The Evolution and Measurement of Institutions and Instability in Kenya, 1880-2010: Is there Evidence of Persistence and Interdependence?

E.M.Letete, S. Mare, and J.W. Fedderke

October 31, 2011

Abstract

This paper presents a new database for indicators of Political Institutions, Economic Institutions and Political Instability for Kenya for the period 1880 to 2010. The institutional indicators are de-jure in nature and computed from archival information based on formal legislature (Acts of Parliament, Amendments, Proclamations and approved Rules issued under the jurisdiction of enabling legislature), while the Political Indicators are de-facto in nature. The study discusses the evolution of these institutions, their persistence and tests for interdependence among them. The novel feature of this study is the lengthy time period chosen for these indicators, which, helps to provide nuanced discourses on the evolution of such institutions and enables a test of interrelationships between institutional measures and economic development indicators. These new institutional indicators correlate fairly well with some of the widely used institutional indices produced by Polity IV, Freedom House and Heritage Foundation for the periods 1960-2010; 1970-2010 and 1995-2010 respectively.

Key Words: Institutions, Growth and Development, Instability, Interdependence and Persistence

JEL Classification: E10, E12, E14

1 Introduction

What institutions are important for economic growth and development? How did such institutions evolve overtime? Are such institutions interdependent and persistent? These questions have sparked renewed interest and become central in development policy debates and academic circles, not only in Kenya but in the world at large, given the general consensus that a lasting improvement in the lives of a large proportion of the world population requires strong and sustained growth. Traditionally, such growth was premised on factor accumulation, physical capital, human capital and technological advancement, with less attention given to the environment under which such factors are accumulated. Following four decades of disappointing growth performance in many African countries (Kenya inclusive) and the continued growth differences between countries in the world, emphasis has shifted to institutions as fundamental causes of economic growth and development with physical and human capital regarded as the proximate causes (see Acemoglu & Robinson (2001), Hall & Jones (1999), North & Thomas (1973), and Olson (1993)).

Current empirical work and theoretical discussions that assess the impact of institutions on economic growth and development assume either implicitly or explicitly that institutions persist over a long period of time, hence

\*School of Economics, University of Cape Town, Rondebosch 7701, South Africa: Email Address: brletete@gmail.com
\*School of Economics, University of Cape Town, Rondebosch 7701, South Africa. Email Address: maresarr@gmail.com
\*Pennsylvania State University, University of Witwatersrand and Economic Research Southern Africa. Email Address: jwf15@psu.edu
have lasting effect on economic development (Acemoglu & Robinson 2001)\(^1\). Thus institutions in countries that were once colonized, are said to be a legacy of colonial hegemony. According to Acemoglu & Robinson (2001) in countries where Europeans colonizers faced high settler mortality rates, they could not settle hence they designed institutions aimed at extracting value, rather than creating it and such extractive institutions did not foster (and still do not foster) rule of law, thus have negative effects on development, while in countries where colonizers faced less settler mortality rates, they created durable institutions that have promoted economic development. These institutions include formal laws, particularly those relating to property law and commercial law. For instance, protection of property rights and limitations on the power of the executive are built into these formal institution (laws) of a country and tend to persist over centuries and are important in providing predictability and security in fostering investment, while other bodies of law that would protect civil and human rights and legal entitlements would lead to various social welfare benefits. The civil and criminal court system would be an important bulwark for the protection and enforcement of these rights (Davis & Trebilcock 1999).

Kenya, like many other African countries that were once colonized finds itself at the centre of these debates. With a record of more than seven decades of British colonial rule, the crucial question is whether economic institutions and political institutions that were created during the colonial period have (and continue) to affect the process of growth and economic development in this economy\(^2\). This question finds its support from the regularity that after 56 years of post colonial rule, the country’s economic development remains disappointing. Evidence of this disappointing performance is reflected in per capita Gross Domestic Product (GDP) that is estimated at US$550\(^3\), poverty status estimated at 51 percent of the country’s population living below poverty line, infant mortality rates (per 1,000 lives birth) estimated at 54.8 percent and Life expectancy at birth estimated at 54.9 years, which make the country rank position 131 on Human Development Index in 2010 (United Nations Development Programme 2010). Undeniably, today the Kenya development debate is centred on the role of colonial institutions and the viability of capitalism in the process of socioeconomic development in post-colonial era and the necessary ingredients for promoting growth and development in this economy. In other words, should Kenya’s disappointing socioeconomic development be traced to the kind of institutions that were created during the colonial hegemony and did such institutions persist to the present day?

Studies that have attempted to diagnose Kenya’s economic growth and development problem make an assertion that such poor performance and underdevelopment is due to weakness in both political and economic institutions which have also exacerbated tribal and political conflicts, increased inequalities in societies, and led to the marginalization of the majority of the population at the benefit of a few political elites. This evidence further argues that such institutions are a legacy of the colonial rule (see for example Adam, Collier & Ndung’u 2011, Collier 2003, Mwega & Ndungu 2002, Berman 1998). This assertion said in Njukana’s word goes as follows “the present legal and institutional framework of economic property rights (land tenure, land use, and the system of acquisition and disposition of land rights) which have been in place since the colonial times has brought about tension, strife and litigation in land matters. The structural framework and principles for the management and administration of land inherited from the colonial times and developed over the four decades since independence has largely failed to instill confidence in the markets and created uncertainty in the whole economy which has undermined investment and development”.

However, much of the foregoing assertions on Kenya’s disappointing record of development are not empirically verifiable because of lack of institutional data set that extends over a long period of time. The absence of such data set has made it impossible to also assess the evolution, interdependence and persistence of such institutions over time. These problems have consequently undermined any evidence based policy guidance and formulation in Kenya. The difficulty to measure both political and economic institutions with a minimum degree of error, has led to some empirical studies, although not necessarily done for Kenya to test the Institutions-Development Nexus, relying on institutional indices (both political and economic indices) computed by the International Country Risk Guide, Frazer Institute, World Bank and IMF, Heritage Foundation, Freedom House and Polity

---

\(^1\)see also ( North 1990, Engerman & Sokoloff 2000, Acemoglu & Robinson 2001, Robinson, Acemoglu & Johnson 2002),

\(^2\)see also (Jerven 2011) and (Fahnbulleh 2006)

\(^3\)In 2000 Purchasing Power Parity terms
Yet, Glaeser, La Porta, Lopez-de Silanes & Shleifer (2004) argue that the use of such indicators in empirical work is suspect because of a number of problems inherent within them. These problems include; short time coverage which makes them not useful for undertaking long-term time series economic analysis and cannot be used to understand dynamics and evolution of institutions overtime; the conceptual misunderstanding between institutional measurement as factors of production and measurement as output variables. Glaeser et al. (2004) go further to argue that the measurement of institutions as outcome variables done by most organizations which attempt to measure institutions does not capture institutions as postulated by North (1990), hence such institutional indicators do not meet the criterion of permanency that North referred to. Such indicators have also received equivalent criticisms from other scholars such as Arndt & Oman (2006), who specifically criticizes the World Governance Indicators developed by Kaufmann, Kraay & Mastruzzi (2006). Their arguments are that the World Governance indicators lack comparability over time, and are perception-based measures of governance.

Given the weaknesses of the often used institutional indicators; the need to understand the evolution of institutions overtime and the possibility of country heterogeneity, it becomes imperative to provide new database of institutional indicators that minimize some of the problems articulated above and provide data set that span lengthy time periods which then can be used to explain growth trajectories at country level over time. An alternative approach is to consider constructing longer dated indicators of a de jure and de facto nature to allow for testing the impact of institutions on economic growth and socioeconomic development over time. Recently, Fedderke, De Kadt & Luiz (2001) have provided the framework for such alternative approach and this framework attempts to circumvent some of the problems inherent in the widely used institutional indicators. The framework has been applied in a number of studies that have attempted to measure institutions. For instance, this framework has been applied in a study by Fedderke et al. (2001) for South Africa dating back as far as 1950 and spanning up to 1997. There are as well other studies done for a number of other African countries. (see for example Zaaruka & Fedderke 2011, Fedderke, Lourenco & Gwenhamo 2011, Fedderke & Garlick 2010, Gwenhamo, Fedderke & Kadt 2008). This framework is based on legal statutes that govern immovable property and thereby meeting North’s criteria of durability of institutions.

In this study, we provide data set for institutional indicators of democratic (political and civil liberties) institutions, economic (property rights) institutions and political instability for Kenya over the period 1880 to 2010. We take into account the foregoing criticisms and attempt at best to limit some of the common problems faced by many of the institutional indicators. The construction of our indicators is guided by the conceptual framework developed by Fedderke et al. (2001). We then provide discourse on the evolution of our institutional indicators from the pre-colonial period to the post colonial period. Finally, we assess the persistence and interdependence of our institutional indicators and their interplay with measures of economic development. This work compliments earlier works on institutional measurements. The lengthy time span is chosen following the suggestion by Kaufman & Mastruzzi (2006) that the likelihood of observing significant changes in institutional indicators occurs if institutions are measured over a long span (see for example Gwenhamo et al. 2008, Fedderke et al. 2001).

The rest of the paper is organized as follows: the next section provides review of literature on institutions and the process of economic development. Section three presents the methodology employed for the construction of indices for this study. Section four applies the methodology for constructing the indicators for Kenya, and presents the discussion on the evolution of such institutional indicators as well as the interpretation of the indices. Section five presents the comparisons of indicators with other existing indicators computed for Zimbabwe and Zambia, and correlates our institutional indicators with widely used indicators to assess the efficacy of our indicators. This section further presents evidence on the assessment of interdependence among institutional indicators and their persistence. Section six presents the summary of the findings and the conclusion.


see also Kurtz & Schrank (2007)
2 Institutions and Economic Development in Literature

2.1 The Institution & Economic Development Nexus

Recent empirical and theoretical work on the process of economic growth and development has advanced the notion that institutions are fundamental causes of economic growth and development. However, the definition and measurement of institutions remain elusive despite a large body of literature that attempts to define, measure and evaluate their impact on economic development. North (1990) defines institutions as humanly devised constraints (rules)⁶ that shape interactions among individuals. In consequence, they structure incentives in human exchange, whether political, social or economic. This definition, comprises “formal and informal rules that shape the relationships among individuals in society and the enforcement mechanisms thereof. The idea of coexistence between formal and informal constraints implies that on one hand there exists a continuum of undocumented taboos, customs and traditions which constraint behavior of individual and on the other hand there exist that which are documented such as constitutions, and formal laws which perform similar functions. In the absence of formal rules, a dense of social network; repeated interactions; reputations and mutual knowledge lead to the development of customs, laws, trust and normative rules that constitute an informal institutional framework (Fedderke & Garlick 2010)⁷.

How then do institutions affect the process of economic growth and development? The structure of both formal and informal rules and the character of the enforcement are what define incentives and wealth maximizing opportunism of individuals and organizations(Aron 2000). These rules create order and reduce uncertainty, thereby facilitating exchange in transactions by both individuals and organizations. The element of enforcement contained in the definition of institutions indicates availability of correctional mechanisms in case of default. Thus, the institutional framework affects growth because it is integral to the amount spent on both the costs of transactions and costs of transformation (in the production process). Transaction costs, for instance, are higher when property rights or rule of law are not reliable and in such situations, as Aron (2000) notes, firms typically operate on small scale, perhaps illegally in an underground economy, and may rely on bribery and corruption to facilitate operations. Transformation costs, too, can be raised substantially because enforceable contracts mean using inexpensive technology and operating at a less efficiency and competitiveness on a short-term horizon. When institutions are poorly defined or if there are few formal institutions, economic activities are restricted to interpersonal exchanges. In such cases, repetitive activities and cultural homogeneity facilitate self-enforcement. Therefore in an environment of weak institutions, firms and agents cannot engage in complex, long-term and multiple contract exchanges with effective enforcement. Hence a basic structure of property rights that encourage long-term contracting appears essential for the creation of well functioning markets and economic growth (Shirley 2008).

Based on the impression that institutions reduce uncertainty and risk, hence promote incentive to invest and exchange, it implies that once good institutions are in place, investment in factors of production (human capital, physical capital, and technology) and therefore growth are expected to follow. Growth will then lead to improvement in institutions. The emphasis made in this regard is on security of property rights which serves as an important economic institution that affects incentives to invest. Hence democratic political institutions and other checks and balances on the government could be the first mechanism for security of property rights. However, political institutions also have a positive externality in fostering economic freedoms thereby further increasing propensity to engage in economic activity. Lipset (1959) provides an alternative hypothesis linking institutions and economic outcomes. According to him minimum threshold level of economic development and human capital are required in order to sustain democratic institutional development. Thus causality between institutions and economic growth stems from economic development. However, this argument provides little theoretical insight on the possible impact of institutions of economic growth.

⁶Rules refer to commonly known prescriptions used by a set of participants to order repetitive, interdependent relationships. Thus prescriptions refer to which actions (or states of the world) are required, prohibited or permitted.
⁷See also (Bates 2005) and (David 1994)
Contrary to the Institutions and Development nexus, some scholars still emphasize the Geography and Development nexus while others emphasize the Trade-Development nexus. Proponents of Geography and Development nexus such as Jared Diamond and Jeffrey Sachs argue that geography (soil quality, climate, resource endowment, topology and the disease environment) directly and indirectly affects economic development through its impact on agricultural productivity, transport costs and communication, and the quality of human resources (Sokoloff & Engerman 2000)\(^8\). The Trade and Development advocates see openness to international trade as the stimuli for economic development and that development can enhance trade in return. Market integration and globalization can drive productivity change hence can foster economic convergence between the rich and poor countries in the world (see for example Sachs, Warner, Åslund & Fischer 1995, Frankel & Romer 1999).

However, when these competing ideologies are subjected to empirical testing, the Institutions rule hence are regarded to explain best the process of economic development (Rodrik, Subramanian & Trebbi 2002). It is for this reason that burgeoning amount of literature has attempted to assess the effects of institutions on economic development across a number of countries. This literature provides evidence that validates the primacy of institution over geography and trade and argue that developed countries are those where the rule of law prevails, contracts are enforced, and citizens have recourse to political freedom while poor countries are those where the rules are absent or ill-formed (see for example Rodrik et al. 2002, Acemoglu & Robinson 2001, North 1990, North 1993). The arguments raised in this literature accords well with Modernization theory, which largely subscribes to the view that developing countries development prospects depend, for the most part, on convergence on the policies and institutions of developed Western societies, including assigning a prominent role to both liberal political values (democratic institutions and a welfare state), and liberal economic institutions, in particular a prominent role for private markets. On the basis of the foregoing discussion, the interplay between institutions, human behaviour and economic outcomes is illustrated in Figure1:

**Figure 1: The Institutions-Investment-Economic Growth Framework**

---

\(^8\)See also (Diamond 1997), (Gallup, Sachs & Mellinger 1998) and (Sachs 2001)
2.2 A Framework for Measurement of Institutions

This subsection presents a brief review of institutional indicators and some caveats on such indicators. However, it lies beyond the scope of this subsection to provide an exhaustive review of all institutional indicators hence only those that are frequently used in empirical studies are reviewed. Proxies for institutions were first introduced in cross-country growth and investment equations more than a decade ago, and recently this literature has experienced a renaissance. Researchers have used diverse institutional indices computed either over a short period of time or those which are not reproducible and often not clearly defined. These indices encompass the attributes of political institutions, social characteristics, social capital and measures of the quality of institutions that affect economic exchange (property rights institutions).

2.3 Property Rights Indicators

A number of indices have been proposed in literature to measure security of property rights and risk of expropriation by government. The Frazer Institute compiles and publishes an objective index on Economic Freedom Index which measures the degree of economic freedom in five broad areas, one of which is legal structure and security of property rights for 141 countries starting in 1975 to 2011. The summary index is based on Forty-two data points such as government expenditure as a share of GDP, and these are used to measure each of the five broad areas including property rights protection. Initially, this index excluded very crucial elements of legal structure (law) and regulations affecting economic freedom and this was corrected in 1997 in Gwartney, Lawson & Block (1997). Since then, the index has been continuously updated and the five broad categories are used to rate countries on a scale of zero to ten on annual basis. A scale of ten implies that a country is most free, and a score of zero implies a country is least free. It is worth indicating that for some countries, the rating is available since 1970 on a five year interval.

The Heritage Foundation provides another property rights index which is partly subjective (Miller, Holmes & Kim 2004). This index measures security of property rights on a score of one (very secure) and zero (nonexistent). Under this index, the property rights component is an assessment of the ability of individuals to accumulate private property, secured by clear laws that are fully enforced by the state. It measures the degree to which a country’s laws protect private property rights and the degree to which its government enforces those laws. It also assesses the likelihood that private property will be expropriated and analyzes the independence of the judiciary, the existence of corruption within the judiciary, and the ability of individuals and businesses to enforce contracts. The more certain the legal protection of property, the higher a country’s score; similarly, the greater the chances of government expropriation of property, the lower a country’s score. Countries that fall between two categories may receive an intermediate score. Unlike the Frazer Institute index, property rights index is provided as a separate score and available annually since 1995. The existing empirical work has often made use of the Economic Freedom Index by the Frazer Institute in the case of property rights.

The other often used property rights indicator is the Business Risk Indicator by International Country Risk Guide (ICRG) which is ranked by staff of political risk services. This indicator comprises of six subcomponents which include security of contract and property rights and is available for 135 countries from 1984 to 2011 but for some countries it starts later than 1984. Under this index, countries are classified based on the composite scores, ranging from zero to 100, which is further broken into categories from Very Low Risk (80 to 100 points) to Very High Risk (zero to 49.9 points) (Keefer & Knack 1995, see for example). The last set of indicators although not only measuring property rights is the Doing Business Indicators by World Bank. This index

---

9See Aron (2000) for a complete review of institutional indicators
10For instance the Business Environment Risk Intelligence (BERI) Indices, the Economist Intelligence Unit’s indices of Bureaucratic Efficiency and Institutional Efficiency, the Freedom House Democracy Index, and (to a much less degree) Executive Constraints and the Index of Democracy (from Policy III and Polity IV).
11The other components include: Size of Government, Access to Sound Money, Freedom to Trade Internationally and Regulation of Credit, Labour and Business.
12Other subcomponents include: Rule of law; Corruption in Government; quality of the bureaucracy; reputation of contracts by government and expropriation risk of private investment.
has nine subcomponent among which the protection of investors and enforcement of contract in a country are property rights measures and it covers 183 countries from 2003. The investor protection is scaled from 0 to 10, with higher values indicating more investor protection. The strength of investor protection index is the average of the extent of disclosure index, the extent of director liability index and the ease of shareholder suits index.

2.3.1 Political Rights and Civil Liberties Indicators:

Debates on how to measure political rights and political democracy have not yet been settled and no universal measurement does yet exist. The most popular indices often used in applied work are the quantitative measures of political rights and civil liberties produced and published by Freedom House on an annual basis since 1972 for almost 165 countries. While the political rights index is based on the degree of political competition and freedom of people to choose their political leaders freely, the civil liberty index is based on the rule of law and judiciary independence. The right is scaled on from 1 (free) to 7 (not free).

Polity IV database popularized by Jaggers, Gurr & Jaggers (1995) is often applied in empirical work to measure democracy and political freedoms as well as civil liberties (Polity 2011). The main variables captured in this index are the institutionalized democracy which signals the existence of institutions or procedures through which citizens can meaningfully express their political preferences, and the institutionalized index, which signals an autocratic state in which competitive political participation is suppressed. The data set is available for these indices for the period 1800-2007 for some states only. Beck, Clarke, Groff, Keefer & Walsh (2001) provides another data set on Political Institutions and attempts to measure political freedoms and civil liberties. This index comprises of variety of political variables and the major of which are political party fractionalization index, indexes on checks and balances and the type of voting system.

2.4 Criticisms of Existing Institutional Indicators

Despite their wide usage, most of these indicators have recently received equivalent criticisms particularly regarding their measurement and jurisprudence. For instance, Glaeser et al. (2004) argue that the frequently used measures of institutions such as Polity III & IV, International Country Risk Guide (ICRG) Business Risk Indicators, and World Governance Indicators (WGI) by Kaufmann, Kraay & Mastruzzi (2003) which measures government effectiveness do not capture the element of permanent characteristics of institutions that North (1990) refers to in his definition. Further, they are outcome based and do not capture formal constraints on executive. Similarly, Arndt & Oman (2006) criticizes the WGI in that they lack comparability over time.

On the same breath, Kurtz & Schrank (2007) express their concerns about subjectivity in the construction of the World Governance Indicators and argue that these indicators are perception-based measures and are highly correlated with each other. Voigt (2007) recognizes the foregoing weaknesses and proposes as a way forward that measures of institutions should be precise, objective and take into account de jure as well as de facto elements of institutions, by doing so, the element of permanency would be embraced. The de jure measurement of institutions accords well with North’s definition that institutional measurements must reflect constitutional constraints on government, thus institutions are "rules of the game" not "outcomes of the game" hence are permanent. With regard to transparency, Pande & Udry (2005) argue that the information that underlie most institutional indices is not fully public, and reflects judgment of analysts at the risk assessment organizations as such their credibility is questionable. This point was once raised by Bollen (1980) in as early as 1980, when he argued at that time that most institutional indices only had tenuous links with the concepts they purported to measure.

In addition, Fedderke et al. (2001) argue that most of these indicators are measured over a short span hence cannot be used to tease out the time series dynamics of economic growth and socioeconomic development process at a country level. With special reference to Kenya, the Polity Indicators are available from 1963 to

---

13This implies that these indicators are volatile and change with changes in output of economies.
while the expropriation risk from the ICRG is available for only 16 years (1982 to 1997). These indicators can only be used at best in cross country studies thereby ignoring heterogeneity of countries. The evolution of and changes in institutions differ from country to another hence a need for new data sets of institutional indicators that are based on objective and explicit criteria. Fedderke et al. (2001) provide the criteria that could be used to compute such long-term indices. These criteria is applied in (see for example Zaaruka & Fedderke 2011, Fedderke et al. 2011, Fedderke & Garlick 2010, Gwenhamo et al. 2008) to compute institutional indices for some African states thereby validate Fedderke and de Kadt institutional measurement criteria. The approach to measurement of institutions pursued by these authors undoubtedly meets Bollen’s criterion that any other researcher presented with the same set of information should be able to replicate the index based on the explanations in the paper.

3 Empirical Methodology

We adopt the methodology for the measurement of institutions proposed and used by Fedderke et al. (2001), in constructing institutional indicators for Kenya over the period 1880 to 2010. The methodology relies on formal legislative history and legal framework governing immovable property (land), and political rights and civil liberties in a society. The annual ratings of the status of rights based exclusively on such legislative history and legal framework are performed against a set of standardized normative criteria. Changes in ratings reflect either improvement in the dispensation of constitutional rights or deterioration in constitutional dispensation of such rights. Although this methodology circumvents some of the problems inherent in the measurement of institutions as pointed out in the previous section, it is subject to some methodological caveats. These caveats relate generally to the methodological biases in construction of indicators, be it political rights and civil liberties as indicators for democracy or property rights. The first caveat is the aggregation bias which results from the fact that the rating used aggregates large quantities of information resulting in loss of information associated with aggregation. The second is self induced bias which basically arises because of the biases of the writer, resulting in less precise ratings (see for example Bollen & Paxton 2000, Luiz, Pereira & Oliveira 2011). However, these caveats are minimized by following the steps suggested by Bollen & Paxton (2000). These steps are outlined in the subsections that follow.

3.1 Development of a Theoretical Definition of the Concept Measured.

In this section we define and identify the sub-components of the three indices which are the subject of this paper: the property rights indices, the political and civil liberties indices and the political instability indices.

3.1.1 Property Rights Index

Our conceptual definition of property rights follows Demsetz (1967) who defines property rights as the liberty or permission to enjoy benefits of wealth while assuming the costs which the benefits entail. In order to produce comparable indicators of property rights with those produced in earlier studies on the measurement of institutions by Gwenhamo et al. (2008), Fedderke et al. (2011); Zaaruka & Fedderke (2011); Luiz et al. (2011), we adopt the conceptual framework they used, which borrows from Honore’s definition of “full liberal ownership” and provides an ideal set of property rights. In the original framework, Honore (1961) ’s definition

---

14 Note that for some countries like US and Canada, data set is available from 1800 to 2011.
15 Building on the earlier work undertaken by Fedderke, de Kadt and Luiz (2001), these authors compute long term institutional indicators for Tanzania (1884-2008), Namibia (1884-2008), Zimbabwe (1946-2006), Malawi (1964-1994).
16 The formal legislative history and legal framework here refer to Acts of Parliament, Amendments, and amendments to already existing statutes as well as proclamations and parliamentary approved directives issued under the edges of enabling legislation.
17 This approach is in line with North’s definition of institutions which requires that institutions be durable and be measured by a set of formal legislature governing immovable property and constitutionally guaranteed political and civil liberties.
18 See also Zaaruka & Fedderke (2011)
of full liberal ownership, and as adopted by Waldron (1990), comprised of 11 components and these components were then compressed into 7 components by Fedderke et al. (2001). These seven incidences of an ideal set of property rights against which our rating is performed, are briefly explained in turn.

(i) The Right to Possess (RTP): this is the right to have the exclusive control of the property and the owner of the property is allowed to dispose of his property at his own discretion.

(ii) Right to Use (RTU): this right refers to one’s ability to use property at one’s discretion, including not putting it to use. It can also be regarded as including the right to any income or products derived from the property. Thus the user of property is allowed to use property at his/her own discretion, without contradicting the law.

(iii) Right to manage: this defines the right to decide how and by whom the property owned should be used. This includes, for example in the case of land, the owner’s right to choose which crops should be produced and the right to direct others to use the property in accordance with his/her wishes. In this case an owner of property is allowed to manage his/her property at his/her own discretion without interference.

(iv) Right to capital: this is the right of the owner of property to alienate the property to whoever he or she wishes at whatever price that he/she determines. The right to property includes the right to use property in financial transactions, including its usage as collateral. It also includes the freedom to use of property to sublet and rent to earn capital.

(v) Right to security: this is the right provided the owner of the property that his/her property will not be expropriated and interfered with by whoever it is, be it state or other individuals. Thus the owner could remain in possession of the property indefinitely if he chooses and remains solvent. However, in case of expropriation by the state, his/her consent must be solicited and adequate compensation be made to the owner.

(vi) Incident of transmissibility: this right guarantees the owner of property the right to transfer his/her ownership rights to another person at his/her discretion. This includes the right to sell, or give away, or mortgage, or buy or inherit.

(vii) Liability to execution: this provision guarantees an owner of property an interest in the property and that such property because it belongs to him/her could be held liable for liabilities emanating from injurious effect on others. Thus, the property could be taken away for debt, either by execution of a judgment debt or insolvency.

3.1.2 Political Rights and Civil Liberties Index-Political Democracy Index

Although the notion of political democracy is much debated, Bollen (1980) defines political democracy as an extent to which political power of the elites is minimized and that of the non-elites is maximized. In this regard, political power refers to the ability to control the national governing system. It is therefore the relative balance of power between elites and non-elites that determines the degree of political democracy. Where non-elites have little control over the elites, political democracy is low and where the elites are accountable to the non-elites, political democracy is higher. Bollen (1986) goes further to show that political rights and political liberties reflect the political power of these two groups. Thus political rights and political liberties are two dimensions of political democracy, which remain to a large extent inseparable. Without providing an exhaustive review of the debates surrounding concept of political democracy, we note Sartori’s (1977) definition of democracy where he argues that political democracy is a system in which no one can choose himself, no one can invest himself with power to rule and therefore no one abrogate to himself unconditional and unlimited power.
Jaggers et al. (1995) operationalize the theoretical definition of political democracy by arguing that there are three essential, interdependent elements of democracy as it is conceived in the Western liberal philosophy. They postulate that the first is the presence of institutions and procedures through which citizens can express effective preferences about alternative political policies and leaders and this is accomplished through the establishment of regular and meaningful competition among individuals and organized groups. The second dimension is the existence of institutionalized constraints on the exercise of executive power. The final dimension is the guarantee of political liberties to all citizens in their daily lives sufficient to ensure the integrity of democratic participation, procedures and institutions and in acts of political participation (Diamond, Linz & Lipset 1989). Therefore, in the interest of comparability, we follow Gwennamo et al. (2008), who further operationalized these three dimensions by setting the standard normative ideal criteria against which the rating should be accomplished. To achieve the rating, we assess the extent to which the Kenya legal framework (the Constitution, Acts of Parliament, Amendments and Statutory Instruments) provides for the following rights and freedoms:

(1) **Voting rights/franchise**: this defines the right of individuals to express their preferences about political leaders and policies, or to stand for political positions, with no exclusion from participation on the grounds of race, colour, creed or sex and in which free and fair elections take place on a regular and precisely determined basis.

(2) **Freedom of Association**: The right of individuals who share similar interests to come together with other individuals and form organizations that represent their interests and views, and to collectively express, promote, pursue and defend common interests.

(3) **Freedom of Assembly**: These uphold the right to peaceful assembly be it in public places or not and limit the use of force by authorities in controlling the assemblies. This also includes the right of individuals to petition the Government for a redress of grievances.

(4) **Freedom of Expression**: The right to freedom of expression upholds the rights of all individuals to express their views or to speak freely without censorship. The term includes any act of seeking, receiving and imparting information or ideas, regardless of the medium used. This also includes media freedom.

(5) **Extension of Arbitrary Executive Power**: This deals with constitutional provisions that limit and exclude the use of discriminatory discretionary powers vested in the executive in the applications of laws. An ideal state is that in which the rule of law defined as state in which supremacy of the constitution or law as opposed to selective application of the law, separation of powers as opposed to wide discretionary arbitrary executive power, equality before the law accompanied by right of audience in courts of law are upheld. According to Dicey (1897)’s definition of the rule of law, no one is above the law, which must be applied equally to all.

(6) **Freedom of Movement**: It asserts that a citizen of any state in which that citizen is present has the liberty to travel, reside in, and/or work in any part of the state where one pleases within the limits of respect for the liberty and rights of others, and to leave that state and return at any time.

(7) **Independence of the judiciary and Legislature**: This relates separation of power between the executive, judicial and legislative branches of government.

(8) **Academic Freedom**: The right of a teacher or student, especially at the college or university level, to freely discuss or investigate any issue, or to express opinions, on any topic without interference or fear of penalty or other reprisal from either the school or the government. This also include the freedom of the college or university to control its own policies without government interference, penalty, or reprisal.

(9) **Limit of Government Secrecy/ indemnity**: the right of everyone to access records and/or information held by the government.

(10) **Due process of law**: is based on the principle that the government must respect all of the legal rights that are owed to any person according to law. This calls for protection of individual persons from the state.

Others: is a residual category that captures all rights and freedom relating to political freedom and rights that cannot be classified under any of the specific dimensions. One key right relates to labour rights which were often repressed during the colonial period in Kenya, and other African countries in general.

3.1.3 Political Instability Index

Our notion of political instability captures the occurrence of sociopolitical unrest. Aisen & Veiga (2010) argue that political instability is likely to shorten policy makers’ planning horizons leading to sub-optimal short term macroeconomic policies. It may also lead to a more frequent switch of policies, creating volatility and thus, negatively affecting macroeconomic performance. Evidence from political science literature show that political instability is multidimensional (see for example Rummel & Tanter 1974, Tanter 1966, Feierabend & Feierabend 1966, Morrison & Stevenson 1971, Hibbs 1973). This literature however has not reached consensus as to the appropriate number of dimensions. Considering that political instability is a multi-dimensional phenomenon, eventually not well captured by just one variable, our political instability index therefore captures the following sub-components:

1. Annual number of Political Fatalities, war related fatalities including genocides on general public ($x_1$)
2. Annual number of politically motivated arrest ($x_2$)
3. Annual number of political detentions ($x_3$)
4. Annual number of political parties & publications banned ($x_4$).
5. Number of declarations and renewals of state of emergency per year ($x_5$).
6. Number of township riots & strikes & demonstrations ($x_6$)
7. Number of reported cases of politically-related property damages per year ($x_7$).

3.2 Scaling and Rating

We adopt the scaling and weighting criteria applied in Gwenhamo et al. (2008). The scaling is performed on a range between 0 and 100 points for all institutional indicators, where 100 represents an ideal state of property rights being guaranteed under respective tenure regime and 0 represents complete absence of the right. The overall index in the case of property rights (both freehold and non-freehold) is composed of subcomponents which are given different weights depending on their relative importance in an index. The subcomponents that are relatively more important in the overall index are assigned each heavier weight of 15 while others are assigned weight of 10, except for ownership component which is assigned a weight of 20. Similarly, for political and civil liberties index, a scaling is performed on a range between 0 and 100 points but a slightly different weighting is used. The first eight of the twelve subcomponents are each assigned a weight of 10, contributing a total of 80 points to the index and the other four are each assigned a weight of 5, contributing a total of 20 points to the index. In constructing each index, the subcomponents are then summed up to give the overall status of the quality of the index across time. The scores used for the subcomponents of each index are based on the legislative history of the country.

Increases in the scores on subcomponents of either property rights or political and civil liberties, indicate a move towards recognition of the right, and decreases indicate a move away from an ideal state in the system. Gwenhamo et al. (2008) note that in the case of political and civil liberties, an index ranging between 51 and 74 would imply reasonable recognition levels of civil and political rights and some constraints on arbitrary government power, but may well include discriminatory laws related to various freedoms. If the arbitrariness
of state power is only slightly constrained and the legal provisions of personal freedoms are weak, a country will score between 38 and 50, while a score between 13 and 37 indicates a state whose rights structure grants great arbitrary power to the state and most of the individual rights and freedoms are not recognized. Finally, a score ranging between 0 and 12 would be indicative of a de jure “totalitarian” state.

In scaling the political instability index, we follow an approach used by Zaaruka & Fedderke (2011) with modifications. This approach defines and assigns scores to each of the five subcomponents of political instability index, each of which has a range between 0 and 4 in a given year. The subcomponents are summed up to give a score of political instability in that given year. However, the value on the range for each subcomponent of the index in a year represents different values pertaining to an actual occurrence of an attribute captured by the subcomponent. Our modification includes scaling from one not zero as it is the case in Zaaruka & Fedderke (2011) and we include other components which we feel are part of political instability like number of reported cases on damaged property due to political violence or uprising. Since, the index is de facto in nature, occurrences of some of the subcomponents are disproportionate thereby necessitating standardization in scaling, (see Table 3.2 in Appendix for details).


This section presents and interprets the nature of property rights; political rights and civil liberties; and political instability in Kenya for the period 1880 to 2010. It first briefly discusses the evolution of these institutions and constitutional dispensation in Kenya (formerly known as British East Africa Protectorate). The evolution of these institutions and constitutional dispensation could best be understood within the context of pre-colonialism, colonialism and post colonialism history of Kenya. Therefore the nature of property rights, political and civil liberties and political developments in this economy, reflect an outcome of these three important phases in the Kenya history. All these phases were characterized by major events that shaped legislation, constitutional dispensation and political developments, thereby influencing realization of property rights, political and civil rights and political instability in the economy.

4.1 The Evolution of Property Rights Institutions

The evolution of property rights institutions in Kenya follows the dual system of laws, Customary law and English law, that have operated in the economy since 1885 when Kenya was brought under the British sphere of influence and domination. Before colonization, Kenya practiced customary land tenure (non freehold tenure) where land was owned by different tribes based on a socially and culturally known and accepted arrangement among the community members. Resolution of all land disputes were subject to customary law that was constituted of spontaneously evolved rules emerging through past dispute adjudication (Ojienda 2008). Under the customary land law, there was a distinction between rights of access to land and control of those rights. The power of control was vested in the recognized political authority or entity (council of elders, clan head and/or kings) within a specific community (Wanjala 2000).

The council of elders/clan head or kings exercised the powers to allocate rights of access to individuals depending on the needs and status of the individual in question. Rights of access were guaranteed on the basis of reciprocal duties performed by the rights holder to the community. Rights to land were determined on a continuum of flexibility; always adjusting and changing as circumstances demanded. There was no element of excludability to land under this system as found within English Property Jurisprudence (Sorrenson 1968). This customary land tenure (non freehold) was later to apply in the ethnic enclaves known as "natives reserves" "areas" or "lands" created by the British Government and into which indigenous people were shunted during the colonial period.

Based on the foregoing discussion, this study assumes the existence of property rights in the pre-colonial period,
exercised and governed by the unwritten customs and traditions. Due to the fact that customs laws were unwritten laws, they were subjected to a number of undefined codes of ethics referred to as the "repugnancy" clauses which resulted into customary land ownership being regarded as an inferior form of ownership that discourages agricultural development (Coldham 1978). Consequently, this nature of customary laws gave an opportunity to Imperial Government to alienate large tracks of land for White settlement and introduce English law which was seen as more protective of individualized tenure system, during the colonial period.

The English law was introduced into Kenya (then known as British East Africa Protectorate) through the adoption of the East Africa Order in Council of 1889. The Order stated that jurisdiction should "so far as circumstances permitted be exercised upon the principle of and in conformity with, the substance of the law for the time being in force in England". This implied that from that time onwards Kenya was part of the British Empire, and therefore part of the King's territories. Hence, the understanding of British Authorities in the protectorate was that Britain Crown or King could deal with land in the territory in such manner as he or she pleased. The legal interpretation of the order assumed that there were no indigenous peoples in the territory, and if there were people, their rights were totally irrelevant to Great Britain's plans of expanding its empire (Ndungu 2006). Sadly, this was not constitutionally right because according to the British law, unless the Crown established an original title to land, normally as a consequence of sovereignty, it was legally impossible to make grants of land in fee or under any form of tenure recognized in British law (Sorrenson 1968). Therefore the acquisition of land and expropriation was done under the Indian Land Acquisition Act of 1882.

It is however, worth noting that the colonial period, 1885-1963, introduced freehold tenure system governed by English law. It is this period that saw the substantial number of laws, ordinances and regulations enacted, most of which, were meant to provide security of tenure under freehold, mainly granted to white settlers and transnational corporations (in the so called White Highlands) to the detriment of customary tenure system or indigenous Kenyans' rights. A number of restrictions of rights to immovable property were also instituted along racial lines and legalized under a variety of laws. The end product was the creation of dualism in land ownership as expressed in the four main systems of land tenure in Kenya today, freeholds (private), state land, non-free hold (customary land) and leaseholds systems. The post-independence land rights ownership in Kenya largely reflects the colonial tenure system. The focus of this study is therefore on non-free hold tenure (customary tenure) which governs non-free hold rights and freehold tenure which deals with freehold rights.

4.2 The Outcome of Rating-Property Rights Index in Kenya

The dualistic nature of laws governing property rights in Kenya which were also exercised along racial lines as earlier argued, meant that the property rights enjoyed by people in the economy were different for different groups, most importantly between the white settlers and indigenous people (Africans). Hence, the creation of a single property rights indicator would not be reflective of the limitations to property rights enjoyed by different rights holders. It is on the basis of this argument that the construction of two indicators of property rights (free hold and non freehold) is undertaken. These two indicators are then analyzed individually to reflect the changes in them over time. In construction of both indicators, we take recognition of the methodological difficulties involved in creating such indicators. In the subsections that follow, we discuss the nature of each indicator in turn.

4.2.1 Interpretation of Property Rights Index for Non-Freehold Tenure

*Figure* 4.2.1 plots the property rights index under non freehold tenure and its sub-components are depicted in *Figure* 4.2.1(A) and *Figure* 4.2.1(B) respectively. The *Figure* shows that the property rights index under

---

19 Repugnancy means contradiction or inconsistency

20 In this paper, we shall use the phrases "Africans", "Natives" or "Indigenous people" interchangeably

21 This problem was also noted by Fedderke et al. (2001) for South Africa, Gwenhamo & Fedderke (2009) for Zimbabwe, Fedderke et al. (2011) for Zambia, Zaaruka & Fedderke (2011) for Namibia and Tanzania, and Luiz et al. (2011) for Mozambique.
the non freehold tenure arrangement is relatively high and stable during the pre-colonial period, which reflects the fact that during this period, there were virtually no formal laws that were enacted and passed which could jeopardize enjoyment of rights by indigenous population. The index does not start at full scale of rating because the rights which indigenous people enjoyed by then were restricted to access rights, usufruct rights, rights to manage and some moderate rights to transfer, rights to liability to execution and rights to tenure of security. Although, there was no excludability in land ownership per se, the indigenous population felt that they had security of tenure over their land (see for example Mackenzie 1996, Anaya 2005a, Anaya 2005b, Wanjala 2000).

The index slightly declines between 1885 and 1895, which indicates some slight threat to the land rights of the indigenous population. This initial deterioration in land rights was due the signing of the Berlin Treaty that placed Kenya under the British sphere of influence and dominion; the passing of the East Africa Order in Council of 1889 that introduced English law into Kenya and declared that, from that time onwards, Kenya was part of the British Empire and therefore part of the King’s territories, hence the Crown or King could deal with land in the territory in such a manner as he or she pleased; the adoption of the Indian Land Acquisition Act of 1882, through which British Government expropriated land for railway purposes; the enactment and passing of the Land Regulations of 1894 that gave the commissioner power to sell freeholds in land within the Sultan’s dominions, and powers for the land outside the dominion which he was to grant leases of occupancy originally for 21 years and later extended to 99 years.

The index shows some further deterioration in the land rights of indigenous people during the period 1895 and 1900. The is basically as a result of the passing of the Land Regulations of 1897 which amended the 1894 Land Regulations and provided that although certificates of occupancy may not be provided for land which at the time of commencement was cultivated or regularly used by natives, it may be granted if the commissioner, after such an inquiry as he may think fit, is satisfied that such land is no longer cultivated or regularly used and that the grant of certificate would not be prejudicial to native interests. These regulations further extended certificates of occupation to 99 years. Given the nomadic nature of life and rotational farming of some communities in Kenya at that time, for instance the Masai community, these regulations represented a serious blow on the rights of such communities because if their land was fallow for sometime, it meant it would be expropriated and conveyanced to white settlers. The Transfer of Property Act of India of 1882 which was extended to the protectorate in 1897 and the enactment of the East Africa Acquisition of Lands Order in Council of 1898, aggravated the situation of land rights under non freehold tenure. This Act and Ordinance provided the machinery through which alienation of land and most of the attributes of ownership known to common law jurisprudence, such as those derived from leases and licences, mortgages and charges, easements and profits, restrictive covenants and contracts of sale of land itself would be exercised under the protectorate. Okoth-Ogendo (1991) notes that such legislation was suited for the development of the settler economy in the East Africa Protectorate at the demise of the African economy and it remained the substantive legislation through out the colonial period.

During the period 1900 to 1903, the index exhibits sharp deterioration which symbolizes further repression of land rights under this system. During this period, the Crown Lands Ordinance of 1901, which repealed the 1897 land regulations, the Crown Lands Ordinance of 1902, No.21 and Land Rules and regulations of 1903 were passed. These legislations deprived indigenous people of their rights to land ruthlessly and made them tenants at the will of the Crown. Specifically, the 1901 Crown Lands Ordinance authorized the Commissioner to sell, grant, lease or otherwise dispose off lands which were by then regarded Crown lands and all land that was not in actual occupation by Africans was subjected to this ordinance. However, if granting of land happened to include native settlements, the settled area was deemed to be excluded from the grant until vacated but land still remained Crown land. The Ordinance also enabled him to make temporary issue of certificates of

---

22 The English law would systematise private property law and set the foundation for future private property rights developments in the protectorate.

23 Note that the Land regulations of 1894 were drawn out of Zanzibar Order in Council of 1888 and the East Africa Order in Council of 1889. Clearly these regulations provided for lease agreements for homesteads, grazing and agriculture.
occupancy for Africans on their own land because all land was regarded Crown land. Thus when Africans would cease to occupy their land, it could be sold or leased as if it were "waste and unoccupied land", no prior requirement to seek consent of any tribal chief existed\textsuperscript{24}. The specific terms of this were further laid down in the Crown Lands Ordinance of 1902, No.21, section 30 and section 31. The East Africa (Lands) Order in Council, 1901, defined Crown lands as all public lands within the East Africa Protectorate which for the time being were subject to the control of His Majesty by virtue of any treaty, Convention, or agreement or his Majesty’s Protectorate, and all lands which have been or may hereafter be acquired by his Majesty under the Lands Acquisition Act, 1882 or otherwise howsoever.

The period between 1908 to 1914 saw even further deterioration of the land rights under this system due to passing of the Crown Lands Bill of 1908 and the Land title Ordinance of 1908 (Cap. 338 of Laws of Kenya). The Crown Lands Bill of 1908 introduced formal segregation in land ownership between white settlers and indigenous people in Kenya. This Bill gave the Governor (as the commissioner was then called) the power to reserve from sale, lease or other disposal of land which in his opinion is required for the use or support of the members of the native tribes of the protectorate and that the Governor had power at any time to cancel any gazettlement of such reservations if he was satisfied that "any land so reserved" was not required for the use and support of the members of the native tribes (section 85 of the ordinance).

The final collapse of the index during the colonial period, occurs between 1915 and 1920, and lasts until 1930. This is mainly due to the passing of the 1915 Crown Lands Ordinance, No.22 and the Kenya Annexation Order in Council of 1920. These two pieces of legislation formally extinguished any right to land by an individual native. Thus no native rights were reserved and all land reserved for use of native tribes was formally vested in the Crown. If that be so, then all native rights in such reserved land, whatever they were disappeared and natives in actual occupation of such Crown Lands which would presumably include land on which huts were built with their appurtenances and land that laid fallow, became tenants at will of the Crown (Kinyatti 2008). Section 54 of the Crown Lands Ordinance of 1915 puts a specific embargo on any alienation by such tenants\textsuperscript{25}. The 1920 Kenya Annexation Order in Council declared Kenya a British Colony with consequences that all land was then formally under the jurisdiction of the Crown\textsuperscript{26}.

It is worth noting that the non-freehold tenure holdings were also affected by a number of other laws that were enacted to govern several aspects related to land use, management and produce. These included the Production and Livestock Ordinance, No.3 of 1926 and the Agricultural Produce Export Ordinance, No.44 of 1921 which were used to regulate the production, grading and storage of African produce. These Ordinances were much more prohibitive of African property development. The Coffee Industry Ordinance of 1932 and the Marketing of Native Produce Ordinance, No.28 of 1935, prevented Africans from producing cash crops like Coffee and limited rights of Africans under this tenure regime\textsuperscript{27}.

In 1930, the index reveals some slight improvement in the rights enjoyed by indigenous people. This is owing to two pieces of legislature which were enacted and passed in 1930: the Native Lands Trust Ordinance, No.9 and the Native Tribunals Ordinance, No.39. The principle of these pieces of legislature was to provide the security of land, to provide whatever rights other than those of alienation and to protect such rights (i.e. occupational rights) for the natives in reserves. This legislature also created Central Board (Land Trust Board) to control and administer matters relating to land in African reserves\textsuperscript{28}. The provisions and interpretations of these Ordinances were made clear in the case decided between Stanley Kahahu and others vs. Ole Njogo vs. Attorney General (1913-1914).

\textsuperscript{24}The fact that African were only tenants at will of the Crown is clearly reflected in a number of cases decided against Africans when they had made claims of their lands which were expropriated. For instance, in the case of Ole Njogo vs. Attorney General.\textsuperscript{25}This section reads "such reservation shall not confer on any tribe or members of such tribe any right to alienate the land so reserved or any part thereof". Thus no African living on land reserved had any right to alienate land to anyone else, wether a memeb of his own tribe or an African of another tribe or a non African.

\textsuperscript{26}It must be noted however, that the protectorate status has seldom prevented the British Government from establishing institutions that enabled it to expropriate land from indigenous people for white settlement.

\textsuperscript{27}It was only after 1935 that African were permitted to produce coffee but on an experimental basis yet in subsequent years even more tighter rules were enacted to control such produce. In 1949 Coffee Rules read "No coffee shall be grown by African except on a plan schedule approved by Director and situated in one of the areas set out in the schedule".

\textsuperscript{28}The composition of such Board never had African representation and consisted entirely of the Europeans.
which was decided by Thacker J. in 1938. It was held that Native Lands Trust Ordinance was to provide: (1) New machinery by which the Crown could and did set apart reserves for native tribes in the colony. Although the Land in such reserves remained the Crown land, it was reserved forever for the use and occupation of the various tribes. Therefore different tribes for whom land had been reserved by the Government under section 2(1) had a right of perpetual succession, subject to the power of the Governor to grant land, lease or licence under section 8, to exclude land under section 15 and 15A, and to set apart under Part II of the Native Trust Ordinance.

The index shows further improvement between the period 1935 and 1942. This period marked the second organization of the African reserves (Okoth-Ogendo 1991). The Native Lands (Amendment) Ordinance, No.36 of 1934; the Native Lands Trust (Amendment) Ordinance, No.28 of 193829 and No.51 of 1939; the Crown Lands (Amendment) Ordinance, No.27 of 1938, which were all enacted following the Morris Carter Land Commission Report (Cmd.4556) of 1934 that was commissioned in 1930 to make enquiry into various land issues in Kenya30, had combined positive effect on the rights enjoyed by indigenous people under customary tenure. These pieces of legislature empowered the Governor to make available certain areas of Crown Lands for African use and enjoyment as and when the necessity arose and provided therefore additional lands for future use called by various names "native reserves", "temporary reserves" and "native leasehold areas", set precise boundaries for land reserved for natives and that reserved for white settlers, designated all lands known as "native reserves" to "native lands" and removed jurisdiction of such lands from the Crown to be vested in the Native Lands Trust Board. However, all native rights outside "native land" as they were then called, were extinguished (see section 3 of the Native Authority Ordinance, No.20, 1940) and the ultimate authority concerning land matters within the jurisdiction of the Board was conferred on the Governor. Thus, these statutes formally made provisions for segregation based on racial and ethnic groupings and a large number of Africans were to be formally confined to the newly formed "native reserves". However, constraints still persisted on natives from realizing their property rights since it was during this period that the Kenya Ordinance, No.28 of 1938 was passed providing for compulsory reduction of the number of stock, flocks or herds in any native lands.

During the period between 1943 and 1951, the index remains relatively flat at the 1938 rating level. This period was characterized by the consolidation of colonial rule against a tide of competing political and land claims by various races. Although, this period marked major changes in the country’s constitutional make-up, it affected mostly peoples’ political rights not necessarily their land rights. The agitation for land rights resulted from the severe population pressures against limited land resource in the native lands and continued dissatisfaction of natives who were barred from owning land in the "Highlands", areas regarded fertile and conducive for agricultural purposes, such that by late 1940s, lands agitation had become both a critical economic and political issue. The squabbles on land issues culminated into the 1952 explosion of the Mau Mau revolt, which waved that land issues could no longer be ignored.

The index further improves in 1955 as a result of the passing of the Swynnerton Plan of 195531 and the Agricultural Ordinance, No.8 of 1955 (Cap.318 Laws of Kenya). While the Agricultural Ordinance provided for the comprehensive extension programme aimed at intensifying agricultural production and directed principally at progressive farmers, the Swynnerton Plan essentially recommended individualized form of land ownership (freehold tenure) in those areas which were declared native lands32. The Plan laid the basis for consolidation

---

29 section 68 of this ordinance declared that "in respect of the occupation, use, control, inheritance, succession and disposal of any land situate in the native lands, every native tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing native law and custom or any subsequent modification thereof..."
30 The enquiry included the following matters: (i) the working of the 1930 Native Lands Ordinance, (ii) the needs of the native population, present and prospective, with respect to land, wether to be held on tribal or individual tenure, (iii)the desirability and practicability of setting aside further areas of land for the present and future occupation of communities, bodies or individual natives of recognised tribes, or detribalised natives, (iv). the nature and extent of the claims exerted by natives over land alienated to non-natives, and making of recommendations for the adequate settlement of such claims whether by legislation or otherwise.
31 The plan was drawn up by the East African Royal Commission in 1953 and named after R.J.M. Swannerton who was the then Deputy Director of Agriculture in the Colonial Kenya.
32 see Paragraph 12 of the Swynnerton Plan.
of fragmented holdings or the enclosure of communal lands, through which some African farmers were to be provided with economic size farming holdings. The individualization of title and the creation of private property rights in the "tribal" or "native" lands was supposed to provide farmers security of tenure and help solve the problems (i.e. scarcity of land and accessibility to land) that were inherently perceived to emanate from insecurity of land in the then "native reserves" and poor utilization of land by Natives. The plan further argued that if Africans could be provided with private land ownership and assistance to intensify their agricultural production, they would be able to make sufficient returns from their lands and abandon their demand for redistribution of land held by Europeans.

Indeed between 1957 and 1960, the index improves tremendously and reaches its peak in 1960 during the colonial regime. This was a period of implementation of the recommendations made under the Swannerton Plan and those of the Working Party on Customary Land Tenure, that was appointed in 1957 to propose legislation for the reform of the Customary Land Tenure in the country. It is not surprising that a number of land statutes and rules were enacted and passed henceforth. Of particular interest were: the Native Lands Registration Ordinance, No.27 of 1959 and the Land Control (Native Lands) Ordinance of 1959 (also known as the Land Control (Special Areas) Ordinance, No.28 of 1959) that were meant to guarantee individual land ownership in native lands areas and introduced the measures of control over land transactions in the newly registered areas; The Kenya Native Areas (Amendment) Order in Council of 1958 which provided that upon registration of individual titles to farms in "native lands" such farms cease to be vested in the Trust Board and become exclusively owned; The Native Lands Registration Ordinance, No.27 of 1959 (which later was renamed the Land Registration Special Areas) and the Land Consolidation Act of 1959 (Cap. 283 of laws of Kenya) that provided for demarcation, adjudication and consolidation of areas in what was so called "native reserves" and introduced a system of registration which drastically changed the legal status of the land then registered. The land reform statutes converted customary tenure system to freehold system with consequential effect that all rights enjoyed under customary system were equivalent to those under European property law system. Sections 22, 27 and 89 of the Native Lands Registration Ordinance, of 1959 articulated that the right of occupation under native law and custom, if shown in the register was deemed converted into "tenancy from year to year (section 22) and if it was not shown in the register, it was extinguished (section 27). The law provided further that first registration could not be challenged, even if it had been obtained fraudulently (section 89).

However, the following caveats are in order with regard to land reform laws and programmes passed in 1959. First, the fact that once land was registered could not be challenged no matter it was fraudulently registered, exacerbated land conflicts and landless in the country as few elites registered land that did not actually belong to them creating the phenomenon of "Absentee Landlords" and "squatters"(Ndungu 2006). Secondly, the reform programme revealed the true extent of landlessness and aggravated the situation of those who were already landless but accommodated under customary tenure since their privileges along with other customary rights not noted on the register were extinguished by the process of registration. Finally, the registration firmly placed African holdings on the principle of European property law thereby creating an estate much larger in quantum held by few African elites than Europeans during the colonial period (Okoth-Ogendo 1991).

From 1960 to 1962, the index continues to display some further improvements in land rights under customary tenure. This improvements are attributed to the passing of the Land Order in Council of 1960 that provided for the conversion of (Native) Leasehold into freeholds and for the acquisition of land in the Highlands by Africans (the Areas they had always been shut out off by the Colonial Government) through the purchase on a "willing buyer, willing seller" basis. The original occupiers and other persons in need of land could regain access to the white Highlands through purchase of land under the "willing buyer, willing seller" schemes or through purchase by the post-colonial state for resettlement and re-distribution. The Kenya Land Registration (Special Areas) Ordinance, of 1960, the Conversion of Leases Regulations LN No.632 of 1960 and the Conversion of Leases Rules LN No.632 of 1960 also added to the observed improvement in the index. They provided for the conversion

33The term "Absentee LandLords" refers to persons who seldom if ever, use land of which they are registered owners and such land, if it is managed at all by "agents" who may not have been validly appointed by the registered owner and many agents are thought to be self-appointed with no legal authority over land, while "squatters" refers to a person who occupies land that legally belongs to another person or institution without the owner’s consent.
of (native) leaseholds into freeholds and for the acquisition of land in the Highlands by Africans. By the time Kenya gained independence in 1963, individualization of land tenure had taken centre stage and all legal and policy frameworks were geared towards entrenching the status quo. However, caution should be made in that since most Africans were too poor to buy land, then the majority of the people who were actually settled were not the dispossessed people, instead, a group of elites of people with vested interests in the continuity of colonial property and political process that had emerged and while millions of Kenyans remained landless squatters in their own country (Gatheru 2005).

The post independence (1963) period starts with the property rights index under customary tenure still at its apex due to adoption of the Independence Constitution of Kenya in 1963 (Section 75), which guaranteed protection of all rights including property rights which improved the status of both tenure systems. During the same period, the Government enacted the Registered Land Act, No.25 of 1963 (Cap 300), which was to govern land formerly held under customary law. This law, which was an embodiment of the English law, was to encourage individualization of tenure in line with the agronomic arguments mooted in the Swynnerton Plan. Specifically, it made provision that " the registration of a person as the proprietor of land shall vest in that person absolute ownership of that land..." and of a lease " shall vest in that person the leasehold interest described in the lease".

The year 1965, marked a change in the formal structure of rights under non-freehold tenure system as a number of amendments to the existing statutes were initiated which once again restricted the rights enjoyed under this system, hence the observed deterioration in the property rights index. This change came in just 2 years after independence during the Kenyatta regime. Specifically, the change was driven by the passing of the Constitution of Kenya (Amendment) Act, No.28 of 1964 and the Constitution of Kenya (Amendment) Act, No.14 of 1965, which made provision that with abolition of regions in 1964, all land that was formerly vested in the councils was relocated to the Government of Kenya and that "subject to the provisions of any law, the President or any person or authority authorized in that capacity by the President may make grants or dispossession of any estates, interests or rights in or over land that are for the time being vested in the Government of the Republic of Kenya", (see section of 17 of 1965 constitution), and that "the Commissioner of Lands shall be deemed for the purposes of section 53 of the Trust Lands Act to have been authorized upon the commencement of the Act by every Country Council to administer the Trust Land for the time being vested in it". These Amendments completed the centralization of land administration in Kenya and local communities were not given a say as far as the overall administration of land was concerned (Ndungu 2006).

The deterioration of the index continues till 1968, first with the passing of the Land Control Act, No.34 of 1967 and Agricultural (Amendment) Act of 1963, which controlled all transactions on agricultural land. The Land Control Act further limited the sale, transfer, lease, mortgage, exchange, partition or disposal of any agricultural land under land control area, and provided that transactions on lands under land control areas were subject to the approval of the Land Control Board, which was given the mandate to either give or refuse its consent to the controlled transaction and that its decision was regarded final and conclusive hence could not be questioned in court. The Agricultural Act also gave the minister all powers to determine ownership of agricultural lands (section 3.1.2) and regulate planting of cash crops such as coffee and tea. These crops could neither be planted nor taken out without a ministerial permit, thus, the Act remains one of the most authoritative land use legal documents. Second, the index was affected by the Land Acquisition Act, No.47 of 1968 (Cap.295) that made provision for compulsory acquisition of land for public benefit. However in times of such expropriation by government, the Act provided that full compensation for the expropriated land be made. The Land Control Act also contained segregation clause that any sale of land conditional on approval of the Board had to be made only to citizen of Kenya and not to any foreign individual or company.

However, the index improves slightly in 1969, with the passing of the Land (Group Represenatives) Act, No.36 of 1968 (Cap.287) which recognized "group ownership" of land. Although the Act seemed to protect and recognize group ownership, it reflected the preferences for individualized tenure in attempting to demarcate communal land holdings into separate units or group ranches. The intention of the Act remained that the land should be held communally in accordance with applicable customary law and practices. It was for the first
time that customary tenure was given formal recognition in the written laws. The Land Adjudication Act, No.35 of 1968 (Cap 284) also strengthened the index as it provided for demarcation and registration of titles under trust land. However, as Southall (2005) notes the group ranches scheme was abused by elites and persons registered to hold the ranches in trust for the community invariably resorted to selling off pieces of land to the community’s detriment.

Then substantive changes to the administration of customary tenure were introduced during the first two phases (1978/83 & 1984/87) of the second post independence regime (Moi regime). A series of legislative Amendments passed during this regime affected customary tenure rights considerably and resulted in substantive weakening of the index. These Amendments in a nutshell simply strengthened powers of the president and his administrative organs in matters regarding land use and allocation without necessarily changing provisions of the previous laws. They included: (1) the Land Control (Amendment) Act, of 1981, (2) the Magistrates Jurisdiction (Amendment) Act of 1981 and (3) the Trust Land Act (Amendment) 1982 (chapter 290).

The period also witnessed the amendments to the Chief’s Authority Act (Cap 128) and the Local Government Act of 1963 (Cap 265). These two pieces of legislation provide Chiefs and Local Government Officials with extensive policing powers on land issues. The Chief’s Authority Act confers on administrative officials the power to issue orders regulating and prohibiting land use. It further gives extremely wide-ranging powers to Chiefs. The Act for example allows Chiefs to require persons to plant any specified crops for the support of themselves and their families if the area concerned is suffering from or is threatened with a shortage of foodstuff. The Act also allows a Chief to prohibit grazing in areas that are being rehabilitated or have been planted with fodder crops. The Local Government Act also confers on local authorities far reaching powers to regulate land use in the trust-land under their jurisdiction. Through this Act, local authorities have the power to manage forest reserves and regulate land use in already settled areas. The Act also confers on the authorities powers to alter boundaries, and acquire land. County Council by-laws made under section 201 empower County Councils to prohibit or regulate the performance of certain activities on land. These by-laws are regulatory in nature but some recognize the residual rights of the local communities. Like the Agriculture Act, the two legislations are authoritarian and do not allow free public participation in use of land resource. The laws also do not provide incentives for proper land use.

Starting in 1999, the index displays noticeable improvements which continue to the present. These improvements are credited to: (1) The several amendments that were made to the constitution of Kenya during the period 1999-2010, for instance, Constitution of Kenya, 1998,1992, 2001, 2002 (Amendments) that reinforce the protection of property rights and establishment of Trust Boards, (2) the National Land Policy of 2007 which was enacted following the some of the recommendations of the Report by Ndungu Commission on Land Law System of Kenya of 2002, gives recognition to customary land tenure rights and set out clear procedures to be followed in times of adjudication, demarcation and conveyancing of land held under customary tenure. Finally, the New Constitution of Kenya of 2010 strengthens the index as it reaffirms existing rights that any Kenyan may acquire and own land anywhere in Kenya. The Constitution introduces a limitation on the same right which affects non-citizens, non-citizen companies and other non-citizen bodies; they may acquire land anywhere in Kenya but may not own the land absolutely, only hold it under a lease (i.e. Article 40 (1)). It reaffirms that it is illegal for Government to arbitrarily deprive any persons of their property, whether or not the right to land held is registered or not, whether the right is one of full ownership or less than ownership (such as in the form of an customarily accepted right to access an area for pastoral use), and whether or not the owner is individual, family, corporate association, group or community.

The constitution further gives stronger protection to all interests in land, whether registered or not and specifically including Community Lands (current Trust Lands) (Articles 40 (2) & 63 (4)). It however sustains the right of the State (i.e. Government) to take a person’s property if needed for a public purpose or in the public interest, but only on the basis of prompt payment of full and fair compensation. The holder or lawful user of the land is also guaranteed access to a court to challenge the legality of the proposal or the amount of compensation being offered and makes it explicit that compensation must be paid not just to titled owners but also to those who occupy land in good faith but do not hold title (this includes occupants on Trust land, lawful occupants
on Government land, and could include urban squatters of long-standing living on Government land in cities, or in parks and reserves and other areas), (Article 40 (3 & 4). Interestingly, the new constitution does not extend constitutional protection of property to those who are found to have acquired their land in an illegal manner (Article 40 (6)). This introduces an important limitation on the current situation whereby under the Registered Land Act those holding land under first registration are protected against challenge, even if known to have been obtained by fraud.

Furthermore, it introduces an important limitation on what constitutes public interest, unlike the 1963 Constitution and other laws (Land Acquisition Act) that define public interest broadly (as most Land Acquisition laws do), which, enabled Government and Country Councils to take away people’s land on the presumption that this will be of some local public benefit, Article 66 of the 2010 Constitution limits this by requiring Parliament to enact a law to ensure that investors/investments in property provide benefit to local communities and their economies.

4.2.2 Interpretation of Property Rights Index for Freehold Tenure

Figure 4.2.2 plots the overall formal property rights index under freehold ownership in Kenya while Figure 4.2.2(A) and Figure 4.2.2(B) plot its subcomponents respectively. The Figure shows that individual ownership of land in Kenya dates back to 1880s as reflected in the case of the British East African Association (which later became Imperial British East Africa Company (IBEAC)) that had private land rights over some piece of land on the Coast acquired from Sultan of Zanzibar. Further evidence shows that even prior to 1887, certain tribes in Kenya (i.e. the Kikuyu tribe) already had private rights over their lands (see for example Kenyatta 1932, Overton 1988, Coray 1978).

Given the foregoing arguments, it is in order that our index starts counting at one third of the rating scale which is also consistent with the absence of the formal legislature which governed such rights prior to 1885. The index improves slightly with the passing of the African Order in Council of 1888 and 1889 which promulgated a set of land regulations and other regulations for peace, order and good government on the Coast area. The formal set of laws regulating land rights therefore was introduced through the adoption of the Foreign Jurisdiction Act of 1890 that gave recognition to the creation, acquisition and conveyance of Crown land in the protectorate, and recognized the conveyance of ownership or lease through issued title deeds for settlers. Subsequently, the land regulations of 1894 (which were later amended by land regulations of 1897) were enacted by the IBEAC and these regulations were meant to provide for European settlement and freehold land ownership to the Settlers within the Sultan’s dominion only and for land outside the dominion, certificates of occupation for a period of 21 years, which later were extended to 99 years were provided.

The period between 1895 and 1902 witnessed noticeable improvements in the index (see Figure 3). This was due to the passing of the Crown Lands Ordinance of 1901 and the Crown Lands Ordinance, No.21 of 1902. These two Ordinances marked a complete transition from mere holding of certificates of occupancy to complete freehold ownership in landholdings by the settlers and formalized land registries. In conjunction with East Africa (Lands) Orders in Council of 1895, 1897,1901 and the land regulations of 1897, these Ordinances dealt with and governed the alienation of land for agricultural, residential, commercial and other purposes for settlers. These statutes defined "Crown Land" to mean "all public land within the East African Protectorate which for the time being was subject to the control of her/his Majesty". In other words the entire territory known

---

34By the end of 1887, the company had concluded 21 treaties entitling it to sovereignty over some land on the Coast. Therefore the legal principle underlying such acquisition of sovereignty to land was absolute ownership and all rights deriving therefrom.

35Specifically the regulations provided settlers with leasehold certificates for a period not exceeding twenty one years but renewable, no fixed rent was specified on them. The grazing leases were also issued not more than 20 000 acres could be held in one block, and the annual rent was half an anna an acre. On agricultural land, leases of not more than 2000 acres might have had a rent of 1/2 anna an acre for the first five years...homesteads were of 100 acres at a rent of 4 annas an acre for the first years, during which occupation was compulsory.
as Kenya was declared "Crown Land". Thus from 1902 onwards, settlers could acquire freehold title and long leases over land in the protectorate as provided by section 4 of the 1902 Crown Lands Ordinance, No.21 which gave the commissioner the power to sell freeholds in Crown Land to any purchaser in lots not exceeding 1000 acres and for any sale above this figure, the consent of the Secretary of the State was to be solicited. The Ordinance further specified that "nothing although herein shall invalidate any sale".

It is worth noting that although, the 1901 and 1902 legislative measures provided for freehold tenure, the settlers considered such legislative measures repugnant to the sanctity of title because they did not allow individuals to hold land for speculative purposes\(^{36}\), prohibited grants of land in actual occupancy of Africans and gave the commissioner powers to repossess any land for which no full payment had been made. These limitations necessitated the passing of the 1908 Crown Land Ordinance and the Land Titles Ordinance of 1908 (Cap.285 laws of Kenya) which let to further improvements in the legal holdings under freehold tenure arrangement. The Ordinances made land tradeable good by making a provision for holding of title to land and established a land Registration Court and provided for adjudication of land claims. This meant that white settlers could secure their property (land) which they had expropriated from indigenous Africans.

Furthermore, the Ordinances permitted notices of auctions of town land to specify that the plots or any of them may not be acquired by the Asiatic or Natives. Covenants could be inserted in the leases of these plots preventing the lessee from assigning, subletting or in any way parting with land or any part of it, to an Asiatic or African native. Similar restrictions were placed on agricultural land. These Ordinances in principle divided Kenya land into that which was reserved for white settlers and that which was regarded reserves for native people. Effectively these Ordinances prevented African from leasing, acquiring or occupying property in European areas and Europeans from doing the same in African Areas.

In 1915, the index rises sharply following the enactment of the Crown Lands Ordinance No.22 of 1915 which set the stage for what settlers saw as a secure foundation for organization of their settlement. This prime Ordinance extended 99 year-lease to 999 year-lease and gave statutory recognition to the administrative practice of permanently reserving land in the highlands for Europeans by making subsequent transfers from Europeans to non-Europeans subject to the Government’s veto. This implies that there were to be no restrictions on transfers as long as full pay was made, unless the transfer was between different races when it could be vetoed by the Governor in Council. There were to be no restrictions on bidding, except that the conditions of auction could state wether non-Europeans would be permitted to bid. It as well provided that there be no restrictions on the number and size of farms a person could purchase (permitted holding land for speculative purposes). Finally, the Ordinance provided for comprehensive registration of titles under freehold ownership. All titles, transfers and encumbrances had to be registered at the central registry office in Nairobi. All persons holding lands under the 1902 Land Ordinance or previous regulations were permitted but not compelled to surrender their titles for new ones granted under the terms of the 1915 Ordinance. However, it declared that all land outside European occupation was Crown Land and subject to Governor’s power of alienation (these land included that occupied by indigenous people).

The index shows further improvements in 1920 with the promulgation of Kenya Annexation Order in Council of 1920 and the Registration of Titles Ordinance No.26 of 1919 which superseded all existing legal regimes throughout the country and a certificate issued under the new Ordinance was declared to be conclusive evidence that a person named therein as a proprietor of land had absolute and indefeasible ownership thereof. With Kenya declared a British Colony, the door was open for constitutional advance in any direction and at any pace that the British Government might choose and the colony came under the British Settlement Act of 1887. The period between 1920 to 1929, marked the first phase of the organization of native reserves to make way for further European settlement and the legal framework enacted that far had provided the property system tailored to the needs of free enterprise in that there was degree of freedom from state intervention. The recommendations of Hilton Young Commission of 1927 which provided for the setting of boundaries to demarcate land for Europeans vs. that for Africans, strengthened the index even further.

---

\(^{36}\)see section 5 of the 1902 Ordinance
The status of land rights continued to improve in the period between 1930 and 1933, the period that marked the beginning of consolidation of colonial settlement in Kenya. The enactment of Native Lands Trust Ordinance, No.9 of 1930, although negatively affected customary tenure holdings, it strengthened holdings under freehold since only land in actual occupation by Africans was declared Crown lands while that in Settlers’ occupation remained freehold. The period between 1935 and 1942 saw further improvements in the index as a result of the promulgation of the Crown Land Ordinance, No.27 of 1938 (Amendment), The Kenya (Native Lands Trust) Ordinance, No.28 of 1938 (Amendment) which repealed the 1930 Ordinance, the Kenya (Highlands) Order in Council of 1939, the Kenya (Native Areas) Order in Council, 1939, and Farmers Assistance Ordinance No.18 of 1936. These set of legislature were meant to implement the Morris Carter Land Commission’s recommendations of 1933 and in the main, they strengthened legal effect to the dual land policy as "White Highlands" (or high potential areas) were reserved for Europeans and "Native Reserves" (or Marginal lands") for Africans.

The index started to show some deterioration in 1944 with the passing of the Land Control Ordinance, No.24, 1944. The passing of this Ordinance was a serious blow on European occupied land since it provided for expropriation and alienation of unused land in European-owned land in the Kenya Highlands, not from the native reserves. This was a period of second European settlement in Kenya following the second World War and settlement schemes were devised for European soldiers who participated in the World War. With the establishment of the European Settlement Board in 1945 and the application of the Chattels Transfer Ordinance, No.24 of 1930, the uncertainty on freehold land ownership was bound. However this uncertainty did not prolong and this is supported by Koth-Ogendo (1991) who argues that during the same time, individualization of tenure under customary tenure holdings had started as early as 1952, although the whole process had, until 1956, no real legislative basis except perhaps in Central Province, where an ordinance was passed in 1954 which gave the government the power to confiscate any land of persons... leading or organizing armed or violent resistance against the forces of law and order after 1952.

The period between 1953 to 1963 was the last period for setting legal infrastructure for freehold tenure holdings in Kenya prior to independence. This period saw once again an improvement in the index owing to the passage of the Swynnerton Plan of 1955 which supported individualization of tenure in the economy and led to enactment of a number of laws to support the land reforms emanating from the recommendations made under the plan. Examples of laws enacted during this period to support land tenure reforms meant to make way for individualization of land ownership particularly, the land which was still held under customary tenure included: The Kenya Native Areas (Amendment) Order in Council, 1958; The Native Land Registration Ordinance, No.27 of 1959 (or the Land Registration (Special Areas)); The Land Consolidation Act of 1959 (Cap. 283), The Land Control (Native Lands), 1959; The Land Registration (special Areas) Ordinance, No.27 of 1959; The Land Order in Council of 1960; Agricultural (Amendment) Ordinance, No.47 of 1960; The Kenya Land Ordinance of 1960; The Kenya Land Order in Council of 1960 (section 15); The Land Control (Special Areas) Regulations of 1961; The Development and use of Land (Planning) Regulations of 1961; The Government Lands Act of 1960(Cap. 280). These laws largely strengthened tenure holding under freehold.

On attaining Independence in 1963, Kenya inherited and adopted the entire set of colonial land laws that had been enacted to address the interests of the white settlers. The principal of these laws as elaborated in the foregoing paragraphs were the crown Lands Ordinances of 1902 and 1915. The independent Government made superficial amendments to the laws inherited from British, such that Ordinances were simply renamed "Acts", Crown was substituted with "President", Crown Land was renamed "Government Land", and where Crown referred to the British Monarch as an institution, it was substituted with "Government".

The first negative effect of formal legislature on the index of freehold land tenure after independence was in 1965. These came through the Constitution of Kenya (Amendment) Act No.14 of 1965 which placed the

37See Also the Conversion of lease Regulations, Legal Notice No.631 and the conversion of Lease rules, Legal Notice No.632 of 1960
administration of land in the hands of President or commissioner. This was followed by the Land Control Act, No.34 of 1967 which became substantive law to control all transactions on agricultural land in Kenya and repealed the land regulations of 1963 and all other laws that controlled land prior to 1967. In 1968, the Land Planning Act of 1968 (Cap.303) and the Land Acquisition Act of 1968 (Cap.295) were enacted. The Former Act provided that no land development could be effected without the consent of the Central Authority in Areas where the Act applied while the latter provided for the compulsory acquisition of land for the benefit of public interest. This provision was also embodied in sections 75, 117 and 118 of the Constitution of Kenya (Amendment) Act No.28 of 1964; The Constitution of Kenya (Amendment) Act No.14 of 1965 and as well as other legislation including; The Water Act; The Electric Power Act and the Local Government Act cap 265. The compulsory acquisition of land weakened private rights/interests in the affected land hence the deterioration of our index.

The period between 1978 and 1989 saw further deterioration in our index as a number of amendments in the post independence regime began to take toll. The 1979 Constitution of Kenya (Amendment) Act, No.5 which strengthened further the compulsory acquisition of land by government; the Magistrates Jurisdiction Amendment Act of 1981 which vested in councils of elders the administration of land, adjudication and setting of boundaries on land and the Land Control Act of 1981 (Amendment) which established Land Control Board to further strengthen control of all transactions on land, hence account for the observed decline.

Starting in 1999, our index starts to show some signs of improvement reflecting improvement once again in tenure holdings under freehold. This was a result of the Constitution of Kenya, 2001 (Amendment) and the Land control (Amendment) regulations of 2001 which repealed some stringent regulations on land use and strengthen protection of property rights under freehold. This improvement in our index continues till 2010. The legal framework that explained this further improvement was the passing of Kenya Land Policy in 2007 which was meant to govern land issues in a more holistic manner and the enactment of the 2010 New Constitution of Kenya which reaffirms the existing rights that any Kenyan may acquire and own land anywhere in Kenya.

4.2.3 Freehold versus Non-freehold Property Rights Indices in Kenya

The great divergence is observed between the two indices that reflect rights held under non-freehold vs. those under freehold during the colonial regime period (1885 to 1962). This divergence point to the fact that the legislative measures that were put in place during the colonial regime had far reaching effect of reallocating the radical title to the land in the British Crown, and thereby setting the stage for massive expropriation of lands, belonging to the indigenous people, to the British settlers and other foreigners, who would otherwise never have qualifies to own lands under the African customary laws. The best farmlands in Kenya were reserved and allocated to the white settlers. Local communities who may have previously occupied such lands were forcefully moved to make a room for white settlers hence increasing uncertainty in land holdings under non-freehold. The crafting of legal infrastructure to provide for freehold ownership came with the cost to non-freehold ownership.

At the end of the first and second world wars, any British ex-servicemen who wished to settle in Kenya were duly facilitated and allocated what was deemed "free land". The settlers established agricultural economy that was assisted by the Government in the form of subsidies, loans and marketing boards for virtually every crop grown by the white settlers. The locals were, by law, prohibited from crowing any cash crops and could not have access to the agricultural privileges granted white settlers.

Although, some drastic legal framework was put in place beginning the 1950s to reform the non-freehold tenure system to freehold (individualization) with aspiration of furthering capitalist mode of production, the cost of such reforms far outweigh their benefits since that has caused even more uncertainty in the overall land holding in the country because a large segment of the population has remained landlessness even after such reforms. The increase in land conflicts emanating from such reforms, the failure of government to find appropriate way of dealing with people that were dispossessed of their land during the colonial period, and the allocation of
large tracks of land to few political elites has also served to perpetuated conflict and uncertainty in property
in the economy. Hence the two indices continue to move in parallel but with non-freehold laying far below the
freehold tenure reflecting the fact that rights enjoyed under freehold are given more recognition than under
non-freehold.

4.2.4 Interpretation of the Political and Civil Liberties Index for Kenya

Before the advent of colonialism, Kenya had a unique political and social organization that recognized political
and civil liberties. Such political system was largely democratic and egalitarian except for Wanga Kingdom in
western Kenya, but all societies contained many features of democracy (Oyugi 1994). The political organization
of most of the societies was nested upon small lineages, clans or sub-clans such as the Kikuyu mbari and the
Kamba uti. The persistence of small political units within which pre-colonial Kenyan societies were organized
was a disincentive for the rise of capitalism. The organization of government in such societies was based on
consensus rather than representative or delegated government and it forestalled the possibility of the rise of a
'state-led' transformation that could have involved change, even compulsive change (Chweya 2006).

In those traditional settings, there was no separation of powers between the Legislature, Executive and Judiciary.
At village level, the chiefs had power to maintain law and order in their areas of jurisdiction, and this power
gave them a lot of leverage to act as legislators, judges and administrators. Thus power relations were typically
of patrons and clients, ‘elderly men or chiefs’ presided over intricate networks of clientage involving reciprocal
but unequal relations with ‘fellow men’, as well as power over women and children, and those held in the diverse
forms and degrees of servitude (Berman 1998). On the basis of these arguments, it is logical that our political
and civil liberties index starts counting above two thirds of the rating scale. This is also in recognition that
during the pre-colonial period, some rights were limited such as universal suffrage since authority was based on
"patrons and clients".

INSERT Figure 4.2.4 ABOUT HERE

Figure 4.2.4 plots the aggregate political and civil liberties index for Kenya and Figure 4.2.4(A), 4.2.4(B) and
4.2.4(C) show the sub-components of this index respectively. Some cautions must be made at the onset that
the index represents the dejure political rights and freedoms within the enacted legislature and is not intended
to capture whether or not legislature was actually applied. On the same note, the index does not separate
political rights from civil liberties since the two are not fully independent. Finally, the index recognizes the
likely commensurability issue because of the lengthy span under which it is computed given that Kenya went
through a series of political and legal regime shifts which make it difficult to assume unified political system.

With the advent of the colonial regime in 1895, the political landscape changed in Kenya as the number of
laws, regulations and orders which limited people from realizing their political rights and civil liberties were
introduced, hence our index starts to decline during this period 38. The first dominant of these laws were: the
Vagrancy 39 Ordinance of 1896 and African Passes Ordinance of 1900; the Labour Regulations of 1898; the
East Africa Order in Council, No.14 of 1897 and the Native Courts Regulations No.15 of 1897. The hallmark
of Vagrancy law since its incarnation and the African Passes Ordinance was to control movement of indigenous
people between rural areas and urban centres as well as within urban centres, and to limit their behaviour
and access to the places that were reserved for white settlers. The Vagrancy Ordinance in combination with
Labour Regulations of 1898 were used also as a tool in drawing and directing African labourers for growing
number of Europeans Settlers requiring labor in their agricultural estates (Beier & Ocobock 2008). Although,
the East Africa Order in Council established formal judicial system in Kenya, and marked the first phase of
constitutional dispensation under colonialism in the country, it increased the powers of the Commissioner over

38Note however that there were regulations that were passed prior 1895 but these regulations affected to a larger extent people
who were residing under the authority of Sultan of Zanzibar

39According to these laws, vagrancy was anyone found asking alms or wondering about without any job or visible means of
subsistence. Those suspected of vagrancy by police could be arrested without warrant, imprisoned for up to 3 months. While
incarcerated, vagrants were put to work until they had earned enough to pay for repatriation.
the natives, yet they were legitimately not British subjects and their territory was foreign.

The order in council established the initial government machinery and became the first comprehensive constitutional instrument for the protectorate and vested all powers in the commissioner who was to make laws for the administration of the protectorate. To that effect, the Native Courts Regulations were enacted and under these regulations the commissioner arrogated to himself wide discretionary absolute powers of detention, deportation and restriction of movement of natives which were only formalized in 1908 through the Removal of Natives Ordinance, No.17 of 1908 (which was succeeded by No.18 of 1909).

During the period 1905 and 1920 which marked the second period of constitutional dispensation in the protectorate, the index continues to deteriorate as the legal infrastructure ratified during this period controlled several aspects of native lives hence the quality of political and civil liberties for natives was worsening. The broad compendium of these laws included: the Native Porters and Labour Regulations of 1902 that gave employers authority to forcefully impose terms of service to employees and safeguarded employers against desertion of employees, thereby limiting employees freedom of choice and liberty at work, as well as freedom of association since the Ordinance banned the formation of trade unions by employees\(^{40}\); the Poll and Hut Tax Ordinances of 1901 and their subsequent amendments (No.9 of 1903; No.8 of 1907; No.2 of 1910 and No.40 of 1934), which were basically meant to provide for forced labour since Africans had to work in order to get some wages so that they could pay tax obligations; the Masters and Servants Ordinance, No.8, of 1906\(^{41}\) which protected the rights of employers at the expense of those of employees, thus enforcing employers’ rights in draconian way and guaranteeing availability of forced labour for employers\(^{42}\).

The Native Authority Ordinance of 1912, empowered chiefs and headmen to order compulsory labour up to 60 days a year at wages below even that of voluntary workers for state purposes especially for railway, public works and portage, and Native Registration Ordinance, No.15, 1915 (Kipande) facilitated and reinforced the colonial policy of forced labour supply. The Kipande system ensured that all African men worked whether they wanted or not and that they did not leave their colonial masters before the contract terminated, hence all Africans who quieted their jobs were arrested, flogged and then imprisoned for breach of contract. However, Kinyatti (2008) notes that wages remained frozen across all states as the workers wearing a Kipande could be imprisoned for agitating for wage increase or better working conditions and that racial segregation laws were maintained and ruthlessly enforced.

On the political front, natives political rights remained depressed even after an establishment of the Legislative Council (LEGCO) in 1905\(^{43}\) and throughout the colonial period till 1958. The composition of the LEGCO was exclusively made up of Europeans (settlers and Europeans administrators). In addition, Africans were denied the right to vote. According to the Legislative Council Ordinance No.16 of 1919, only British subjects, who were literate, spoke English, and owned a property of a certain value could vote and/or stand for elections from 1919 onwards. Africans did not meet these qualifications hence were not allowed to vote any representative to the LEGCO.

During this same period, the natives’ freedom of expression was largely limited by the colonial government through wide use of sedition and censorship laws. For instance, the Newspaper Ordinance of 1906 and British Protectorate (Defence) Order in Council, No.181 of 1916 empowered the Governor in council to declare any publication seditious, and to prohibit the importation of any newspaper, book, or document that he considered seditious publication in the protectorate. The application of the British Protectorate (Defence) Order was part of the emergency orders which were evoked because the two colonial powers, British and German, were enemies at War (first World War of 1914-1918), hence the need for emergency measures in their respective colonial

\(^{40}\) For instance, the natives who were serving as porters in transportation of goods through out the protectorate were not allowed to desert work, if they did were to be fined healy.

\(^{41}\) Its subsequent amendments were made in 1912, 1915, 1916, 1918 and 1919 but in the main, these amendments just tightened the constraints upon employees and added to the severity of punishment, making desertion a cognizable offence, allowing the police to arrest deserters without a warrant and increasing the penalties for breach of contract.

\(^{42}\) see Anderson (2000)

\(^{43}\) The LEGCO was established through Order in Council of 1905 and Royal Instruction of 1907 and was charged with responsibility of making laws in the Protectorate. It was established in response to pressure from the European settlers who demanded political representation in the political system of the protectorate.

25
possessions. Under this Order, the Governor was empowered to appropriate, control and forfeit and dispossess property thus increasing arbitrary powers of the Governor. In addition to these and other powers granted to the Governor, he could make regulations authorizing the trial of civilians by court martial whereupon such civilians, for all intents and purposes, would be treated as if they were members of the armed forces (Wanjala & Kibwana 1997). Any laws of the protectorate which were inconsistent with these regulations were of no effect during the continuance of these regulations. The Penal Code Ordinance, No.10 and No.11 of 1930 further strengthened these sedition and censorship laws.

The period between 1921 and 1951 characterized the third phase of constitutional dispensation under the colonial regime in Kenya. During the early years of this period (1921 to 1930), the index slightly improves as a result of the passing of Local Authority Ordinance (Amendment) of 1924 that established the Local Native Council (LNCs) to represent Africans and control African politics at local level. However, the LNCs members were not elected but appointed by the European field officers and the LNCs remained under the authority of the District Commissioner. During this early years, there was also increased African political activity through the formation of various African political associations. For instance, the formation of the East Africa Association (EAA) in 1921 and the Young Kavirondo Association (YKA) in 1922. All these associations added a new dimension to the already existing political struggles between the Europeans and the Africans. Africans were increasingly agitating for direct political representation. In essence, the freedom of association and assembly was improving for Natives though no provision was made for Natives to participate in LEGCO and the argument was that they lacked the necessary capacity to do so (Gatheru 2005).

From 1931 to 1936, the political and civil liberties index remains fairly stable with some slight deterioration in 1933 due to passing of the Stock and Produce Theft Ordinance, No.18 of 1933 which legalized collective punishment on tribes and clans for the offences of members of their tribes. The Special Districts (Administration) Ordinance of 1934 which gave the colonial administrators extensive powers of arrest, restraint, detent and seize properties of "hostile tribes" was also passed during this period. These two ordinances subjected Natives to undue processes of law. Some improvement in the index although not long lived emerged in 1942 as a result of repeal of some of the laws passed in earlier years such as the Native Passes (repeal) Ordinance of 1942. However just three years after the repeal, more stringent laws were passed in response to the nationalist struggle that culminated into the Mau Mau revolt in 1952. Natives continued to clamour for freedom and agitated for their land, which had been taken away since Kenya was declared a settler colony. Laws enacted during the period of nationalist struggle had far reaching repercussions on the people of Kenya. Principal of these laws were: the Emergency Powers Ordinance, No.12 of 1948 which supplemented the powers availed to the Governor under 1939 Emergency Powers Order in Council thereby affording him powers of arrest, search, detention, restriction and deportation once he has declared emergency, either throughout the colony or any part thereof; the Mau Mau Emergency Regulations of 1952 which enabled the Governor to make emergency detention orders with broad powers to vary, revoke or suspend any detention orders; Public Order Ordinance of 1950 and the Penal Code Amendment No.2 of 1950 which intensified penalties for forced oaths taking by Native Africans through the Mau-Mau. It basically declared that such oaths were illegal and liable to heavy penalties such as death sentence. It further indicates that chain letter communication was a crime, that is, no one person was allowed to send someone a letter which he was to read and pass to someone to also read and the chain continues. The Preservation of Public Security Ordinance, No.2 of 1960 was passed to supplement these laws.

Wanjala & Kibwana (1997) argues that the application of these laws in colonial Kenya heightened during the struggle for independence. On basis of these laws, the Governor-General of Kenya in 1953 imposed death penalty for persons who were suspected members of the Mau Mau or who administered Mau Mau oath. Those who were mainly considered leaders of African nationalism or who spoke against discrimination and repressive colonial policies were detained without trial over a number of years and more than 50 000 Africans were detained and more than 4 000 were convicted to death sentence within a period of less than 5 years during the revolt (Wanjala & Kibwana 1997).

---

44The powers of this Order in Council were lifted on February 25, 1919 when the war ended
From 1954, the Index starts showing some improvement. This was a result of the passing of the Societies Ordinance of 1952 that allowed for the formation of political parties, and the Lyttelton Constitution of 1954 which provided Africans, for the first time, an opportunity to vote members to the LEGCO. The Lyttelton Constitution sought to provide the principle of multi–racialism, correct the anomaly in the powers and composition of the Executive Council and regulate African political participation by providing for separate racial representation. In fact, it established the Ministerial system by creating the Council of Ministers, of which for the first time, one Minister was an African, in charge of community development. In 1954, Africans were permitted to participate in politics and as per the recommendations of the British Parliamentary delegation that visited Kenya during that period, the Governor and his government were to cultivate a multi–racial society. The delegation further recommended that an acceptable basis for electing African representatives to the Legislative Council at the following General Elections be found. To this effect, a Commission was established in 1955 to study how African representatives could be elected to the LEGCO and the first general elections were held in 1957 under the Lyttelton Constitution. However, such elections were characterized by unsatisfactory franchise as the suffrage was based on several qualifications such as income, education, age, tenure in some offices, and military service. Under this discriminatory multiple voting system, the large section of the African population was handicapped because they never possessed these qualifications. Sad enough, the universal adult suffrage for African did not exist yet it existed for Europeans and Asians (Gibbon 1995).

Between 1957 and 1963, the British empire crumbled. Consequently, the crumble was accompanied by further notable improvements in political rights and civil liberties of the people of Kenya. The Lennox-Boyd Constitution was introduced in 1957 replacing the Lyttelton Constitution that the Africans had rejected. This Lennox-Boyd Constitution provided for an increased African representation in the LEGCO and in the council of ministers. It further provided for an undiluted democracy based on universal franchise and respect for rights of all individuals regardless of their race or colour. This constitution called for the resignation of all ministers, effectively nullifying the basis upon which the Lyttleton Constitution was founded. Interestingly, this constitution for the first time created a council of state comprising of 10–16 members nominated by the governor whose function was to watch over discriminatory legislation with powers to delay, to refer back, or to hold such legislation for the signification of the colonial secretary. The year 1960 saw the first Lancaster Constitutional Conference in which negotiations for self-governance were made in Britain and the subsequent conferences (second and third) ushered the independence constitution of Kenya.

In 1963, with the passing of the Independence Constitution, the index rises sharply reflecting the move towards full recognition of political rights and civil liberties of the people of Kenya. The Independence Constitution established among other things, a regional system of parliamentary government, with an executive, an independent judiciary with security of tenure; and an independent Electoral Commission; a multi–party system of government; a Bill of Rights and Freedoms; and safeguards for minority rights, including political devolution of power to the country’s regions (majimbo)\textsuperscript{45}. It was during this period that general elections were held in Kenya, and for the first time universal adult suffrage was exercised, hence, the setting up new self-government in what had been a British colony. However, the recognition of the political rights and civil liberties of citizens was not prolonged as the subsequent amendments to the constitution passed in the post-colonial era, starting in 1964 limited such rights and liberties. These amendments to the Constitution could be classified under five phases: the 1964-1969 phase; 1974-1986 phase; 1987-1992 phase;1993-2001 phase and 2002-2010 phase. During these phases, 38 Constitutional amendments were made excluding the new 2010 Constitution (Constitution of Kenya Review Commission 2005).

The 1964-1973 phase saw the first reversal in the constitutional provisions made in 1963 constitution, and within this brief period, 10 amendments were passed that affected citizen’s rights and political freedoms hence the collapse of our index . Principal of these amendments was the 1964 Constitution (Amendment) Act, No.28 of 1964 that dismantled the Westminster form of government established by 1963 constitution and replaced with a Republic in which there was established executive president, who was all in one the Head of the State, the head of Government and the commander of armed forces. This amendment centralized much more power

\textsuperscript{45}Thus, the separation of powers and protection of fundamental rights of citizens were core elements of the constitution.
in the presidency thereby extinguishing the powers of Parliament and Judiciary. It abolished the senate, and the national assembly became unicameral legislature and its composition was altered by substituting the twelve specially elected members with members nominated by the president. Regionalism was dismantled and replaced with central authority. Thus separation of powers was compromised.

The powers of the president embedded in this amendment included among others, detention without trial, powers to appoint members of the Public Service Commission and to apply the Preservation of Public Security Act without approval of Parliament. Major infringement of the fundamental rights and freedoms were made through this legislature and the 1966 Constitution (Amendment), No.18 which provided that fundamental rights and freedoms of, *inter-alia*, freedom of association, assembly, expression and movement would not be contravened if under the provisions of the Preservation of Public Security Act, the president exercised his special emergency powers. M’Inoti (1991) notes that the law was amended to suit the interest of the ruling elites and that the authoritarian structure of governance that was a legacy of colonial rule had emerged in the post colonial Kenya. In 1966, Kenya became a defacto one party state when the Constitution (Amendment) Act, No.17 of 1966 was swiftly made with the aim of dismantling the newly formed opposition party by some of the then members of the ruling Kenya African National Union (KANU) who had resigned from the ruling party (Gibbon 1995).

The second phase saw further deterioration in the index as the dismantling of the constitution that had rested in 1970 with the passing of the Indemnity Act, of 1970 that provided for government secrecy, resurfaced. Wanjala & Kibwana (1997) notes that this phase revealed an Executive that was increasingly contemptuous of the Constitution, thus tampering with it at will. The most crucial of these amendments was the Constitution (Amendment) Act, No.14 of 1975 which extended the prerogative right to disqualify any case and rule or report that arises out of election court that an election offence had been proved against an election candidate, thus affecting the principle of free and fair elections under universal suffrage. The index continuous to decline during the third phase which saw the most far reaching amendments. During this phase Kenya was declared a single party state through the Constitution (amendment) Act, No.7 of 1982, thus affecting people’s right to vote the government of their choice since the holding of political office and voting dependent on being a member of KANU. As a result, the majority of Kenyans were disenfranchised. The extent of arbitrary executive powers of the president were further strengthened through the Act No.14 of 1986 which provided powers for the president to appoint and dismiss the Attorney General, and Controller and Auditor General, Judges of the High Court and Court of Appeal, thus security of tenure of these offices and separation of power of the executive and judiciary completely varnished.

The third phase of the amendments marks the last collapse of the index. This phase started off as an assault on the Judiciary, indicating a paranoid obsession with curtailing citizen’s rights to protection of the law and significant swings in direction of democracy were observed (Constitution of Kenya Review Commission 2005). This phase was also characterized by massive public demonstrations against one party state, the incarceration of many Kenyans who were seen as being threat to state security and genocide of many Kenyans during demonstrations. The Constitution (Amendment) Act, No.20 of 1987 made all capital offences, i.e. treason, murder, robbery with violence and attempted murder non-bailable. In so doing, the Legislature actually overruled the Judiciary and interfered with the Judiciary's discretion to award or refuse to award bail depending on the circumstances that prevailed. This amendment interfered with a basic constitutional right-bail-which is premised on the presumption that all accused persons are innocent until proved guilty after due process of law. On the same breath, Kenya enacted Constitution (Amendment) Act, No.4 of 1988 that empowered the police to hold suspects in capital offences for 14 days before they appear in court, instead of 24 days provided in earlier version of the constitution.

---

46See also Constitution (Amendment) Act No.14 of 1965 and Act No.45 of 1965, and Constitution (Amendment) Act No.16 of 1968
47This Amendment Act provided that members of the national assembly who had resigned from the party on whose ticket they stood for elections had to vacate their seats and go and seek new mandate from the electorates.
48It needs to be noted that this amendment was made for the purpose of rescuing Paul Ngei, a close friend of President Jomo Kenyatta, who was found guilty of election offence(Wanjala & Kilwana 1997)
In 1992 (beginning of the fourth phase), section 2A of the Constitution was repealed through Constitution (Amendment) Act, No.12 of 1991 which returned the country to multi-party democracy. Consequently, this resulted into enrichment of individual rights and civil liberties in the country and great expectations for far reaching social, economic and political reforms which were necessary to lay foundations for a new era of multi-party democracy (Gibbon 1995). The return to multi-party democracy came along with other fundamental amendments that repealed some sections which impinged on fundamental rights of citizens. These repeals included Chief’s Authority Act (Repeal) Bill of 194; the Public Order (Amendment) Bill of 1994; the Preservation of Security (Amendment) Bill of 1994 and the Elections Offences Act, 1998 (Cap. 66). During the last phase that started in 2002, the index strengthened further due to the passing of Political Parties Act of 2007 (Cap.7A) which provided for the formation and registration of political parties in Kenya and that, (a) every citizen who has attained the age of eighteen years has the right to participate in political activities which are intended to influence the composition and policies of the Government; and (b) to join any political party of his own choice hence the Act further strengthened people freedom of association and freedom of assembly and the suffrage in the country. The Indemnity Repeal Act of 2010, Official Secrets Act of 2009 (Repeal) (Cap.187) and the Kenya New Constitution of 2010 made a tremendous impact of the realization of the state of rights and civil liberties of the people in the Country.

4.2.5 Interpretation of Political Instability Index

Figure 4.2.5 plots political instability index for Kenya over the period 1880 to 2010. The index shows that the country experienced several episodes of political and social instability since 1888. The first episode that lasted for nearly 3 decades (1890-1915) was characterized by British invasion that met with fierce resistance from indigenous population. During this period when the British began to extend their imperialist hegemony in Kenya, a number of battles were fought in an anti-colonial resistance. However, it was the battle of 1895-1896 that was decisive because it set stage for British victory and led to consolidation of their political hegemony in the country (Berman & Lonsdale 1992). The battles that were fought in the period, 1911-1915 were often characterized by natives resistance to forced labour and colonial rule. For instance, the fight between Giriama and British colonialists provides a good illustration of such resistance. The Giriama people refused to be coerced into colonial scheme of development and to be made a workforce of British capitalist, to pay taxes, to work as colonial porters or being turned into mercenaries in the imperialist army or to work on settlers plantations. Then the British responded by using armed forces, thus killing many of civilians (Kinyatti 2008). This early anti-colonial warfare led to a loss of a number of lives, property and political tranquility among indigenous population.

INSERT Figure 4.2.5 ABOUT HERE

During the period 1920-1945, although the economy experienced some level of calmness, rebellious activities were brewing underground. This period witnessed the formation of African political organizations, trade unions movements and the intensification of anti-imperialist concealed resistance, which culminated into the 1952 revolt. Between 1952 and 1963, political instability in the economy reached peak and a number of factors contributed to this status. First, this was a period of armed independence revolutionary movement, and the formation of Mau-Mau with its armed wing (the Kenya Land and Freedom Army (KLFA)) which sought to abolish the colonial regime altogether hence the introduction of guerrilla warfare in the country. Consequently, this period saw a number of political detentions, death sentences, armed attacks and a number of massacres and genocides (i.e. Hola Massacre and Lari Massacre) which occurred during the struggle for independence.

During the first republican government (1969-1978) in the post independence period, some political assassinations occurred in the country and these contributed to some level of instability in the economy. These were

49Note that these battles were fought between different tribes in the country since Kenya was not yet a unified country.
50The Hola Massacre took place in Hola detention camp and more than 1158 prisoners were beaten to death (Elkins 2005).
51The Lari Massacre took place at the Lari District and a thousands of civilians (estimated at more than 5,000) were killed by the British police forces (Anderson 2005, see).
assassinations of some prominent political leaders such as Pio Gama Pinto in 1965, Tom Mboya in 1969 and John M Kariuki in 1975. Such assassinations were followed by some political violence that resulted when some members of legislature were dismissed after they broke away from KANU and formed an opposition party, the Kenya Peoples Union (KPU) and a number of civilians were killed during this event.

However, political instability intensified in the second republican government, (1979-1990). This period was characterized by general lack of respect of rights of citizens by the state as the president exercising his powers under one party state detained and harassed any person who opposed the party authority. The exercise of this powers, provided for under Public Order and Public Security Law became evident following an attempted military coup in 1982. A number of citizens (i.e. lecturers, students, & ordinary citizens) were detained for opposing or rebuking policy of government, thousands of innocent civilians were killed in the Wagalla Massacre and the Saba Saba (7:7) uprising under which people were fighting for return to multipartism, publicans were banned, and year after year there were political turmoils until 1990 (Wanjala & Kibwana 1997). It was during this period that John Robert Ouko was assassinated, thereby increasing further political instability in the economy.

The period between 1991 and 2003 was characterized by some relative political stability in the country except in 1998, when the American Embassy was bombed and hundreds of civilians lost their lives, thereby leading to some instability in the country. Since 2002, the economy remained relatively stable until 2007 when the post election violence erupted in the economy thereby intensifying political instability once again. The 2007 post election violence, killed more than 1,000 people and many more citizens sustained injuries and had their property damaged. This incidences magnified political instability in the economy(Republic of Kenya 2008). Therefore given the continued episodes of political instability in Kenya since 1800 years ago, implications for social economic development are bound to be huge.

5 Comparative Analysis of Institutions

5.1 Did the British Imperial Government set the same institutions across its colonial subjects?

We answer this question by comparing institutional indicators, both the political institutions and property rights institutions computed in this study with those computed for two other former British Colonies, Zambia and Zimbabwe respectively over the period 1947-2005. This period is choosen because the indicators computed for Zambia and Zimbabwe only start in 1947 and end in 2005. The results from this exercise show that the Imperial Government established similar political and civil liberties institutions that were repressive of the local people across these selected British colonies (Kenya, Zambia and Zimbabwe). These political institutions began to improve over time as indigenous people started agitating for their rights. Towards independence, (1963 &1964 for Kenya and Zambia respectively, and 1980 for Zimbabwe) these rights and liberties were given recognition.

INSERT Figure 5.1.1(A) ABOUT HERE

Unfortunately, the move towards free liberal/democratic state did not last as the number of laws that were past following independence, were repressive of the system. The move towards repressive state started just a year following independence in Kenya and continued into 1990s, while in Zambia, the liberal state was maintained at least until 1970. After 1970, a big shift occurred towards repressive state and continued into 1990s as well. In the case of Zimbabwe, which gained independence a bit later, the reversal of democratic principle occurred just 5 years following independence. The reversal in democratic principles had implications for economic development of these three former colonies.

52 More than 5000 people of the Somalia Kenyans were brutally killed by Government armed forces without a course of action
In the case of property rights, the institutions that were established were extractive and provided security of tenure for the white settlers only, against the majority of the indigenous population. The structure of these institutions was inherited at independence, and has continued to the present day especially in Kenya. In Zambia however, the property rights institutions suffered a big blow just some few years after independence as well and insecurity of tenure in the case of freehold intensified since 1969 until 1990s, while in Zimbabwe, the protection of rights over property was given priority until after 1999 when a complete collapse occurred in the index. In the case of non-freehold property rights, less emphasis was put in this property system in Kenya and Zambia following independence hence the declining trends in the index few years after these countries achieved independence. The situation was different in Zimbabwe since the country seem to have given equal weight on both freehold and non-freehold property system even before independence and the collapse of the system of property holdings only emerged after 1999.

5.2 To what extend do our indicators correlate with the widely used Institutional Indicators?

To answer this question we correlate our Property Rights Indicators with the Heritage Foundation Property Rights Index, and Political and Civil Index with the Freedom House Index for Political Rights and Civil Liberties respectively. We also correlate our Political Rights and Civil Liberties Index with Polity IV index. We compute the Spearman correlation coefficient to test such correlations and Table 5.2.1 presents the results.

The results show that political and civil liberties indicators are highly correlated with the political rights and civil liberties from Freedom House with correlation coefficient of 63 percent and 77 percent respectively which are both very significant. Our political and civil liberties index also correlates well with Polity IV index with correlation coefficient of 74 percent which is also significant. Turning to the property rights index, the freehold index correlates very well with the Heritage Foundation Property Rights Index with correlation coefficient of 91 percent. These correlations point towards efficacy of our newly constructed institutional indicators based on durable qualities of institutions.

5.3 Are Institutions time Invariant?

We answer this question by making use of the Dickey Fuller Generalized Least Squares (DFGLS) test and the NG-Perron test of stationarity. Table 5.3.1 reports the statistics from these two tests.

The statistics show that our institutional indicators are non mean reverting (non-stationarity) and this is invariant to the type of test used, be it DFGLS or NG-Perron test. The DFGLS test statistics for all the variables at level form appear smaller than the 95 percent critical values hence rendering all variables non-stationary. The first difference of all the institutional variables appear stationary. The DFGLS statistics is greater than the 95 percent critical values hence we reject the hypothesis of unit root (non-stationarity) in first difference of variables. This decision is supported by the NG-Perron test. The NG-Perron test relies on four statistics, $M_{zr}, M_{zT}, MSB$ and $MP_T$. The first two of these statistics are negative and the other two are positive (see Table 5.3.1). Therefore for us to decide whether there is unit root, we compare the two positive statistics and the two negative statistics with the 95 percent critical values provided by NG-Perron. If the

---

53 These tests circumvents some of the problems of the ADF test such as the weak power and size distortions.
54 We report the statistics for the DFGLS at level form of variables ($X$) and those for the first difference of variables ($\Delta X$), while for NG-Perron test, we report statistics for the first difference of variables ($\Delta X$) only.
computed negative and positive statistics are less than the NG-Perron critical values, we reject the hypothesis of unit root and conclude that the variables are stationary. Table 5.3.1. shows that the computed negative statistics are less than the NG-Perron negative critical values and the computed positive statistics are less than the positive critical values hence we reject the unit root hypothesis and conclude that our variables are stationary at first difference. These findings reveal that all the institutional variables computed are integrated of order one \((I(1))\). The implication of these results is that institutions inherited from the colonial regime although had persisted, were subjected to a number of amendments during different political regimes in Kenya hence did not continue in the form that they were before, hence institutions change with regime changes. This is also supported by evidence that between the period 1964 and 2009, Kenya amended the constitution 38 times thereby changing a number of provisions of the constitution (Constitution of Kenya Review Commission 2005).

5.4 Are Institutions Interdependent?

Although it widely acknowledged that both economic freedoms, in the form of free markets and small governments that focus on the maintenance of property rights, and political freedoms in the form of political rights and civil liberties, are important for economic growth and development, the connection between economic and political freedom is controversial. Friedman & Friedman (2002) argued that the two freedoms are mutually reinforcing. In this view, an expansion of political rights-more "democracy"-fosters economic rights and tends thereby to stimulate economic growth. However, the growth retarding aspects of democracy have also been stressed. Therefore, we revisit this debate and test the interdependence of institutional indicators using the standard Johansen procedure\(^{56}\) embedded within the Vector Autoregressive (VAR) Framework. We posit that if institutional variables are interdependent, they must display some co-movements (cointegrated) in the long run. We confirm the direction of this relationship between institutional measures using Autoregressive Distributed Lag (ARDL) framework proposed by Pesaran, Shin & Smith (2001). The model we use could be specified as follows in its general form:

\[
Z_t = A_1 Z_{t-1} + A_2 Z_{t-2} + \ldots + A_m Z_{t-m} + \mu + \delta_t
\]  

(1)

where \(m\) denotes lag length, \(\mu\) deterministic elements, and \(\delta_t\) a Gaussian error term. While in general \(z_t\) may contain \(I(0)\) elements, if our variables would be \(I(1)\), then we could parameterize our model to VECM specification:

\[
\Delta Z_t = \sum_{i=1}^{k-1} \Gamma_i \Delta Z_{t-i} + \Pi Z_{t-k+1} + \mu + \delta_t
\]  

(2)

The existence of \(r\) cointegrating relationships amounts to testing the hypothesis that:

\[
H_0(r) : \Pi = \alpha \beta' \]

where \(\Pi\) is \(p \times p\), and \(\alpha, \beta\) are \(p \times r\) matrices of full rank. Therefore our interest is to test the reduced rank of \(\Pi\). Where \(r > 1\), i.e. there is more than one cointegrating relationship present in the data\(^{57}\) against the null hypothesis of one cointegration vector. Since our data shows the existence of one unique cointegrating relation, we proceed with Pesaran, Shin and Smith (1996,2001) bounds testing and ARDL approach to cointegration (henceforth PSS), as a means to verify the direction of association between institutional variables. In its general form, and with the assumption of the existence of long run relation between variables \(y_t, x_{1t}, \ldots, x_{nt}\), then the PSS approach is specified as follows:

---

55 See (Sirowy & Inkeles 1990, Przeworski & Limongi 1993)or complete survey on these debates.
57 If more than one cointegrating vector, the issues of identification arise.
The test proceeds by computing an F-statistic for the joint significance of from the set of all feasible lag structure combinations by means of information criterion (i.e. Akaike, Schwarz). The order of augmentation, 

The regression assumes that valid but the regression requires augmentation. Further the approach assumes, 

The distribution of the test statistic is non-standard, and influenced by whether \( x_{jt} \) variables are \( I(0) \) or \( I(1) \), the critical values are tabulated by Pesaran, Shin and Smith, with both lower bound values and upper bound values. Our decision criteria is based on whether the estimated statistic exceeds the upper bound value or lies below the lower bound value. In the case where the estimated statistic lied above the upper bound value, we reject \( \delta_1 = \delta_2 = \delta_3 = ... \delta_{n+1} = 0 \). Since, the distribution of the test statistic is non-standard, and influenced by whether \( x_{jt} \) variables are \( I(0) \) or \( I(1) \), the critical values are tabulated by Pesaran, Shin and Smith, with both lower bound values and upper bound values. Our decision criteria is based on whether the estimated statistic exceeds the upper bound value or lies below the lower bound value. In the case where the estimated statistic lied above the upper bound value, we reject \( \delta_1 = \delta_2 = \delta_3 = ... \delta_{n+1} = 0 \), and infer the presence of a long run equilibrium relationship. In case where the estimated statistic lies below the lower bound value, we accept the hypothesis that \( \delta_1 = \delta_2 = \delta_3 = ... \delta_{n+1} = 0 \), and infer the absence of long run relationship. The estimation can be shown to be feasible on the basis of the "Bewley regression":

The regression assumes that \( x_t \) and \( \epsilon_t \) are uncorrected, and where they are correlated, the methodology remain valid but the regression requires augmentation. Further the approach assumes, \( \sum_{i=1}^{k} x_i; \sum_{j=0}^{r-1} \Delta y_{t-j} \) and \( \sum_{m=0}^{q-1} \Delta x_{t-m} \) serve as instruments hence estimation is done through instrumental variable approach.

### 5.4.1 Interpretation

Table 5.4.1 provides the results for the test of interdependence among the institutional indicators computed in this study. The Table reports results of trace statistics for the reduced rank from different combinations of these indicators. Noticeably, these results show the presence of long run interdependence between various institutional indicators. For instance, the first model (VAR1) shows that such interdependence is strong between non freehold property rights (NFhPR) and political instability (Pol) in the Kenya economy. This long run interdependence implies that at times when the economy was politically unstable, the non freehold property rights were also threatened. Similarly, the interdependence between non-freehold property rights (NFhPR) and political rights and civil liberties (PrCL) appear very strong in the long run (see VAR2). This interdependence is invariant to the inclusion of the political instability index. Model 3 (VAR3) further shows that such interrelationship continue to hold even if we include all institutional indicators in the model. Model 4 (VAR4) shows that removal of political instability index from the model does not change the results hence the relationship remain robust in the long run.

Model 6 (VAR6) shows further that the removal of political rights and civil liberties from the model does not change the interdependence of the remaining variables while model 7 (VAR7) shows that such interdependence continue to hold in the absence of non freehold property rights. In model 8 (VAR8), we test this interdependence between political rights and civil liberties and political instability. The results similarly reveal that the two variables also display some long run interrelationship. Thus improving people’s political rights and civil liberties has an ultimate effect on the political stability in the economy. Similarly, the protection of property rights has implications for political stability. However, a weak relationship existed between freehold property rights and non freehold property rights. Unlike in the case of Zambia where the two rights displayed some highly statistically significant relationship in the long run, in Kenya such relationship although existed after 1960, it was weak. This basically implies that the two rights measures, although had developed alongside one another after independence, the freehold rights were given preference over the non freehold.

Given these interdependence in the rights measures, it implies that during the period (1960-2010), when political

\[
\Delta y_t = \alpha_0 + \sum_{i=1}^{p} \beta_i \Delta y_{t-i} + \sum_{j=1}^{n} \sum_{i=1}^{p} y_{i,j} \Delta x_{j,t-i} + \left( \delta_1 y_{t-1} + \sum_{t=2}^{n+1} \delta_k x_{k,t-1} \right) + \epsilon_t
\] (3)
and civil liberties were infringed, non freehold property rights were also not respected hence creating insecurity in the rights to property and political instability in the economy.

**INSERT Table 5.4.1 ABOUT HERE.**

Having noted the existence of a stable long run interdependence (unique cointegrating vectors) among our institutional indicators, the next question we ask is what is the direction of relationships between these institutional measures. As a result, we report in Table 5.4.2, the normalized unique cointegrating vectors among our institutional measures. These normalized vectors provide us an idea of such direction of causation between variables in the long run. We confirm the results of this normalization process using the Autoregressive Distributed Lag (ARDL) Model. We also generate an error correction term using such a normalized model in order to assess the persistence of institutions or the speed at which institutions adjust to their long run equilibrium once they had deviated from their long run path. The error correction term in particular shows us the speed of adjustment of the deviations of variables from their long run stable equilibrium values and helps us identify whether there is persistence in the long run interdependence.

**INSERT Table 5.4.2 ABOUT HERE.**

The results from column 1 of the Table show that if normalization is done with respect to the freehold property rights, there exists a stable positive relationship between freehold property rights and non freehold property rights and this relationship is significant. That is protection of freehold property rights was undertaken along side with non freehold property rights after the 1960s. Similarly any infringement in non freehold rights, affected the freehold property rights. The political rights and civil liberties index although negatively affected the development of freehold property rights, such effect was not statistically significant. This relationship is confirmed by the use of an ARDL model which shows a marginal decline in the coefficient between the two variables of interest (freehold and nonfreehold) and the F-statistics which is above the bounds critical values confirms that such long run relationship still holds when normalization is done over freehold property rights (see Column 2 of Table 5.4.2). Model 3 in column 3 of Table 5.4.2 shows that such normalization is not affected by the inclusion of political instability index. In any case, the inclusion of such an index in the model, only marginally reduces the magnitude of the effect of non freehold rights on freehold rights. This inclusion, leaves the association stable and positive.

Therefore, protection and respect of political rights and civil liberties seem to move in line with security of property rights in the long run. Model 6 (VAR6) further shows that such normalization is not affected by the removal of political and civil liberties index because even if such an index is removed the long run relationship still holds and remains positive between economic rights. However, in model 7 (VAR7), we attempt to normalize over non freehold rights and relate this to political rights and civil liberties. The results from column 7 shown a strong relation between non freehold rights and political rights and civil liberties and such relationship is positive and statistically significant. This implies that improvement in the political rights of citizens led to improvements in the economic rights.

However political instability seem to have affected non freehold property rights negatively and this effect remains statistically significant. The F-statistics also confirms that normalization could be undertaken over non freeholds rights as well. The implication of these results is that the process of economic development can not only be entrusted on the improvement of one set of property rights such as private property rights rather it requires improvement in other sets of rights as well. Protection of customary (non freehold) rights remains fundamental in agrarian societies like Kenya. In cases where such rights are not respected, the result is conflicts over resources which eventually increases uncertainty in the economy and creates political instability.
6 Conclusion

This study set out to construct new set of institutional indicators for Kenya for the period 1880 to 2010, and to assess the interdependence and persistence of such indicators. The purpose of constructing such a set was premised on the criticisms levied against the existing institutional measures and was also meant to provide a longer data set that can be used to analyze in a time series context, the dynamics of economic growth and development in Kenya economy. These objectives were achieved. The new set of institutional indicators constructed in this paper correlate well with the existing indicators. This correlations provide us confidence over our indicators. Interestingly, these new indicators are found to be highly interdependent and they have persisted over time. The property rights indicators blend well with political rights and civil liberties which justifies the argument raised in literature that the two set of indicators are not mutually exclusive. Thus improvement in political rights and civil liberties has implications for protection of property rights in the economy. It is also worthnote that political instability, has negatively affected non freehold property rights in Kenya over the sample period (1960-2010). Thus, when the economy was politically unstable, property rights were also threatened. This has implications for economic development and investment in the economy.

The study also compares our indicators with those constructed for the two other former British Colonies, Zambia and Zimbabwe. It is noted that the Imperial Government implemented similar set of political institutions in these three former colonies. These institutions were biased towards protecting the white minority at the expense of the large indigenous population. The property rights institutions in these former colonies however improved with time and towards independence in each colony, full recognition of the rights to property was made. However, deterioration in the rights started at different times following independence and the colonial structures were again resuscitated. The repressive system of governance then followed in each former colony following independence. The rights of citizens were later not respected by the indigenous ruling elites. This reversal of fortunes in democratic principles might have affected economic development in these former colonies. It could therefore be argued that poor economic development paths in former colonies is a result of the resuscitation of colonial structures in the post colonial states by the ruling elites.
References


APPENDIX A

Table 5.2.1: Correlations between Institutional Indicators: Spearman Correlation Coefficient

<table>
<thead>
<tr>
<th>Correlation</th>
<th>PrCL</th>
<th>PRFHouse</th>
<th>PolityIV</th>
<th>PolI</th>
<th>NFhPR</th>
<th>HPR</th>
<th>CLHouse</th>
<th>HFPR</th>
</tr>
</thead>
<tbody>
<tr>
<td>PrCL</td>
<td>1.000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PrCL</td>
<td></td>
<td>1.000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PRFHouse</td>
<td>0.633</td>
<td></td>
<td>0.459</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PRFHouse</td>
<td>(0.000)***</td>
<td></td>
<td>(0.004)***</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PolityIV</td>
<td>0.739</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PolityIV</td>
<td>(0.000)***</td>
<td></td>
<td>(0.004)***</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PolI</td>
<td>-0.349</td>
<td>0.065</td>
<td>-0.317</td>
<td>1.000</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PolI</td>
<td>(0.0313)**</td>
<td>(0.699)</td>
<td>(0.053)*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NFhPR</td>
<td>0.790</td>
<td>0.676</td>
<td>0.306</td>
<td>-0.101</td>
<td>1.000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NFhPR</td>
<td>(0.000)***</td>
<td>(0.000)***</td>
<td>(0.062)*</td>
<td>(0.546)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>HPR</td>
<td>0.378</td>
<td>0.573</td>
<td>-0.127</td>
<td>0.150</td>
<td>0.076</td>
<td>1.000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HPR</td>
<td>(0.019)**</td>
<td>(0.000)***</td>
<td>(0.447)</td>
<td>0.367</td>
<td>(0.000)***</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CLHouse</td>
<td>0.760</td>
<td>0.892</td>
<td>0.479</td>
<td>(-0.00)***</td>
<td>0.826</td>
<td>0.642</td>
<td>1.000</td>
<td></td>
</tr>
<tr>
<td>CLHouse</td>
<td>(0.000)***</td>
<td>(0.000)***</td>
<td>(0.002)</td>
<td>0.981</td>
<td>(0.000)***</td>
<td>(0.000)***</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HFPR</td>
<td>-0.644</td>
<td>-0.392</td>
<td>-0.524</td>
<td>-0.393</td>
<td>-0.797</td>
<td>-0.907</td>
<td>-0.522</td>
<td>1.000</td>
</tr>
<tr>
<td>HFPR</td>
<td>(0.007)***</td>
<td>(0.133)</td>
<td>(0.037)**</td>
<td>(0.132)</td>
<td>(0.000)***</td>
<td>(0.000)***</td>
<td>(0.038)**</td>
<td></td>
</tr>
</tbody>
</table>

Asterisk ***, ** and * indicates 1%, 5%, and 10% level of significance respectively. P-Value in brackets.


Notes: PrCL = Political & Civil Liberties Computed; PRFH = Political Rights from Freedom House; Instability (PolI) = Instability Index computed; NFhPR = Non Freehold Property Rights computed; HPR = Freehold Property Rights Computed; CLHouse = Civil Liberties from Freedom House & HFPR = Heritage Foundation Property Rights Index. Correlations between all variables are computed between 1960 and 2010 except for HFPR which is computed between 1995 and 2010 due to unavailability of data that dates far back for this index.

Table 5.3.1: Unit Root Tests: DF-GLS de-trending test and the Ng-Perron test

<table>
<thead>
<tr>
<th>Variable</th>
<th>DF-GLS</th>
<th>Ng-Perron</th>
<th>Inference</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>K</td>
<td>X</td>
<td>EX</td>
</tr>
<tr>
<td>PrCL</td>
<td>1</td>
<td>-0.73</td>
<td>-5.30***</td>
</tr>
<tr>
<td>NFhPR</td>
<td>1</td>
<td>-0.89</td>
<td>-6.64***</td>
</tr>
<tr>
<td>FhPR</td>
<td>1</td>
<td>-1.26</td>
<td>-3.34***</td>
</tr>
<tr>
<td>PolI</td>
<td>1</td>
<td>-1.27</td>
<td>-13.30***</td>
</tr>
<tr>
<td>FdIL/GDP</td>
<td>2</td>
<td>-0.82</td>
<td>-8.03***</td>
</tr>
<tr>
<td>GDPPC</td>
<td>1</td>
<td>-0.53</td>
<td>-3.59***</td>
</tr>
</tbody>
</table>

Asterisk ***, ** and * indicates significant at 10%, 5%, and 1% level of significance respectively.

ΔX=first difference

Notes: The DF-GLS critical statistics are -2.59, -1.94 and -1.61 at 1%, 5% and 10% level of significance respectively. Ng-Perron (2001) critical values at 1% level of significance are -13.8; -2.58; 0.17 and 1.74, while 5% are: -8.10; -1.98; 0.23 and 3.17 for MZ, MZ<sub>T</sub>, MSB, and MP<sub>T</sub> respectively. Ng-Perron (2001) critical values at 10% are: -5.70; -1.62; 0.275 and 4.45 for MZ<sub>GLS</sub>, MZ<sub>T</sub><sup>GLS</sup>, MSB<sup>GLS</sup>, and MP<sub>T</sub><sup>GLS</sup>.  

41
Table 5.4.1: Interdependence among Institutional Indicators—the Trace Statistics

for the reduced rank

<table>
<thead>
<tr>
<th>Hypothesis</th>
<th>VAR1</th>
<th>VAR2</th>
<th>VAR3</th>
<th>VAR4</th>
<th>VAR5</th>
<th>VAR6</th>
<th>VAR7</th>
<th>VAR8</th>
</tr>
</thead>
<tbody>
<tr>
<td>$r = 0 vs. r \geq 1$</td>
<td>17.37</td>
<td>36.28</td>
<td>65.43</td>
<td>33.41</td>
<td>13.06</td>
<td>47.61</td>
<td>35.78</td>
<td>20.75</td>
</tr>
<tr>
<td></td>
<td>[15.49]</td>
<td>[29.80]</td>
<td>[47.85]</td>
<td>[29.80]</td>
<td>[15.49]</td>
<td>[29.80]</td>
<td>[29.80]</td>
<td>15.50</td>
</tr>
<tr>
<td></td>
<td>(0.025)**</td>
<td>(0.01)***</td>
<td>(0.00)***</td>
<td>(0.02)**</td>
<td>(0.05)**</td>
<td>(0.00)***</td>
<td>(0.01)***</td>
<td>(0.00)***</td>
</tr>
</tbody>
</table>
| $r \leq 1 vs. r \geq 2$ | ... | 3.39 | 33.71 | 8.93 | ... | 12.40 | 13.54 | ...
| | ... | [3.84] | [29.80] | [15.49] | ... | [15.49] | [15.50] | ... |
| | ... | (0.07) | (0.02)** | (0.37) | ... | (0.14) | (0.10) | ... |

Asterisk ***, ** and * indicates 1%, 5%, and 10% level of significance respectively

[ ] = 95% critical values and ( ) = P-Value

Variables included in the Models: VAR1 = (NFhPR, PoI); VAR2 = (NFhPR, PoI, PrCL); VAR3 = (NFhPR, PoI, PrCL, FhPR); VAR4 = (NFhPR, PrCL, FhPR); VAR5 = (NFhPR, FhPR); VAR6 = (NFhPR, FhPR, PoI); VAR7 = (PrCL, FhPR, PoI); VAR8 = (PrCL, PoI).

Table 5.4.2: Normalized Cointegrating Vectors among Institutional Indicators

<table>
<thead>
<tr>
<th>Cointegration Vector</th>
<th>VAR4</th>
<th>ARDL(1,1)</th>
<th>VAR3</th>
<th>ARDL(1,1)</th>
<th>VAR6</th>
<th>ARDL(1,1)</th>
<th>VAR7</th>
<th>ARDL(1,1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>$FhPR$</td>
<td>1.00</td>
<td>Dep 1.00</td>
<td>Dep 1.00</td>
<td>Dep ...</td>
<td>1.00</td>
<td>Dep ...</td>
<td>...</td>
<td>...</td>
</tr>
<tr>
<td>$NFhPR$</td>
<td>-0.74</td>
<td>0.72</td>
<td>-0.73</td>
<td>0.67</td>
<td>-0.65</td>
<td>0.63</td>
<td>1.00</td>
<td>Dep</td>
</tr>
<tr>
<td></td>
<td>[0.08]**</td>
<td>(0.00)***</td>
<td>[0.06]**</td>
<td>(0.00)***</td>
<td>[0.04]**</td>
<td>(0.00)***</td>
<td>...</td>
<td>...</td>
</tr>
<tr>
<td>$PrCL$</td>
<td>0.004</td>
<td>-0.06</td>
<td>0.03</td>
<td>-0.03</td>
<td>...</td>
<td>...</td>
<td>-0.54</td>
<td>0.34</td>
</tr>
<tr>
<td></td>
<td>[0.036]</td>
<td>(0.04)**</td>
<td>[0.03]</td>
<td>(0.40)</td>
<td>...</td>
<td>...</td>
<td>[0.17]**</td>
<td>(0.00)***</td>
</tr>
<tr>
<td>$PoI$</td>
<td>...</td>
<td>...</td>
<td>0.12</td>
<td>-0.18</td>
<td>0.03</td>
<td>-0.23</td>
<td>4.39</td>
<td>-0.74</td>
</tr>
<tr>
<td></td>
<td>...</td>
<td>...</td>
<td>[0.13]</td>
<td>(0.13)</td>
<td>[0.11]</td>
<td>(0.02)</td>
<td>[0.85]**</td>
<td>(0.00)</td>
</tr>
<tr>
<td>$ECM$</td>
<td>...</td>
<td>-0.005</td>
<td>...</td>
<td>-0.006</td>
<td>...</td>
<td>-0.005</td>
<td>-0.003</td>
<td>...</td>
</tr>
<tr>
<td></td>
<td>...</td>
<td>(0.00)***</td>
<td>...</td>
<td>(0.00)***</td>
<td>...</td>
<td>(0.00)***</td>
<td>...</td>
<td>(0.00)***</td>
</tr>
</tbody>
</table>

Impulse Stable Stable Stable Stable Stable

F-statistic ... 3.88 ... 4.25 ... 5.10 ... 4.29

Bounds tests critical values are 2.57 and 2.91 for I(0) and I(1) at 1%. ECM-error correction term.


Asterisk ***, ** and * indicates 10%, 5%, and 1% level of significance respectively; [ ] = standard errors; ( ) = P-Value
Table 3.2: Scaling Matrix for Political Instability Index

<table>
<thead>
<tr>
<th>Subcomponents</th>
<th>Scaling Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Annual number of Political Fatalities, war related fatalities including genocides on general public (x_1)</td>
<td>(0 &lt; x_1 \leq 100) (100 &lt; x_1 \leq 1000) (1000 &lt; x_1 \leq 5000) (5000 &lt; x_1 \leq 10000) (x_1 &gt; 10000)</td>
</tr>
<tr>
<td>scale</td>
<td>1</td>
</tr>
<tr>
<td>2. Annual number of politically motivated arrest (x_2)</td>
<td>(0 &lt; x_2 \leq 10) (10 &lt; x_2 \leq 25) (25 &lt; x_2 \leq 50) (50 &lt; x_2 \leq 100) (x_2 &gt; 100)</td>
</tr>
<tr>
<td>scale</td>
<td>1</td>
</tr>
<tr>
<td>3. Annual number of political detentions (x_3)</td>
<td>(0 &lt; x_3 \leq 100) (100 &lt; x_3 \leq 1000) (1000 &lt; x_3 \leq 5000) (5000 &lt; x_3 \leq 10000) (x_3 &gt; 10000)</td>
</tr>
<tr>
<td>Scale</td>
<td>1</td>
</tr>
<tr>
<td>4. Annual number of political parties &amp; publications banned (x_4)</td>
<td>(0 &lt; x_4 \leq 10) (10 &lt; x_4 \leq 20) (20 &lt; x_4 \leq 30) (30 &lt; x_4 \leq 40) (x_4 &gt; 40)</td>
</tr>
<tr>
<td>scale</td>
<td>1</td>
</tr>
<tr>
<td>5. Number of declarations and renewals of state of emergency per year (x_5)</td>
<td>(0 &lt; x_5 \leq 2) (2 &lt; x_5 \leq 4) (4 &lt; x_5 \leq 6) (6 &lt; x_5 \leq 8) (x_5 &gt; 8)</td>
</tr>
<tr>
<td>scale</td>
<td>1</td>
</tr>
<tr>
<td>6. Number of township riots &amp; strikes &amp; demonstrations (x_6)</td>
<td>(0 &lt; x_6 \leq 10) (10 &lt; x_6 \leq 25) (25 &lt; x_6 \leq 50) (50 &lt; x_6 \leq 100) (x_6 &gt; 100)</td>
</tr>
<tr>
<td>scale</td>
<td>1</td>
</tr>
<tr>
<td>7. Number of reported cases of politically-related property damages per year (x_7)</td>
<td>(0 &lt; x_7 \leq 100) (100 &lt; x_7 \leq 1000) (1000 &lt; x_7 \leq 5000) (5000 &lt; x_7 \leq 10000) (x_7 &gt; 10000)</td>
</tr>
<tr>
<td>scale</td>
<td>1</td>
</tr>
</tbody>
</table>

Authors' breakdown following Zakura (2011) with modifications.