Lesotho: Economic implications of migrant labour", South African Journal of Economics, Vol. 39, (1971), pp. 149-78

Wolpe, H., 1972 "Capitalism and cheap labour power in South Africa: from segregation to apartheid", Economy and Society, Vol. 1, No. 4 (1972) pp. 425-454.