

LAND LAW REFORM: A COMPARATIVE ANALYSIS OF SOUTH AFRICA'S LABOUR TENANCY CONTRACT AND MALAWI'S TENANT WORKER'S CONTRACT

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A INTRODUCTION

In this article, a comparative study of land law reform will be made with respect to South Africa's *labour tenancy contract* and Malawi's *tenant worker's contract*.¹ Under a South African labour tenancy contract, a labour tenant occupies and uses for his or her own purposes a parcel of privately owned farmland in exchange of an undertaking by the *labour tenant* to work for or supply labour to the owner of the land for a specified period of the year.² Under a Malawian tenant worker's contract, the private estate owner grants the *tenant worker* access to a parcel of land on private estate land, and material agricultural inputs and services, in consideration for an undertaking by the *tenant worker* to produce and sell agricultural commodities to the private estate owner. Although this article makes a comparative analysis of two separate jurisdictions, each contract does encapsulate common features, identifiable from a range of perspectives.³

Both the labour tenancy contract and tenant worker's contract emerged on the farms of South Africa and on the private estates of Malawi as a consequence of colonialism. Their emergence reflects the negative view each of the colonial States

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¹ S Banda, 'The Limits of Law: The Private Estate, the Tenant Worker and Commodity Production in Malawi' (PhD Thesis, University College Cork 2006). I will use the term 'tenant worker' to refer to a person engaged in tenant worker's contract. The 'tenant worker' is also referred to as a 'private estate squatter', a 'visiting tenant' or a 'tenant sharecropper'—this last term appears in s 3 of Malawi's Employment Act 1999 (No 6 of 2000)—.

² See M Hathorn and D Hutchison, 'Labour Tenants and the Law' in C Murray and C O'Regan (eds), *No Place to Rest: Forced Removals and the Law in South Africa* (OUP, Cape Town 1990) 194.

³ These contracts represent, sociologically speaking, mechanisms for access to otherwise inaccessible land. Historically they emerged as a consequence of the inequitable colonial reconstitution of the socio-legal order. Economic and development policy viewed them as transient and awkward institutions incompatible with the modern capitalist relations of production. The legal rights of both the labour tenant and the tenant worker have been truncated. From a land reform perspective, they have both been the subject of campaigns aimed at attaining dignity, legal rights and secure tenure.

had of the indigenous systems of customary land tenure and their eventual marginalisation⁴ through legal, social and economic policies of racial discrimination.⁵

Prior to the establishment of the pluralist political system, South African society had relatively intense and sustained debates respecting the land question. Consequently, the Constitution of South Africa has provisions that expressly support the land law reform process.⁶ Land reform in South Africa is therefore intended to address the legal, social and economic distortions that resulted from policies of racial discrimination.⁷ Similarly, in Malawi, grievances over the land question constituted an important rallying point in the country's re-democratisation process in the early 1990s. Even the Malawian Government has recognised that the land question had not been dealt with equitably.⁸ While Malawi's Constitution does not have a provision expressly mentioning land reform, some of its provisions may be construed as allowing for land reform.⁹

Nevertheless, the contemporary responses by Malawi and South Africa to the historic inequity incorporated in the labour tenant contract and the tenant worker's contract have little in common. For its part, South Africa has adopted a robust approach towards the rectification of the historic injustice that has characterised the labour tenancy contract. This has been done in the context of South Africa's land reform programme,¹⁰ mirrored to some extent in Malawi.

In this regard, Malawi has recently formulated and adopted a new land policy, which is expected to form the basis for a comprehensive land law reform initiative.¹¹ It has acknowledged in various fora the tenant worker's deplorable social, economic and legal situation on the private estate. However, Malawi's new land policy does not make any reference to the tenant worker, the tenant worker's contract or the obvious need to undertake corrective action. This is a strong indication that the proposed land policy will not address the social, economic and legal deficits underlying the plight of the tenant worker.¹²

⁴ See TW Bennett, 'African Land—A history of Dispossession' in R Zimmermann and D Visser (eds), *Southern Cross: Civil and Common Law in South Africa* (Clarendon Press, Oxford 1996) 65–94. See also JP McAuslan, *Bringing the Law Back In: Essays in Land, Law and Development* (Ashgate, Aldershot 2003) ch 4.

⁵ See H Mostert, 'The Case of the Richtersveld Community: Promoting Reconciliation or Effecting Division?' [2002] 1 Tyds S Afr R 160, 165–167 where it is stated that this is combated by the objective of the land law reform process.

⁶ See the Constitution of South Africa Act 108 of 1996. See also pp 213–14, below.

⁷ H Mostert, 'Land Restitution, Social Justice and Development in South Africa' (2000) 119 SALJ 400, 403–05.

⁸ Republic of Malawi, Ministry of Lands, Housing, Physical Planning and Surveys, *Malawi National Land Policy* (Lilongwe 2002) [1.1.3]–[1.1.4], [2.3]–[2.4]. <<http://www.malawi.gov.mw/publications/landpol.htm>> accessed 27 December 2006

⁹ Republic of Malawi (Constitution) Act (No 20 of 1994); text to n 23, below.

¹⁰ Republic of South Africa, Department of Land Affairs, 'White Paper on South African Land Policy', (Department of Land Affairs, Pretoria 1997). See also DL Carey Miller and A Pope, 'South African Land Reform' (2000) 44 J Afr L 167, 167–194.

¹¹ Malawi Land Policy Document (n 8).

¹² The Malawi Law Commission has been given the task, among others, to review existing land legislation and to develop a new legislative framework for land matters. Although not meant to be

In this article, attention is drawn to these divergent responses. It will be argued that Malawi's response is inconsistent with the domestic concern expressed over the social, economic and developmental status of the tenant worker and with domestic constitutional obligations and regional trends. Moreover, it will be argued that South Africa's response provides Malawi with a reference point for the formulation of corrective action appropriate to the circumstances that prevail on the private estates of Malawi. A brief history of the conditions that led to the emergence of the labour tenancy contract and the tenant worker's contract will be provided, followed by a historical discussion of the regulatory frameworks of the South African labour tenancy contract and the Malawian tenant worker's contract, as well as their impact on labour tenants and tenant workers. Later on, the contemporary responses by both South Africa and Malawi to these historical phenomena in the context of their land law reform programmes will be discussed. On the basis of a comparative analysis, it can indeed be considered that South Africa's response to the historical situation of the labour tenant offers invaluable lessons for Malawi.

It will also be argued that Malawi must re-constitute the tenant worker's contract within a framework that promotes the personal development of the tenant worker as a right-bearer. Furthermore Malawi must craft a comprehensive and sustainable response to the situation of the tenant worker's contract along the lines adopted by the South African approach. Ultimately, it will become apparent that while this process may face institutional and structural challenges and perhaps opposition from vested interests, concerns over the social, economic and developmental circumstances of the tenant worker as well as domestic constitutional obligations and regional trends should provide a justification for a reform of the tenant worker's contract.

B. THE EMERGENCE OF THE LABOUR TENANT AND THE TENANT WORKER IN HISTORICAL CONTEXT

1 South Africa and the Historical Context of the Labour Tenant

As stated above, the emergence of the labour tenant's contract in South Africa is a direct consequence of the attitudes prevalent during the colonial period. The development of the labour tenancy contract is linked to the Natives Land Act 1913,¹³

exhaustive, a list of legislation earmarked for review was published and it did not include legislation applicable to the tenant worker and the tenant worker's contract. At the time this article went to press, the 'Report on the Review of Land Related Laws' was not published online. See Republic of Malawi, Law Commission, 'Malawi Law Commission Official Website' <<http://www.lawcom.mw/index.htm?http%3A//www.lawcom.mw/land.htm>> accessed 17 January 2007.

¹³ Act 27 of 1913 (later renamed Black Land Act 1913). See C Bundy, 'Land, Law and Power: Forced Removals in Historical Context' in Murray and O'Regan (n 2) 5–8. See also Hathorn and Hutchison (n 2) 195 where the history of labour tenancy is discussed.

which was enacted so as to legally justify and formalise the use of racial grounds as a criterion of access to land. The purpose of the Natives Land Act 1913 was to facilitate the proletarianisation of South Africans categorised as blacks and to create a white landowning class. In practice, because of the provisions of the Natives Land Act 1913, independent access to land by black persons was restricted to relatively small and agriculturally unproductive designated areas: the so-called ‘scheduled areas’.

Overnight, this Act turned South African black landowners into squatters on their own land. Section 1 of the Natives Land Act 1913 prohibited a black person from entering into ‘any agreement or transaction for the purchase, hire or other acquisition from a person other than a native’ of any land outside the designated areas. Its purpose was to eliminate independent forms of existence by black people on lands the state had reserved for white people. Consequently, blacks had the ‘option’ of either relocating to the designated areas, where independent living could be pursued, or of remaining on what was previously their land—now the property of the white landowning class—and lead dependent livelihoods.¹⁴ The Labour Tenancy Contract provided a mechanism that enabled both land-expropriated blacks and the white landowning class to get around the restrictions on land access by black people. Furthermore, the labour tenancy contract did not fall within the ambit of the Natives Land Act 1913, on the basis that it did not constitute an agreement or transaction for the ‘purchase, hire or acquisition’ of land.

2 The Tenant Worker’s Contract in Colonial and Post-Colonial Malawi

In colonial Malawi, the tenant worker’s contract emerged as the dominant contractual relationship in the commodity production labour process of the private estate.¹⁵ This domination was due to several factors.

First, the Malawian colonial state engaged in restrictive commodity production policies.¹⁶ Before the 1940s, the colonial state viewed economic development as contingent on the establishment of an expatriate white landowning class engaged in private estate commodity production. In order to support the commodity pro-

¹⁴ Black people lived ‘dependent livelihoods’ in the sense that access to the use of land by the labour tenant was conditional on compliance with the terms of the labour tenancy contract.

¹⁵ I define the term ‘labour process’ as the use of labour for the purpose of ‘capitalist production, accumulation and profit’. See T Brass and H Bernstein, ‘Introduction: Proletarianisation and Deproletarianisation on the Colonial Plantation’ in EV Daniel, H Bernstein and T Brass (eds), *Plantations, Proletarians and Peasants in Colonial Asia* (Cass, London 1992) 6.

¹⁶ See J McCracken, ‘Planters, Peasants and the Colonial State: The Impact of the Native Tobacco Board in the Central Province of Malawi’ (1983) 9 *Journal of Southern African Studies* 172, 176–83. See also J McCracken, ‘Share-Cropping in Malawi: The Visiting Tenant System in the Central Province C. 1920–1968’ in Centre of African Studies, University of Edinburgh, ‘Malawi: An Alternative Pattern of Development’ (Seminar Proceedings No 25, Centre of African Studies, University of Edinburgh, Edinburgh 1985) 35, 44–51.

duction of the white property-owning class, the colonial state restricted the small (black) farmer's commodity production. As a result, the Malawian small farmer was compelled to engage in contractual agreements with private estate owning classes in order to produce commodities on the latter's private estates. This contractual agreement, the tenant worker's contract, enabled the small farmer to participate in lucrative commodity-producing activities in an otherwise hostile commodity production environment.

Second, the Malawian private estate owner could not sustain commodity production on the basis of a wage-earning workforce. Therefore, the estate owner resorted to engaging small farmers in the tenant worker's contract.¹⁷ However, despite of the best efforts of the colonial Malawian state and the expatriate commercial and agriculture business community, a labouring class completely dependent on wage-earning was almost non-existent¹⁸ because the private estate owning class faced competition for labour from better paying domestic commercial enterprises, the mining centres of South Africa and of Northern and Southern Rhodesia (now Zambia and Zimbabwe), as well as from independent commodity production by the small farmer.

For post-colonial Malawi, the production of agricultural commodities has been a major generator of economic growth. The post-colonial state's policies have perpetuated inequality between private estate agriculture and small farmer agriculture favouring the former over the latter. However, a fundamental change occurred in the ranks of the private estate owning class in that it underwent a purposive policy of africanisation.¹⁹ Parallel to this policy, there was a considerable expansion of the private estate sector linked to the fortunes of Malawi's small farmers on a number of levels through the pursuit of specific policies in favour of private estate commodity production.

The post-colonial state has overseen a further concentration of power in the state for the determination of land access and land use. Institutions that regulate customary land tenure have been weakened and manipulated in order to serve the particular needs of private estate commodity production.²⁰ The expansion of the private estate sector and the intensification of the private estate commodity production fundamentally depended on the conversion of customary land to private

¹⁷ R Palmer, 'White Farmers in Malawi: Before and After the Depression' (1985) 84, *Afr Aff* 211, 235–39.

¹⁸ MOJ Chipeta, 'Labour in Colonial Malawi: A Study of the Growth and Development of the Malawian Working Class, C. 1891–1961' (PhD thesis, Dalhousie University, Halifax 1986) 459–60.

¹⁹ GCZ Mhone, 'The Political Economy of Malawi—An Overview' in GCZ Mhone (ed), *Malawi at the Crossroads: The Post-Colonial Political Economy* (Sapes, Harare 1992) 6. See also McCracken 1985 (n 16) 58–59.

²⁰ See: RM Mkandawire and CD Phiri, 'Assessment of Land Transfer from Smallholders to Estates' (World Bank, Eastern and Southern Africa Project, Washington DC 1987) 57–58; Republic of France, Ministry of Agriculture, Bureau pour le Developpement de la Production Agricole, 'Final Report on the Customary Land Utilisation Study' (Lilongwe 1998) 99–103.

land through the Land Act.²¹ The post-colonial state facilitated the acquisition of converted customary land by prospective private estate operators through leases made under the Land Act.²² As a result, more private estates were created, the private estate sector expanded and a post-colonial constituency of dispossessed rural communities was built on account of this conversion of customary land.

Another aspect linking the expansion of the Malawian private estate sector and the fortunes of small farmers has been the control of peasant agriculture production and the marketing of peasant commodity products. Through the Special Crops Ordinance, 1963, post-colonial agricultural policy precluded the small farmer from participating in the agricultural production of specified commodities.²³ Further legislation established restrictive marketing mechanisms whereby the small farmers were compelled to market their produce through the state,²⁴ thereby deliberately advancing the interests of the private estates.

This way of structuring the small farmer's commodity production and marketing, combined with the constant diminution of customary land reserves, a rapid population growth rate and a labour market devoid of employment opportunities had an impact on the private estate operator's capacity to access labour. The small farmer's capacity to engage in independent livelihood was undermined, a situation which has compelled the members of the small farmer's class on the margins to seek employment in the private estate sector through the tenant worker's contract. Consequently, the tenant worker's contract continues to be a dominant feature on Malawian private estates.

C THE TENANT WORKER: A DISTINCT LEGAL CLASS ON PRIVATE ESTATES

Malawian law recognises three different categories of residents in private estates, among which the tenant worker. Established under the Africans on Private Estates

²¹ Malawi Land Act, 1965 (No. 25 of 1965) s 2 under which land in Malawi comes under three categories: private land, public land and customary land. Until the early 1990s, lucrative commodity production could only be carried out on land registered as private land. However, there being no reserves of private land, other categories—mostly customary land—were converted into private land.

²² See Malawi Land Act (n 21) s 5. See C Ng'ong'ola, 'Customary Law, Land Tenure and Policy in Some African Countries at the Threshold of the Twenty-First Century' in GE van Maanen and AJ van der Walt (eds), *Property law on the Threshold of the 21st Century* (Proceedings of International Colloquium, Maastricht 28–30 August 1995, MAKLU, Antwerp 1996).

²³ No. 27 of 1963 (now repealed).

²⁴ See CHS Ng'ong'ola, 'Statutory Control of Land and The Administration of Agrarian Policies in Malawi' (PhD Thesis, University of London, School of Oriental and African Studies 1983) ch VI. See also: I Livingstone, 'Agricultural Development Strategy and Agricultural Pricing Policy in Malawi' in K Arhin, P Hesp and L van de Laan (eds), *Marketing Boards in Tropical Africa* (KPI Ltd, London 1985) 172, 177–85; J Kydd and R Christiansen, 'Structural Changes in Malawi Since Independence: Consequences of a Development Strategy Based on Large-Scale Agriculture' (1982) 10 *World Development* 355, 366–71; Mhone (n 19) 19–20.

Ordinance, 1962²⁵ (now Africans on Private Estates Act, 1962)²⁶—and originally the Natives on Private Estates Ordinance, 1928—²⁷, this system must be understood in light of colonial policy in Malawi.

Following the establishment of the Protectorate of Nyasaland,²⁸ the colonial state made land grants to a white private estate owning class. Communities that claim to have been dispossessed of rights of ownership and use in respect of the lands granted contest the legitimacy of these land grants. Therefore there are two broad categories of people residing on the private estates. The first category constitutes people who are resident on the private estate on account of contractual relations. The second category comprises communities which claim rights of ownership and use over private estate lands, on the basis of a historical and cultural connection to them.

The Africans on Private Estates Act provides a framework for distinguishing these different classes of residents on private estates. It also provides a framework for the reconciliation of competing interests in land on the private estates between the residents on the private estate, on the one hand, and the private estate owning classes, on the other.²⁹ Under the Act, the claims of the Malawian dispossessed communities were purportedly addressed by recognising the right of the members of these communities to live on parts of the private estate lands under specified conditions.³⁰ The Act recognises three classes of residents on private estates:

- 1 The dispossessed communities, who have a statutory right to reside on the private estate lands. They are referred to as ‘resident Africans’.³¹
- 2 The employees of the private estate, referred to by the Act as ‘exempted Africans’.³²
- 3 Tenant workers and other persons who reside on the private estate pursuant to land access agreements, referred to as persons under a ‘special agreement’.³³

²⁵ No 12 of 1962.

²⁶ Although originally enacted as an ‘ordinance’, this piece of legislation has been known as the Africans on Private Estates Act since independence, and it will be referred to as such hereafter.

²⁷ No 15 of 1928. This ordinance was replaced by the Africans on Private Estates Act (n 25).

²⁸ Nyasaland was the name of Malawi before independence (1964). It had been known as the Protectorate of Nyasaland since 1907, but it was originally established as the British Central Africa Protectorate in 1891.

²⁹ B Pachai, *Land and Politics in Malawi, 1875–1975* (Limestone Press, Kingston 1978) ch VII. See also C Baker, *Seeds of Trouble: Government Policy and Land Rights in Nyasaland, 1946–1964* (British Academic Press, London 1993) chs 2, 3.

³⁰ The expansion of the private estate sector in the post-colonial period has also produced communities who dispute the legitimacy of the ownership of private estate lands. However, the Africans on Private Estates Act (n 25) has neither been applied to this situation nor has it been used at all since 1970.

³¹ See Africans on Private Estates Act (n 25) ss 3, 5. The purpose of the bill was described as ending ‘Thangata’: a maligned practice of the private estate owning classes whereby the dispossessed communities were compelled to offer their labour for a specified period in the year in exchange for rights of residence. See Nyasaland Protectorate, Legislative Council, *Proceedings of the Fourth Meeting of the Seventy Sixth Session of the Legislative Council* (June 1, 1962) 266 ff.

³² Africans on Private Estates Act (n 25) s 3.

³³ Africans on Private Estates Act (n 25) ss 3, 25.

In the following section, it will be shown how legislation, the principles of law and the administration of the law were employed, both in South Africa and Malawi, to reinforce the weak position that the labour tenant and the tenant worker has had in relation to farmland and private estate land respectively.

D THE REGULATORY FRAMEWORKS OF THE LABOUR TENANCY CONTRACT AND THE TENANT WORKER'S CONTRACT

1 South Africa: The Regulation of the Labour Tenancy Contract

The rationale of the legal regime constituted by South Africa's Natives Land Act 1913 was to prevent or limit the acquisition of proprietary rights in land by specified classes of people. The emergence and endurance of the labour tenancy contract was closely linked to a wider state project aimed at the development of capitalist production relations. The Government's attitude towards the labour tenancy contract swung from grudging tolerance (1913–1948) to extreme hostility (after 1948). The labour tenancy contract was tolerated when the authorities held a sympathetic attitude towards cash-strapped property owners who were unable to engage wage-earning workers. The use of labour tenants proved to be a cheaper option for the property owners. The later hostility, on the other hand, was a reflection of the attitude of the state towards labour tenancy, which it now perceived as an economically awkward and retrogressive institution of production. Furthermore, labour tenancy undermined the policies of racial segregation pursued by the apartheid state.

During the period of 'grudging tolerance' (1913–1948), the Native Service Contract Act was enacted.³⁴ It recognised, defined and regulated the detailed aspects of the labour tenancy contract. Under the Native Service Contract Act, the parties to the contract were not required to satisfy any formalities to enter into the contract, which lasted for one year, extendable for a period of one to three additional years. The Act also provided for the termination of the labour tenancy contract and all formalities required for it. Through subsequent legislation,³⁵ a Labour Tenant Control Board was established to register, monitor and control the number of labour tenants on a farm.

In the period following 1948, hostility towards the labour tenancy contract intensified and culminated in the passage of the Bantu Laws Amendment Act.³⁶ The purpose of this Act was to annihilate the labour tenancy contract and to remove 'surplus' labour tenants from white owned farmland in South Africa. It is

³⁴ Act 24 of 1932. See Hathorn and Hutchison (n 2) 195–96 where this Act is discussed.

³⁵ See Native Trust and Land Act 18 of 1936, ch IV. This Act was later renamed 'Development Trust and Land Act'.

³⁶ Act 42 of 1964 which repealed the South Africa Native Service Contract Act (n 34) and amended the South Africa Native Trust and Land Act (n 35).

estimated that some 340,000 labour tenants were removed from white-owned land between the years 1960–1970 and that a further 400,000 were removed from such lands between the years 1971–1974.³⁷ By 1986, the Government could virtually have declared itself victorious in its efforts to annihilate labour tenancy.³⁸ Nevertheless, labour tenancy did survive, mainly in the provinces of Mpumalanga and KwaZulu Natal.³⁹

In the absence of legislation since the passing of the Bantu Laws Amendment Act, the labour tenancy contract was regulated on the basis of South African contract law, which has always been uncertain on the point of whether the labour tenancy contract constitutes a lease and a contract of service or a contract of employment.⁴⁰ From a legal perspective this distinction is of fundamental importance, because if labour tenancy was considered a lease, the labour tenant could potentially acquire proprietary rights under South African law. This capacity to acquire proprietary rights would have had profound social and economic implications for the labour tenants, as their tenure would become relatively more secure.

Alas, such an interpretation would run afoul of the Natives Land Act 1913. In *De Jager v Sisana*,⁴¹ it was held that a labour tenancy contract was not a lease. The labour tenancy could be construed as either a contract of employment or an ‘innominate contract’.⁴² Although labour tenants were able to seek the usual protections offered by contract law, their rights were less than those of proprietors. Consequently, the tenure of a labour tenant party to a labour tenancy contract—if construed as an innominate contract—was less secure than the tenure enjoyed under a lease, but more secure than the tenure conferred by a contract of employment.

In spite of these distinct implications in law, these differences were mostly academic for the South African labour tenant, as the odds were stacked heavily against him. Since labour tenants reside in rural and isolated places, their struggles have enjoyed poor visibility and ‘are further distanced from legal institutions because the law is obscure and remote’.⁴³ The owners of farms hardly paid any attention to the finer points of law when seeking the removal of a labour tenant from their land.

³⁷ See Hathorn and Hutchison (n 2) 197 where these figures are attributed to M Morris, ‘State Intervention and the Agricultural Labour Supply post-1948’ in F Wilson, A Kooy and D Hendrie (eds), *Farm Labour in South Africa* (David Phillip, Cape Town 1977) 71.

³⁸ See the Abolition of Influx Control Act 68 of 1986 which repealed Chapter IV of the South Africa Native Trust and Land Act (n 35). All racially discriminatory land laws were finally abolished by the Abolition of Racially Based Land Measures Act 108 of 1991.

³⁹ A statutory framework has been enacted, which partly aims to phase out labour tenancy. This will be discussed in a subsequent part of this article. See pp 210–14, below.

⁴⁰ See Hathorn and Hutchison (n 2) 198–200.

⁴¹ 1930 AD 71 at 76 per Curlewis JA and at 83 per Wessels JA.

⁴² See *De Jager* (n 41) 84 per Wessels JA. See also Hathorn and Hutchison (n 2) 199–200.

⁴³ N Haysom, ‘Rural Land Struggles: Practising Law Democratically’ in Murray and O’Regan (n 2) 107. See also A Dithake, ‘Labor Tenancy and the Politics of Land Reform in South Africa’ in R Levin and D Wiener (eds), *No More Tears: Struggles for Land in Mpumalanga, South Africa* (Africa World Press, Trenton 1997) 226, 228–30.

Furthermore, the concerns of labour tenants simply could not be addressed by compliance with the required technicalities of the law applicable to the labour tenancy contract at the time. Fundamentally, the labour tenant claims a historical and cultural link to the land on which he was forced to eke out a precarious existence without the protection of substantive rights. For the labour tenant, the basis on which the property rights of the farmland owners was established lacked legitimacy, because the legal regime creating them did not guarantee effectively—or at all—the property rights of the majority population.⁴⁴ These rights were truncated or extinguished on the authority of violence under the garb of law.⁴⁵

In the wake of South Africa's new constitutional system, statutory law has expressly intervened in the situation of the labour tenant in certain distinct ways. First, a legal framework has been put in place that aims to enhance the security of tenure of the labour tenant. Secondly, on the basis of a special legal mechanism, a labour tenant is now able to acquire rights of ownership to the land which he or she occupies. A further and perhaps more controversial development of the law has seen the labour tenant being granted protection against successors in title of farmland owners, a right previously denied to him by South African common law.⁴⁶

2 Malawi: the Regulation of the Tenant Worker

As for Malawi, the special agreement provides a legal framework for the constitution of the tenant worker's contract on private estates. It does not, however, expressly state or clarify whether there are any proprietary implications that flow from the special agreement and the nature of such proprietary implications.⁴⁷ Similarly, the special agreement does not restrict the relationships arising out of commodity production to a particular type of contract. Functionally, the Malawian special agreement provides a legal framework for the creation of contractual relationships on the private estate whose primary purpose is the production of commodities referred to under the Africans on Private Estates Act as economic crops.⁴⁸ The contract must be written and it must provide for access to

⁴⁴ EF Kanyongolo, 'The Limits of Liberal Democratic Constitutionalism in Malawi' in KM Phiri and KR Ross (eds), *Democratisation in Malawi: A Stocktaking* (CLAIM, Blantyre 1998) 368 ('not guaranteed effectively or at all'); Dithake (n 43) 220–26.

⁴⁵ Dithake (n 43) 224–28.

⁴⁶ This is because the *huur gaat voor koop* rule—the one allowing for protection against successors in title—did not reach the labour tenancy contract, as this rule applies to leases. See MD Southwood, *The Compulsory Acquisition of Rights by Expropriation, Way of Necessity, Prescription, Labour Tenancy and Restitution* (Juta, Landsdowne 2000) 134–38; see also discussion at pp 217–18, below.

⁴⁷ A tenant worker does exercise limited land use rights such as the right to draw water, to use fuel and burial rights. These can constitute proprietary rights under Malawi land law, but they are of a limited nature.

⁴⁸ See Africans on Private Estates Act (n 25) s 3 where economic crops are defined as 'such crops as are grown for sale and not for the consumption of the grower or his family'.

land. Furthermore, the minister concerned must be satisfied that the terms of the contract guarantee adequate security of tenure and that the contract is fair and equitable.⁴⁹

The use of the special agreement in the creation of the tenant worker's contract in both the colonial and the post-colonial period has not been impressive. Under the colonial regime, the private estate owning class sought to exclude the tenant worker's contract from the scope of the old Natives on Private Estates Ordinance, 1928.⁵⁰ The private estate owning class was keen on creating the impression that the tenant worker's contract did not confer proprietary rights on the tenant worker, although as an absolute view this position is incorrect both in law and in equity. They lobbied the colonial administration to adopt a *laissez faire* policy with respect to their activities on the private estate, including the tenant worker's contract. The private estate owning class argued for self-regulation on the grounds that it was economically wise to do so and that it was politically compatible with liberal ideals.

From the point of view of the private estate owning class, this *laissez faire* approach represented the desire to set boundaries beyond which the colonial administration could not legitimately extend its reach, as well as an expression of the colonial regime's own commitment to respect private property.⁵¹ Regulation in all its forms was resented and viewed as an expression of paternalism by the colonial administration. Furthermore, the private estate owning class argued unconvincingly that the provisions of the Natives on Private Estates Ordinance, 1928 did not cover the tenant worker and the tenant worker's contract on the basis that the Natives on Private Estates Ordinance, 1928 applied only to a designated area and only to specific private estates. A plausible technical reason was that contrary to formal requirements of the Natives on Private Estates Ordinance, 1928, many a private estate owner did not wish to reduce the tenant worker's contract into written form. Non-compliance, from the perspective of legal formalism, removed the tenant worker from the ambit of the special agreement. In spite of a penalty for non-compliance with this requirement under the Act, no private estate owner was ever prosecuted.

Similarly, Malawi's post-colonial⁵² enforcement record of the Africans on Private Estates Act on private estates has been dismal because of strategic developmental interests of the state.⁵³ Unlike during the colonial period, the

⁴⁹ See Africans on Private Estates Act (n 25) s 25. Such an interventionist approach requiring an overt act on the part of the minister sits uncomfortably with the orthodox common law approach to proprietary rights.

⁵⁰ See n 27, above.

⁵¹ S Hynde, a publisher and private estate operator, stated that 'any control . . . will be resented as it interferes with owners and leases of private land'. See S Hynde, *Letter to the Chief Secretary, Protectorate Administration dated 23 June 1924* (Malawi National Archives SI/1879/24).

⁵² Malawi attained self-government in 1962, independence in 1964 and republican status in 1966.

⁵³ The non-application of the Africans on Private Estates Act to the tenant worker's contract is consistent with the post-colonial development approach, which has been based on private estate commodity production. For a discussion of the post-colonial development approach, compare Kydd and Christiansen (n 24) where the main argument is that the dominance of private estate agriculture in

post-colonial application of the Africans on Private Estates Act has not been universal and happens by proclamation alone.⁵⁴ In the absence of legislative intervention, the regulation of the tenant worker's contract is dependent on a common law contract. In post-colonial Malawi, state practice, the conduct of the private estate owners and the social position of the tenant worker have combined to create a strong and enduring impression that the tenant worker's contract, as a social institution that mediates land relations, is a legal aberration. This impression conveys that there is no law, statutory or otherwise, specifically addressing the tenant worker's contract. Officials of state ministries with responsibility for aspects that relate to the private estates view the question about the tenant worker's position on the private estate as a source of irritation. In the Department of Land Affairs, the tenant worker and the tenant worker's contract are not considered to fall within the Department's official remit of responsibility. This suggests complicity in the view that a jural relationship does not exist between the private estate owner and the tenant worker.⁵⁵

The post-colonial private estate owner, like his colonial counterpart, views the tenant worker's association with the private estate solely in terms of a relationship to produce a commodity without any jural implications. The post-colonial private estate owner does not wish to create the impression that proprietary rights—rights other than personal rights—extend to the tenant worker by virtue of his contract with the private estate owner. A clear implication of this is the removal of any suggestion that a proprietary relationship may exist in law. The tenant workers are viewed as not being able to establish a 'psycho-spatial separation between their land and those of others'.⁵⁶ In legal parlance, the tenant worker does not have exclusive possession, a notion that 'imports a hidden structure of rules which critically define the legal phenomenon of private property'.⁵⁷

Malawi is attained by deliberate Government policy and Banda (n 1) where this argument is expanded further, by arguing that the Africans on Private Estates Act has not been enforced because the Government did not wish to undermine the strategic role of the private estate. See also FL Pryor and C Chipeta, 'Economic Development Through Estate Agriculture: The Case of Malawi' (1990) 24 *Can J Afr Stud* 50, 51–61 especially; Mhone (n 19) 13–20.

⁵⁴ See Africans on Private Estates Act (n 25) s 2.

⁵⁵ See Banda (n 1) ch 5. A couple of points may be put forth as evidence of this assertion. The land policy published under the auspices of the ministry of the Malawi Government responsible for lands poignantly fails to address the status of the tenant worker and the tenant worker's contract. See Malawi Land Policy Document (n 8). The ministry is responsible for the land rights registration system for both registered and unregistered land. To that extent, a suggestion that the tenant worker's contract does not fall within the area of responsibility of the ministry implies that the tenant worker's contract does not give rise to proprietary interests in land.

⁵⁶ A Grear, 'A Tale of the Land, the Insider, the Outsider and Human Rights (An Exploration of Some Problems and Possibilities in the Relationship between the English Common Law Property Concept, Human Rights Law, and Discourses of Exclusion and Inclusion)' (2003) 23 *LS* 33, 36–39. Psycho-spatial in this context means that the tenant worker, in his or her relationship to land, is viewed as a person who does not have the legal capacity to conceptually ('psycho') and physically ('spatial') exclude others from the land.

⁵⁷ K Gray, 'Property in Thin Air' (1991) 50 *CLJ* 252, 269.

In a practical sense, the tenant worker has been cast outside the remit of land law and characterised as a person who may only become a subject of land law under appropriate circumstances. As a 'potential' subject of land law, the tenant worker in Malawi is caught up in what Tomasson Jannuzi refers to as 'definitional obfuscation'.⁵⁸ In spite of the use of the word 'tenant', the tenant worker is portrayed as a person who does not have a recognised claim in law or in equity to the use of land on the private estate. There is no indication by either the state or the private estate owners of the recognition of proprietary land rights of the tenant worker.

Similarly, the tenant worker has not fared well with regard to the specific question of security of tenure. Although the Africans on Private Estates Act does attempt to address this question, it may be argued that the question of security of tenure ought to be dealt with independently from the question of whether the tenant worker acquires proprietary rights under a tenant worker's contract. This is mainly because the responsible minister has not adhered to the requirement set by the Africans on Private Estates Act that he or she must be satisfied the terms of the contract do guarantee adequate security of tenure.

The non-recognition of proprietary implications of the tenant worker's contract and the non-observance of statutory mechanisms aimed at enhancing the security of tenure of the tenant worker creates adverse effects for the tenant worker. A land access mechanism ought to be conceptualised as a 'relationship that is subservient to the social' as opposed to a mere facilitative technical tool or structure.⁵⁹ This approach is justified on social, economic, and developmental bases.⁶⁰ Studies have repeatedly shown that as a social institution of production, it is the tenant worker who bears the largest share of risk of production.⁶¹ The conception of an employment relationship as the only valid legal characterisation of the tenant worker's contract is too rigid a view and does not address the social, economic and developmental concerns that pertain to the tenant worker. Studies on agricultural tenancies also indicate that, from an economic point of view, efficiency of agriculture is linked to guarantees of long-term access to land because such access facilitates

⁵⁸ F Tomasson Jannuzi, *India's Persistent Dilemma: The Political Economy of Agrarian Reform* (Westview Press, Inc., Boulder 1994) 147.

⁵⁹ See McAuslan 2003 (n 4) 5 where it is stated: 'We can in fact isolate two broad approaches to land in society; one of which sees land as basically part of the social relations between people and society, the other of which sees land as basically part of the economic relations between persons and persons in society.'

⁶⁰ This is based on the law in context model approach to the discussion of property law. See M Doupe and M Salter, 'Property Law: Between Private Rights and Public Policy' in P Jackson and DC Wilde (eds), *Contemporary Property Law* (Ashgate, Aldershot 1999) 82–87. See also McAuslan 2003 (n 4) ch 1.

⁶¹ See, for example, L Tørris (ed), *The Smoking Business: Tobacco Workers in Malawi* (Fafo Report No 39, Institute for Applied Social Science, Oslo 2000) ch 3 at Fafo Foundation, 'Fafo-Report 339: Tobacco Tenants in Malawi' <<http://www.fafo.no/pub/rapp/339/>> accessed 18 January 2007 where these risks are explained for the particular case of the Malawian tobacco tenant workers. See also S Lastarria-Cornhiel and J Melmed-Sanjak, *Land Tenancy in Asia, Africa and Latin America: a Look at the Past and a View to the Future* (Working Paper No 27, Land Tenure Centre, University of Wisconsin, Madison 1999) <http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=1265> accessed 18 January 2007.

the reinvestment of profits in the holdings.⁶² From a developmental perspective, a lack of security of tenure undermines the personal development of the tenant worker and his family⁶³. From a legal perspective, the tenant worker has been subject to summary evictions leading to social hardship.

In order to address the problems of the tenant worker it is suggested that Malawi may learn from the specific experience of South Africa. First, the experience of South Africa is instructive with regard to the question of conversion of personal rights to proprietary rights, in particular to the protection of the tenant worker against successors in title of private estate owners. Under the Africans on Private Estates Act, a common law- and equity-based land regulatory framework, land law in Malawi provides a framework within which the tenant worker may seek to claim legal or equitable proprietary rights. However, the common law route provides the tenant worker with little assurance, since it is dependent on either the cooperation of the private estate owner or on the satisfaction of elements beyond the capacity of the tenant worker.⁶⁴

Secondly, South Africa's experience is informative in relation to its development of a statutory framework that incorporates detailed terms under which tenure is made more secure. This experience provides Malawi with a basis for developing a statutory framework appropriate to the circumstances of the tenant worker. The lack of secure tenure that the Malawian tenant worker has experienced despite the existence of the Africans on Private Estates Act is largely due to the way the Act is formulated. The tenant worker is not given legal rights directly; rather, the rights of the tenant worker depend on the actions of the minister.

E LAND LAW REFORM AS A CONTEMPORARY RESPONSE TO HISTORICAL INEQUITY

1 South Africa's Response to Historical Inequity

Prior to and following the establishment of a democratic regime in South Africa, there was a recognition of the need to correct the historical and race-based injustice endured by an overwhelming part of the population. Naturally, race-based injustice in the acquisition and ownership of land was identified as an area that required urgent redress through land reform. South Africa's land reform programme comprises three main components: restitution, redistribution and tenure reform.⁶⁵

⁶² Lastarria-Cornhiel and Melmed-Sanjak (n 61) 7–8, 39.

⁶³ Tørrres (n 61) 44 ff; Lastarria-Cornhiel and Melmed-Sanjak (n 61) 7–8, 39.

⁶⁴ See pp 220–21, below.

⁶⁵ White Paper on South African Land Policy (n 10) [2.3]; DL Carey Miller, 'The Reform of South African Land Law in its Roman-Dutch Context: New Wine?' in Jackson and Wilde (n 60) 287; Carey Miller and Pope (n 10) 173; S Sibanda, 'Land Reform and Poverty Alleviation in South Africa' (SARPN Conference on Land Reform and Poverty Alleviation in Southern Africa, Pretoria 2001) <<http://www.sarpn.org.za/EventPapers/Land/20010604Sibanda.pdf>> accessed 27 December 2006.

In light of all the historical events surrounding South African labour tenancy, the legislative measures were undertaken to address this issue through land tenure reform were more than called for.⁶⁶ In the South African Constitution, provisions were established supporting the land tenure reform process. Among such provisions s 25(1), regulating the deprivation of property, can be cited. Likewise, s 25(5) enjoins the state to ‘take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis’. Similarly, s 25(6) requires promulgation of legislation whose purpose is tenure reform in order to undertake corrective action in relation to insecure tenure of individuals or communities as a result of ‘past racially discriminatory laws or practices’.

The approaches to the treatment of land rights in South African land law are comparable to the approaches taken in common law jurisdictions. South African land law, like Malawian land law, is a system of hierarchical interests in land. Equally, South Africa’s conveyancing law is reliant on registration, which facilitates the ‘principle of publicity underlying the law of property’ and provides ‘the necessary security of title’ for the enforcement and protection of ‘rights against the public at large’.⁶⁷ Ownership and limited real rights constitute proprietary rights, thus allowing for their registration.⁶⁸ A limited registrable right is recognised as a proprietary right on the basis that it is a right that constitutes a ‘subtraction from the dominium’.⁶⁹ Interests that are less than ownership and less than limited registrable rights are not proprietary since they ‘merely place an obligation on a specific person’,⁷⁰ as opposed to obligations on the property itself. Because of this, the rights of South African labour tenants, previously non-registrable, were vulnerable, as they were only capable of limited protection. Consequently, land law reform radically shifted the orthodoxy of registration of land rights, which now has to accommodate and enhance hitherto non-registrable rights ‘at the expense of the right of ownership’.⁷¹

Land law reform seeks to secure hitherto precarious forms of tenure through a rights-based approach—as opposed to a permits-based—approach.⁷² Prior to

⁶⁶ White Paper on South African Land Policy (n 10) [225]; Carey Miller and Pope (n 10) 188–90; Carey Miller (n 65) 298–99.

⁶⁷ H Mostert, ‘The Diversification of Land Rights and its Implications for a New Land Law in South Africa: An Appraisal Concentrating on the Transformation of the South African System of Title Registration’ in E Cooke (ed), *Modern Studies in Property Law* (Hart, Oxford 2003) vol II, 4.

⁶⁸ Mostert (n 67) 4.

⁶⁹ Mostert (n 67) 5. Rights that ‘subtract from the dominium’ are registrable because they bind third parties and successors in title although it is not settled what constitutes such a right. Similarly under the English common law based jurisdictions, a right is proprietary because it binds successors in title and a right binds a successor in title because it is proprietary. For a discussion of what is put forward as a principled and rule based criteria for determining a proprietary right as opposed to this circularity, see S Bright, ‘Of Estates and Interests: A Tale of Ownership’ in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (OUP, Oxford 1998).

⁷⁰ Mostert (n 67) 4.

⁷¹ Carey Miller and Pope (n 10) 191.

⁷² See P McAuslan, ‘Making Law Work: Restructuring Land Relations in Africa’ (1998) 29 *Development and Change* 525, 528 where it is stated: ‘Land reform in South Africa, then, must

reform specific to the situation of the labour tenant, the rights of tenure enjoyed by the labour tenant were very limited and depended on the goodwill of the farm owner and the state. Over and above, through the adoption of a rights-based approach, South Africa's land law reform aims to spell out in detail the relative rights and obligations of the farm owner and the labour tenant. This approach is intended to create certainty by both removing doubts and the possibility for unreasonable and unlawful conduct. As McAuslan observes:

the law has to be much more specific, detailed and clear. Such aspects as the nature and limits of private rights; how they may be acquired, disposed of, burdened, lost; the whole issue of third party rights; and, where the state is to remain involved, a more exact demarcation of state power and its limits... these all have to be spelt out in detail so that all those who have private rights, or intend to try to obtain private rights in land can predict with reasonable certainty the scope and operation of the law applicable to those rights.⁷³

Land tenure and land law reform in South Africa has two aspects potentially relevant to land law reform in Malawi.

The first aspect of land tenure reform in South Africa is the 'adjustment of the correlative position between landowner and the holder of lesser rights' in land.⁷⁴ The legislative instrument used for the adjustment of the relative positions of the farm owner and the labour tenant is the Land Reform (Labour Tenants) Act⁷⁵ (hereinafter 'Labour Tenants Act'). It provides a framework for the detailed regulation and enhancement of tenure security under the labour tenancy contract. For the Labour Tenants Act, a 'labour tenant' is a person

- (a) who is residing or has the right to reside on a farm;
- (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
- (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm [and a successor to a labour tenant but excluding a farmworker].⁷⁶

include land *law* reform because it seeks to change the nature of the legal regime and the legal culture that applies to African-held land. It is to replace, at best, licences or permits held at the mercy of law, with *rights* guaranteed by law' (italics in the original). See also Carey Miller and Pope (n 10) 172–73.

⁷³ McAuslan 1998 (n 72) 536.

⁷⁴ Carey Miller and Pope (n 10) 167; J Pienaar, 'Extending Security of Tenure in South Africa: Labour Tenants and Farm Workers' in Jackson and Wilde (n 60) 317; B Cousins, *How do Rights Become Real? Formal and Informal Institutions in South Africa's Reform Programme* (International Conference on Land Tenure in the Developing World with a Focus on Southern Africa 1998) <<http://www.geomatics.ucalgary.ca/~barry/Research/Publications/Publications%20Page/PublicationsOnWeb/capetown.PDF>> accessed 27 December 2006.

⁷⁵ Act 3 of 1996.

⁷⁶ South Africa Labour Tenants Act (n 75) s 1.

The Act has facilitated a readjustment of the relative positions the farmland owner and the labour tenant have in relation to their respective rights in land, as the farm owner is now compelled to observe legal procedure, without thereby questioning the legitimacy of the ownership rights of the farmland owner. The labour tenant's right to occupation of the farmland may be terminated if the labour tenant waives his or her right of occupation, dies, is evicted or after the labour tenant acquires ownership rights or other rights in the land occupied.⁷⁷

Moreover, and in stark contrast to the violence, unfairness and indignity the labour tenants previously endured in this regard, the Labour Tenants Act also provides for a clearer procedure for eviction of labour tenants. This presupposes and reinforces the notion that occupation is contingent on the satisfaction of prescribed conditions. A labour tenant may be evicted where, contrary to the agreement between the parties, he refuses or fails to provide labour to the farmland owner or where he commits a material breach of the conditions of the relationship between him or her and the farmland owner. In either case, the eviction must be only on the basis of a court order where it is recognised as just and equitable.⁷⁸ Additionally, the Labour Tenants Act provides that a labour tenant cannot be evicted after the attainment of the age of 60 or if on account of disability he is unable to personally provide labour. In neither case is the labour tenant obliged to nominate a person to provide labour on his behalf.⁷⁹

The second aspect of land tenure reform in South Africa of relevance to Malawi is the conversion of the previously personal rights of the labour tenant to proprietary rights. This conversion has been achieved through the Extension of Security of Tenure Act⁸⁰ (hereinafter 'Extension of Security of Tenure Act') and, arguably through the Labour Tenants Act.

The Labour Tenants Act does not expressly address the issue whether the labour tenant has protection against successors in title of the landowner and neither has a court conclusively dealt with this matter. In contrast to the Labour Tenants Act, s 24 of the Extension of Security of Tenure Act expressly provides that the 'rights of an occupier shall, subject to the provisions of this Act, be binding on a successor in title of an owner or person in charge of the land concerned.' The Extension of Security of Tenure Act is therefore an explicit instance of land tenure and land law reform in South Africa where personal rights are converted to proprietary rights.

Nevertheless, following the promulgation of the Land Affairs General Amendment Act No. 51 of 2001, the Extension of Security of Tenure Act is now applicable to the labour tenancy contract.⁸¹ Additionally, it may also be argued

⁷⁷ See South Africa Labour Tenants Act (n 75) s 3(2)(a)-(d).

⁷⁸ See South Africa Labour Tenants Act (n 75) ss 7, 15 where 'normal' and 'urgent' eviction proceedings are regulated, respectively.

⁷⁹ South Africa Labour Tenants Act (n 75) s 9.

⁸⁰ Act 62 of 1997.

⁸¹ See s 6(a) where s 1(1)(x)(a) of the South African Extension of Security of Tenure Act (n 80) is repealed. It was this section of the Extension of Security of Tenure Act the one which excluded the

that the *huur gaat voor koop* rule applies to the circumstances of the labour tenant as it does to a tenant under a short lease at South Africa's common law.⁸²

The labour tenant's now recognised and registrable right of occupation was subjected to conditions as well. The desire on the part of some labour tenants to retain ownership rights in relation to the land they occupy could only be realised under the special procedure provided for in the Labour Tenants Act. The memorandum to the Bill whereby the Labour Tenants Act was originally introduced in Parliament clarified that 'the aim of the Bill is neither to promote nor to entrench the system, but to ensure that in the process of its transformation and demise, the basic human rights of all parties are protected under a stable legal system'.⁸³

In order to acquire ownership rights or other rights in land otherwise held by the farmland owner, the labour tenant—or the labour tenant's successor in title—was required within four years of the commencement of the Act to apply to the Director-General of Land Affairs for an award of land, land rights and for financial assistance in that regard.⁸⁴ The labour tenant had to show that the land in question was under his occupation or that of his predecessors for a period of five years prior to the coming into force of the Labour Tenants Act. However, 'the right to apply to be awarded such land, rights in land and servitudes' must have been exercised on or before 31 March 2001.⁸⁵ A labour tenant who successfully applied for such right ceased to be governed by the scheme of the Act, on the basis that he or she now became an independent owner of land or holder of land rights.

2 Malawi's Response to Historical Inequity in the Tenant Worker's Contract

Following the re-introduction of competitive politics in Malawi, the rural population made clear demands for a review of land ownership and access to land. This demand may be justified constitutionally by reference to Chapters III (fundamental principles of national policy) and IV (the bill of rights) of the Constitution of Malawi.⁸⁶ s 13(e) (a principle of national policy) enjoins the state to 'enhance the

labour tenant from the definition of 'occupier' and hence of the application of the Extension of Security of Tenure Act.

⁸² See Formalities in Respect of Leases of Land Act 18 of 1969, s 1 (2) where a short lease is defined as a 'lease for a period of not less than 10 years'. Under the *huur gaat voor koop* rule (meaning 'the hire goes before the purchase' or loosely 'the lease goes before the sale'), a lessee of land only has a personal right against the lesser unless and until the lessee assumes possession of property. Only when the assumption of possession takes place does a lessee have protection against successors in title of the lessor. In this regard, see P.J. Badenhorst, Juanita M. Pienaar and Hanri Mostert, *Silberberg and Schoeman's the Law of Property* (4th edn LexisNexis Butterworths, Durban 2003) 501 ff.

⁸³ See *Land Reform (Labour Tenants) Bill, 1995* <<http://www.polity.co.za/html/govdocs/bills/1995/labtneng.txt>> accessed 10 January 2007. See also Pienaar (n 74) 318.

⁸⁴ South Africa Labour Tenants Act (n 75) ss 16-28; Carey Miller and Pope (n 10) 189-90; Pienaar (n 74) 315-16.

⁸⁵ South Africa Labour Tenants Act (n 75) s 16(1).

⁸⁶ See Constitution of Malawi (n 9).

quality of life in rural communities and to recognise rural standards of living as a key indicator of the success of Government policies'. s 30(3), a provision in the bill of rights stipulates that 'the state shall take measures to introduce reforms aimed at eradicating social injustices and inequalities'. Furthermore, the Constitution of Malawi—specifically ss 28 (2) and 44 (4) or the 'property clauses'—recognise the distinction between 'deprivation' and 'expropriation' of property, thereby enabling the state to alter private rights held in land without thereby violating the Constitution.⁸⁷

Furthermore, Malawi has formulated and adopted what is dubbed a 'comprehensive land policy'⁸⁸ after a process of public consultation overseen by the Presidential Commission of Inquiry on Land Policy Reform. This reform aims to create a long term framework for the development of land administration, forms of tenure, land use, planning and environmental management.⁸⁹ A notable but unfortunate aspect of land policy in this regard is the absence of any mention of the presence of the tenant worker on the private estate.⁹⁰ This does not mean that Malawi's land policy necessarily and definitively rejects private estate commodity production by tenant workers. The problem is that although the tenant worker's deplorable social, economic and legal conditions in the private estate have been acknowledged by various sectors of the population, this new land policy does not make any reference to the tenant worker, to the tenant worker's contract or to the obvious need to undertake corrective action in this regard.⁹¹ That is a strong indication that land policy will not address the social, economic and legal deficit displayed by the tenant worker's contract, at least not within the context of any land law reform initiative. It is noteworthy that corrective legislative action has been envisaged outside the land law reform process, although all efforts in this regard have come to naught thus far.⁹²

F THE CASE FOR INCORPORATING SOUTH AFRICAN REFORMS IN MALAWI

South Africa's Labour Tenants Act and the legal situation of the South African labour tenant provide a useful and informative basis for the analysis of the legal

⁸⁷ This view is potentially contentious because courts in Malawi have not specifically addressed the existence of the distinction.

⁸⁸ Malawi Land Policy Document (n 8) [1.1.1].

⁸⁹ Malawi Land Policy Document (n 8) [1.5].

⁹⁰ Although the change in land policy is timely, it is submitted there exists a compelling need to determine the practical effects of such a policy change in terms of its impact on the welfare considerations of the social relations that have been built around the private estate sector economy.

⁹¹ The legislature specifically identifies 'tenant share cropper' as a person who may potentially be covered by the definition employee in s 3 of Malawi's Employment Act, 1999 (No. 6 of 2000). Incidentally, it is noteworthy in this context that the Malawi Congress of Trade Unions actively campaigns against the use of child labour in the tenant worker's contract.

⁹² A bill to regulate the tenant worker's contract independent from the land reform process has been in the legislative process for the last 10 years. It has not yet been enacted as far as the author knows.

situation of the Malawian tenant worker. Three distinct but related arguments may be made to the effect that the Malawian tenant worker is in a position similar to that of the South African labour tenant prior to the enactment and implementation of the Labour Tenants Act in South Africa. Consequently, the remedies South African labour tenant have benefited from may equally benefit the Malawian tenant worker.

1 The Tenant Worker's Rights should be Considered Real (*In Rem*), Registrable Rights

The first argument is premised on the assumption that the tenant worker's contract creates and gives the tenant worker a personal right to use land on a private estate. The tenure that the Malawian tenant worker enjoys, therefore, is secure only to the extent that the landowner wishes the tenant worker to continue to use his land. Any action the tenant worker may wish to institute with regard to land use can only lie against the private estate owner and not against the land *per se*. In other words, the right of the tenant worker is personal, as opposed to 'real' (*in rem*) or proprietary rights.

This is a problem for the tenant worker. Because his or her rights can be described as non-proprietary, they are not registrable. If one additionally noted that the description above does not entirely account for the complexities underlying the tenant worker's situation, the need for a legislative framework in the manner of South Africa's Labour Tenants Act or the Extension of Security of Tenure Act ought to be put in place in order to rectify the tenant worker's position. It is submitted that the South African approach should be considered in this respect on account of the difficulties that the tenant worker may encounter with the common-law-based land law.

The tenant worker may also be described, in the context of a common law based jurisdiction, as an individual with potential informal or inchoate rights in land. The principles of equity—in particular its remedial rules—may provide the Malawian tenant worker with a mechanism enabling the vindication of inchoate proprietary rights. Consequently, on the basis of the principles of equity, a definitive statement cannot be made that the tenant worker's contract could not be conceived as a contractual arrangement with proprietary implications.

This reliance on equity, however, has its pitfalls. The Malawian tenant worker may seek aid from equity's remedial rules only where a land access mechanism can conceptually be established.⁹³ The tenant worker is not in the best position to satisfy the requirements of equity in this respect. Generally, equitable intervention

⁹³ See K Gray, 'Equitable Property' (1994) 47 CLP 157, 163 where it is stated: 'An equitable right of property finds its origins not as a pre-existing component of some larger interest which is then hewn free as a block of equitable entitlement; instead it represents the result of a doctrinally-driven movement which impresses new rights upon the pre-existing estate under the mandate of the controlled conscience of Equity.'

with proprietary implications is premised on the assumption that the plaintiff has a prior, existing, continuing and legitimate claim of a proprietary nature that ought to be recognised.⁹⁴ Structurally speaking, the remedial rules of equity are conditional and contingent in relation to the contractual transactions they purport to regulate. 'Conditionality' relates to the basis for intervention, which in turn is premised on whether a wrong has been done, whether it falls within specific categories of wrongs, and whether it is directly attributable to the alleged wrongdoer. 'Contingency' rests on the fact that mere observation of an occurrence of a wrong is not sufficient. The occurrence of the wrong must be formally established, corrective measures must actively be pursued against the alleged wrongdoer and a remedy obtained.

In other words, a right that arises or is threatened as a consequence of the wrong observed is merely inchoate: it must be given concrete form in a competent court of equity. In order to do this, however, the tenant worker must be able to access competent courts and lawyers—generally inaccessible to them—and must bear the costs of a legal process of an uncertain outcome. The observations made about the limitations the South African labour tenant has historically had in dealing with the technical aspects of law equally apply to the Malawian tenant worker. Any attempt by the tenant workers to establish a pre-existing estate or interest will be undermined by his infirmities socially, financially, educationally and because of lack of knowledge and accessibility of the law. It is therefore clear that the common law and equity offers the tenant worker little comfort and hence the need to seriously consider the development of a regime that secures the position of the tenant worker.

2 The Malawian Tenant Worker's Rights Should be Considered Proprietary Rights

The second argument is premised on the relevance of construing the rights of the tenant worker as proprietary, particularly in relation to the question whether the tenant worker ought to have protection against a successor in title of the private estate owner. This is especially significant in the light of the intentions expressed in Malawi's land policy. Malawi's Land Policy Document spells out the state's intent towards the restructuring of land relations. The implementation of this policy may have consequences for the private estate sector. The policy document commits the state to respect and to effectively protect the rights held under the customary land tenure system and to facilitate the operation of institutions of customary land tenure. The attitude towards customary land tenure has been

⁹⁴ See R Grantham, 'Doctrinal Bases for the Recognition of Proprietary Rights' (1996) 16 OJLS 561, 562 where this is referred to as the 'property approach' to the recognition of a proprietary claim. See also J Hill, 'Intention and the Creation of Proprietary Rights: Are Leases Different?' (1996) 16 LS 200, 200 where it is argued that a pre-existing proprietary estate is largely imputable to the wishes of the property owner, whether those wishes be expressly or impliedly established.

identified as a candidate for reform. As part of a common and widely accepted regional trend, reform in this regard heralds a shift in the previous conceptions held with respect to indigenous forms of land tenure and new found respect for these forms of tenure.⁹⁵

This re-alignment should have an impact on private estates, the tenant worker and the tenant worker's contract in Malawi. In the context of agriculture, this attitude change represents a systematic effort towards bringing about 'sustainable agricultural productivity and transformation' through a shift in emphasis from private estate to small farm agriculture. At the very least, the proposed changes reflect a shift in priorities. From a legal perspective, the reversal of policy in practice entails that customary institutions of land tenure will reclaim their dominant position with regard to title to leased private estate land. The policy document makes an unequivocal statement that the reversionary interest in relation to the leases made out to private estate operators vests in the customary institutions of land tenure.⁹⁶ Consequently, upon the determination of private estate land lease, the institutions of customary land tenure should retain the right and authority to decide on the future course of action.

Nevertheless, the course of action set by the land policy fails to address the legal consequences this approach implies. The tenant workers are a distinct group of land users. Land Reform policy affects this group in a significantly different manner than it does other groups of land users. Therefore, appropriate legislation aimed at avoiding undue hardship for the tenant worker should include the development of a framework similar to that of s 24 of South Africa's Extension of Security of Tenure Act.

3 The Malawian Tenant Worker would benefit from Enhanced Security of Tenure

A third argument is premised on the present absence of security of tenure. Although the Africans on Private Estate Act provides a framework by which the minister may enhance the security of tenure of the Malawian tenant worker, the Act has not been enforced. As pointed out above, the tenant worker's contract is a contractual arrangement envisaged by s 25 of the Africans on Private Estates Act. As a contractual relation constituted within the framework of s 25, the tenant worker's contract ought to be assessed by the minister responsible in order to determine whether it secures the tenure that the tenant worker enjoys. The nature of the legal regime formulated under s 25 is such that the tenure enjoyed by the tenant worker under the Act is permit-based and thus dependent on the initiative

⁹⁵ For a brief sketch of the policy shift by individual southern African states (including Malawi) toward customary tenure, see generally HWO Okoth-Ogendo, 'Land Policy Development in Sub-Saharan Africa: Mechanisms, Processes and Outcomes' (1998) <http://www.mekonginfo.org/mrc/html/capetown/cape_fm.htm> accessed 10 January 2007; McAuslan 1998 (n 72) 528–29.

⁹⁶ Malawi Land Policy Document (n 8) [4.10].

of the minister, who has proved to be ineffective in discharging these duties. To date, the minister responsible has opted not to interfere with contractual relations constituted on the private estates including the tenant worker's contract. This fact exemplifies the 'nature of the legal regime and the legal culture' identified by McAuslan,⁹⁷ from which the rights based and elaborate approach to land rights seeks to move away from.

Malawi's Africans on Private Estates Act is not specific, detailed or clear. The tenant worker's circumstances, in relation to security of tenure, require intervention through the development of a new, more detailed legal regime that elaborates on the terms under which the tenant worker enjoys tenure. Additionally, a detailed procedure ought to be adhered to if a private estate owner wishes to terminate the tenant worker's contract or evict the tenant worker. The approach adopted in the South African land law reform initiative and exemplified by the Labour Tenant's Act is an instructive reference point.

G CONCLUSION

It has been argued that the land law reform process in Malawi must incorporate a legislative framework which attempts to address the deplorable social, economic and developmental state of the tenant worker on the private estate. This article has attempted to analyse the tenant worker's contract and the labour tenancy contract in the context of the land reform processes currently undertaken in Malawi and South Africa respectively.

Although in general terms the Malawian tenant worker's contract and the South African labour tenancy contract share similar features, the contemporary responses to their respective situations have been different in both jurisdictions. Under the auspices of the land reform process, South Africa has undertaken a concerted effort to improve the situation of the labour tenant and to act against the consequences of the historical inequity that plagues labour tenancy. To date, the Malawian land law reform process has failed to highlight the obvious need for corrective action aimed at alleviating the social, economic and legal problems with which the tenant worker is confronted with. In the light of such a glaring omission, it is suggested that South Africa's land law reform offers an instructive and informative reference point. In particular, South Africa's Labour Tenants Act and the Extension of Security of Tenure Act incorporate legal aspects that may be particularly useful in any attempt Malawi may make to address the tenant worker's situation.

More specifically, Malawi may benefit from South Africa's experience in two areas addressed by the Labour Tenants Act and the Extension of Security of Tenure Act:

⁹⁷ McAuslan 1998 (n 72) 528.

- 1 The Labour Tenants Act incorporates a detailed legal regime of enjoyment of tenure for the South African labour tenant, as well as a detailed procedure that ought to be adhered to in the event that a landowner wishes to terminate the labour tenant contract or evict the labour tenant.
- 2 In light of the fact that private estate lands may revert to their ostensible owners, it is necessary that the tenure the private estate owner enjoys be protected against such third parties as happens in South Africa through the Extension of Security of Tenure Act.

In spite of being held out as a model for emulation the implementation, South Africa's land reform process has had its problems⁹⁸ and some of these difficulties are likely to occur in the Malawi land reform process. Consequently getting acquainted with the problems encountered by South Africa in the implementation of both the Labour Tenants Act and the Extension of Security of Tenure Act ought to be viewed as a first positive step towards the successful land law reform with regard to the relations of Malawian tenant workers and estate owners.

As was the case in the implementation of the Labour Tenants Act for South Africa, a statutory initiative aimed at bolstering the position of the tenant worker on the private estate is likely to encounter hostility from the private estate owners in Malawi. Moreover, hostility to this process may come from the Malawian customary landowners who have reversionary interests in some private estate lands. During the period leading to and subsequent to the promulgation of the Labour Tenants and the Extension of Security of Tenure Acts, 'evictions peaked' in South Africa, signalling hostility to the process by landowners.⁹⁹ The implementation process under the Labour Tenants Act in South Africa has also been dogged by 'the sheer scale and cost of the programme relative to the resources and capacity' of the Department of Land Affairs.¹⁰⁰

Similarly, in the context of the general land reform programme in Malawi the challenges presented by the scale and the cost of reform have been identified as factors likely to slow down the implementation of land reform.¹⁰¹ Reform of land law aimed at 'adjusting the relative positions' of the tenant worker and the private estate owner will have to contend with specific and fundamental issues if the programme is to succeed. For instance, it will be necessary to determine the potential number of tenant workers, the criteria for determining who a tenant worker is, or whether there will be criteria for identifying private estates that have tenant workers. Additionally, the development of a rights awareness campaign among tenant workers and the development of administrative and judicial or quasi-judicial institutional capacity seem to be necessary in this regard.

⁹⁸ See R Hall, 'Land and Agrarian Reform in South Africa: A Status Report' (Report no 20, Programme for Land and Agrarian Studies, University of the Western Cape 2004) <<http://www.plaas.org.za/publications/researchreports/RR20>> accessed 10 January 2007.

⁹⁹ Hall (n 98) 37.

¹⁰⁰ Hall (n 98) 44.

¹⁰¹ J Quan, 'Review of the Draft Malawi Land Policy' (2001) (on file with the author) 13–36.

The formulation of a legislative framework for Malawi can also be justified on the grounds of regional and domestic imperatives. Land reform in the contemporary politics of the Southern Africa region is recognised as driven by the interplay of political, economic, social and cultural factors.¹⁰² Land reform has acquired visibility because of the space accorded to 'contested democratic politics', which have compelled political systems to 'meet the concerns of the rural voters'.¹⁰³ In the context of the Southern African Development Cooperation grouping (SADC), the security and future prosperity of the region is tied in with its capacity within to settle longstanding grievances over injustices related to land tenure.¹⁰⁴

Finally, there are domestic reasons to implement such a legislative framework. The views expressed by the people of Malawi through consultative processes and on the basis of constitutional provisions support this. The Presidential Commission of Inquiry into Land Policy Reform in its report observed that a diversity of constituencies in Malawi, including the tenant workers, expressed the desire for land tenure reform. The Government of Malawi is obliged by the Malawian Constitution to ensure that its policies and practices 'enhance the quality of life in rural communities'. The tenant worker belongs to a distinct class within Malawian rural communities, with needs which must be addressed through policy and practice. The tenant worker is a small farmer by right, who happens not to own land in the conventional sense. The tenant worker's problems cannot simply be wished away. The current land reform process should serve as a vehicle for addressing the peculiar needs of the tenant worker in a context of comprehensive and sustainable reform. South Africa's experience in this regard may thus be invaluable, both in terms of the conceptual framework it has created and of the problems it has faced in implementing such a framework.

¹⁰² See generally Okoth-Ogendo (n 95).

¹⁰³ McAuslan 1998 (n 72) 527.

¹⁰⁴ B Chigara, *Land Reform Policy: The Challenge of Human Rights Law* (Ashgate Publishing, Aldershot 2004) ch 4, especially 166–70, 195–99.

