



Measuring Institutions: Indicators of Political Rights, Property Rights and Political Instability in Malawi

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Abstract

This paper aims to construct a new set of institutional indicators for Malawi. Our political freedom index correlates strongly with the Freedom House political rights and civil liberties indices, but consists of a far longer time series, which can be used to examine long-run issues with greater efficacy. The high correlations between the political freedoms index and the various property rights indices suggests that, in the Malawian case, lack of political freedom is associated with lack of economic freedom and security. However, our property rights indices correlate poorly with an index based on *de facto* property rights. This suggests that despite the government's legal power to abrogate property rights, these rights were generally respected. Cross-country comparisons suggest that political freedoms follow broadly similar patterns, particularly in Zimbabwe and Malawi. There is less of a match between countries on property rights issues, however.

Keywords: Institutions, Political freedom, Property rights and Malawi

JEL Codes: E02, K00, N4, O1.

1 Introduction

New Institutional Economics argues that a country's growth performance is strongly linked to its political and economic institutions. Empirical examinations of this question encounter two problems: the first is how to define and instrumentalise institutions; and the second is the lack of widely available long-run data for many countries. This paper aims to provide a thorough discussion of institutions and how to define them for the purposes of economic analysis, and to construct long-run institutional data series for Malawi.

New Institutional Economics attempts to explain the well-documented 'productivity' gap of many developing (and particularly African) countries. The productivity gap refers to the difference in output between various countries that remains even after differences in factor quantity and quality are accounted for. The argument, in brief, is that institutions affect the productivity of capital and labour through their incentive effects and through their impact on the allocation of resources.

Despite the wealth of literature on the importance of institutions for growth, there is a lack of agreement on how to define or treat them in economic analysis. Authors such as North (1990, 2005), Scully (1988, 1992), Barro (1996), Knack (1996, 2003), Hall and Jones (1999), and Acemoglu, Johnson and Robinson (2001, 2005) have all discussed the possible causal pathways through which institutions might influence growth. However, as Bollen (1980, 1990) points out, all too often the indicators used in such papers are not clearly reproducible, are not well defined, and may well have only tenuous links with the concepts they purport to measure. Thus, there is a clear need for sets of indicators which are based on objective and explicit criteria. Such a set of indicators is presented in Gwenhamo, Fedderke and de Kadt (2008), which elaborates on an earlier work by Fedderke, de Kadt and Luiz (2001). This approach to building indices 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. Thus, it is well worth using this methodology to build more sets of indicators.

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Malawi presents an interesting case because of its peculiar history. For 30 years, from 1964 to 1994, Malawi was ruled by an extremely oppressive but completely stable regime. The government of President Banda was a one-man machine – his powers were extraordinary and extensive. Autocratic regimes are, unfortunately, not particularly unusual in the developing world, but stable autocracies are less common. For 30 years, there was little political resistance within the country, and the only major incidents of political unrest were at the behest of the government, when it decided to move against perceived opponents. Thus, Malawi can be seen as a test case for both whether a *de jure* institution or *de facto* reality is more important for growth, due to the disconnection between the legal and actual situations, and whether political institutions are important when their impact on economic institutions is limited, in this case through personal power of the ruler.

1.1 Aims

The aim of this paper is to apply the methods developed in Gwenhamo et al (2008) and Fedderke et al (2001) to data from another sub-Saharan African country, Malawi. We aim to produce three indicators to capture the two sets of institutions considered important for economic growth, and the additional dimension represented by political repression. The data will cover the time period 1933 to 2007, which provides far greater coverage than current data series for Malawi, which are available only from the 1970s onwards. The greater the time period, the greater the probability of observing significant changes in institutions, and the greater the probability of observing correlations between institutional change and long-run economic behaviour. However, very long time series encounter the problem that conceptions of institutions change over time, as does the extent of government activity. These concerns, as well as increasing scarcity of data, motivate the decision to begin the index in 1933. The specific objectives of this paper are thus:

- To produce an index measuring the *de jure* recognition of political and civil liberties from 1933 to 2005
- To produce an index measuring the *de jure* recognition of property rights from 1933 to 2007
- To produce an index measuring the *de jure* political oppression from 1933 to 2007
- To use these indices in a cross-country comparison among Malawi, South Africa and Zimbabwe.

2 Literature Review

2.1 Theoretical framework

The New Institutional Economics literature argues that institutions have a strong impact on growth. One of the more influential writers on the subject is North (1990, 2005). In his formulation, institutions comprise both formal and informal constraints on the behaviour of agents – individuals and organisations such as governments and businesses. Informal constraints include norms and social taboos, as well as interpersonal mechanisms such as reputation and information-sharing. At the other end of the scale, written laws and regulations comprise formal constraints. Formal and informal constraints exist concurrently, but formal constraints tend to develop as the size of group membership increases or members must interact with outsiders. North argues that the rate of this development is governed by transaction and transformation costs. Transaction costs are those associated with fulfilling bargains, while transformation costs refer to the costs incurred due to changing institutions.

Informal constraints develop through repeated interaction within relatively small groups, in which reputation and mutual knowledge are able to function as effective signals and allow individuals to transact efficiently with each other. These constraints become less effective as the size of the group increases, or it must interact with other groups. In such situations, parties to contracts do not always know each other, even by reputation. This increases the risk of default, and thus the level and cost of the sureties built into the contract – a rise in transaction costs. Eventually, these costs will rise sufficiently to make it worthwhile to incur the transformation costs of creating or adopting a new set of institutions – merchant houses, formal laws, or international trade treaties.

North also provides an explanation for why inefficient institutional systems persist: if the transformation costs and transaction costs are distributed unevenly, along with political power, there will be no change. If

the existing system benefits those with political power, they have no reason to accept change, and indeed may move to oppose it. Elites may also have reasons to fail to enforce existing rules, and thus to subvert institutions. In the most extreme case, institutions may simply not exist, for a variety of reasons.

More generally, there is disagreement in the literature over the precise relationship between institutions and economic growth. According to modernisation theory, as argued by Lipset (1959) and Helpman (2004), rising prosperity allows new power groups to emerge and creates more complex social structures. This, coupled with forces such as industrialisation, increased literacy and popular political involvement, results in 'better' institutions developing. In contrast, authors such as Acemoglu have presented the alternative view: that good institutions lead to growth¹.

2.2 Empirical Literature

In North's formulation, economic and institutional changes are mutually reinforcing effects. Economic changes will change transformation and transaction costs, possibly leading to institutional change, but changes in institutions will affect the efficiency of economic transactions, and thus shape future economic growth. This duality is at times overlooked in the literature. There is a tendency to ascribe far greater power to institutions than to economic forces. The recent and influential works by Acemoglu *et al*² have all focussed on the importance of institutions and initial conditions on later growth. Their and others' work has stressed the need for strong and efficient institutions as a precondition for growth, and at times overlooked the converse – that growth can lead to strong institutions.³ However, the evidence for modernisation theory has been criticised by some authors, who argue that the effect is an artefact of the data⁴. Generally, when the two effects may be occurring concurrently, identifying the direction of causality is difficult, particularly in historical data such as those used in many Acemoglu papers.

A second tendency in the literature is to treat all institutions equally when examining institutions and growth. The specific set of institutions which should most strongly affect growth is property rights. Hall and Jones (1999) argue that protection of property rights is fundamental to growth because individuals' power to own, transfer and enjoy fully their property determines their incentives to acquire it. If property rights are protected, people should work harder, invest more and generally be more productive. Thus, strong and resilient property rights institutions should result in increased growth. Many other papers adopt similar formulations. Some authors proceed to conflate property rights institutions with political institutions. There is an argument that democratic governments are more inclined to respect property rights, due to the power of the general population to hold them in check, and for similar reasons are likely to be more transparent and less corrupt (thus decreasing unproductive diversions of resources). This is far from a direct correlation, however. It is quite possible for a dictatorial government to respect private property or for a democratic government to not do so; consider the Argentinian military Junta or the current Bolivian regime.

This problem arises when measures for institutional strength are chosen; searching for correlations between voter turn-out or freedom of the press and economic growth may yield results, but the causality of the relationship is far from clear.

Barro (1996) and Glaeser *et al* (2004) provide evidence for this observation. Barro argues that there is not a linear relationship between democracy and growth – the economic rate of return to low levels of democracy is high, but steadily decreases with increases in democracy, and negatively affects economic growth at high levels. He attributes this to slower decision-making and increased diversion of resources due to political motivations. Further, once such institutional factors as the rule of law, free markets, government consumption and human capital levels have been considered, the relationship is very weak.

Glaeser *et al* argue that relying on institutional measures can lead to inaccurate results, specifically due to the power of elites to influence the enforcement of institutions. A dictatorial government that provides no constitutional guarantees of property rights can still pursue policies conducive to growth, by informally protecting them. Governments can also choose to ignore and not enforce institutions protecting property

¹Acemoglu and Johnson, 2005; Acemoglu, Johnson and Robinson, 2001; Acemoglu, Johnson and Robinson, 2002; Acemoglu, Johnson and Robinson, 2005.

²Acemoglu and Johnson, 2005; Acemoglu, Johnson and Robinson, 2001; Acemoglu, Johnson and Robinson, 2002; Acemoglu, Johnson and Robinson, 2005.

³Scully, 1988; Knack, 1996; Hall and Jones, 1999; Aron, 2000; Persson and Tabellini, 2004

⁴Przeworski and colleagues (2000)

rights, resulting in *de facto* insecurity despite legal protections. Democracy is no guarantee of a match between *de facto* and *de jure* institutions, and dictatorship is not necessarily a recipe for disaster.

A third, related, concern is raised by Bollen (1980, 1990). In many instances, the indicators used in this field do not represent the institutions to which they are attributed. In the example cited above, neither freedom of the press nor voter turn-out are conceptually sound measures of democracy. Stability, economic or social equality and investment levels are not direct measures of economic growth or property rights. If invalid indicators are used, the relationships identified may be spurious, or due to entirely different mechanisms than the ones to which they are attributed. Bollen also strongly objects to the general failure to report reliability measures for constructed indices.

Bollen argues that this is a general problem with objective measures of institutions – too often the measures do not capture the strength or format of the institutions themselves, but only related issues. Thus, many authors, when constructing indices, choose to use subjective measures. The great danger with such an approach is the possibility of bias. However, he also provides a solution, by advocating an explicit explanation of all underlying assumptions and steps in the creation of the measures. Most well-known indices fall into the subjective category, and many fail to heed Bollen’s cautions.

In the realm of political institution indices, the Freedom House Index, created by Gastil and beginning in 1972, is a prime example. This index rates political freedom and civil liberties on an ordinal seven point scale. It is one of the longest-running and most comprehensive indices, but has been subjected to criticism, primarily on the grounds that its characterization of institutions equates free institutions with United States of America-style institutions, and that it shows very little awareness of local interpretations.⁵ Both Bank (1971) and Bollen (1980, 1990) create subjective measures based on aspects of the political system. More recently, the Polity series of indicators, by Gurr, measure various aspects of institutional strength.

Despite their importance in the growth relationship, far less work has been done to quantify property rights institutions. Between 1975 and 1996 the Fraser Institute produced measures of property rights within its Economic Freedoms in the World indices. The Heritage Foundation also produces annual measures of property rights protections. Both these indices are subject to a certain degree of ideological bias, and are unfortunately truncated. The Governance Matters indices and the Investment Climate surveys, conducted and published by the World Bank, provide more recent data. Fedderke, de Kadt and Luiz (2001), the paper which this project follows, constructed indices for property rights and political liberties, for an unprecedented time period. These measures were based purely on the formal availability of and protection afforded to these rights, without considering their enforcement.

3 Methodology

The aim of this paper is to apply the methods used in Fedderke *et al* (2001) and Gwenhamo *et al* (2008) in another Sub-Saharan African country, in line with the overall goal of producing comparable data-sets. As such, the same methodology was applied to the political liberties and property rights indices: information is collected on changes in the constitutional and legal framework of Malawi over time, and this information is assessed against a set of standardised criteria to assign ratings to the changes. In this way, annual scores for political liberties and property rights are obtained.

This approach is associated with two main problems: the ratings thus constructed aggregate large quantities of information, resulting in the standard loss of information associated with aggregation; and the criteria used and ratings given are subject to the biases of the writer, resulting in less precise ratings. The former can be mitigated by the reporting of the ratings for each sub-component in addition to the comprehensive rating, and by making the information used in the rating process available. Thus, changes to particular aspects of the rights and the effect of specific changes on the index can be observed. The latter problem cannot be wholly compensated for, but following the technique used in Gwenhamo *et al* (2008), and recommended by Bollen and Paxton (2000), it can be limited. This technique involves defining the criteria used in the ratings process prior to the collection of information, rating sub-components to create an overall score and presenting these results to experts on Malawi. In this way, the theoretical underpinnings of the index are insulated from the constructor’s knowledge of the country’s situation, and the outcomes are compared by independent

⁵Schoultz, 1980.

authorities to the known situation. Thus, the influence of the author's biases are kept to a minimum. This paper uses the same set of weighted criteria as Gwenhamo et al (2008), to maximise comparability.

The indices thus constructed are based on information about the *de jure* legal situation in the country. The rules of the game, rather than the outcome, are assessed. This can result in wide divergence between the scores assigned to the index and the perceived situation in the country. To address this concern, a third index was constructed: political oppression. Malawi, which for 40 years was ruled largely by presidential diktat, would be expected to have large differences between the rights assigned by the legal system and those actually obtainable. This index is created from a variety of instruments for political oppression.

4 Political rights and civil liberties

4.1 Identification and weighting of sub-components of the index

Political rights are typically considered to be the claims that the population has against the state in terms of the political system. The 'ideal' system of political rights is one of full participatory democracy, with universal franchise in regular fair and free elections and in which the state and state officials are legally accountable for their actions. Civil liberties are the claims of the population against government interference – their rights to pursue their own interests – including such rights as freedom of speech, of association, of movement, and of the press. In the interests of comparability, the same criteria and weightings are used here as in Gwenhamo *et al* (2008). As such the components of political liberties used are: voting rights, freedom of association, freedom of assembly, freedom of expression, extent of arbitrary executive power, independence of the judiciary and the legislature, government secrecy or indemnity, the due process of law, freedom of movement, academic freedom, religious freedom and a residual category. The first eight components are each assigned a weight of 10, and the last four are each given a weight of 5. These weights indicate the relative importance of the various categories in the overall index. In this paper, the residual category is used to capture changes in the 'political atmosphere', and reflect the levels of tension or animosity among political institutions. The information used to create the ratings systems is obtained from a variety of secondary sources.⁶

Increases in the score indicate a move toward the full recognition of the right, and decreases indicate a move away from the ideal. A country which achieved a score of 100 would be the ideal participatory democracy with full protection of all civil liberties. A country with a score of 0 is theoretically possible only in a state of nature. As soon as a political or social system exists, at least one individual will have *de facto* rights, raising the score above zero. A score between 13 and 37 indicates a state whose rights structure grants great arbitrary power to the state, and which has discriminatory franchise conditions. If the arbitrariness of state power is more constrained, a country will fall between 38 and 50. Between 51 and 74 sit countries which allow reasonable levels of procedural justice, and thus have considerable restraints on arbitrary state action, and which recognise most civil and political rights to a reasonable extent. Such states will still have limits on personal freedoms and may well include discriminatory laws related to various freedoms, including franchise. A score between 75 and 87 indicates a country with entrenched limits on state action, and thus firmly recognised rights to procedural justice, freedom of association and assembly that are subject to fewer constraints. From 88 to 100 would indicate an ideal liberal democracy, with *de jure* protection of all personal and political freedoms, limited only by other individuals' rights.⁷ It is worth noting that this approach to measurement of rights does not consider second- or third-generation rights, which are not part of the traditional conception of a liberal democracy.

4.2 Malawian political context

This index represents the *de jure* political rights and civil liberties in Malawi in the period 1933 to 2005. As mentioned above, due to the sweeping powers granted by parliament to the executive to rule without checks,

⁶Baker, 2000; Baker, 2001; Chiume, 1992; Colonial Office, 1933-1962; Government of Malawi, 1968-1994; Harrigan, 2001; Joffe, 1973; Lwanda, 1993; Lwanda, 1996; Macdonald, 1975; Meinhardt and Patel, 2003; Palley, 1996; Pike, 1968; Short, 1974; Venter, 1984; Virmani, 1992.

⁷Gwenhamo et al (2008)

and the presence of substantial extra-legal activity by the executive, there is no guarantee that this index will reliably represent the *de facto* realisation of political rights.

The index covers a period of almost 70 years; this time period encompasses several distinct political regimes in Malawi, many of which had very different conceptions of their relationship to the population. This poses two challenges: first, how rights are conceived and defined has changed considerably over the 20th Century; and second, extremely distinct political regimes are difficult to compare across time. For example, in both the period of Consul rule (prior to 1933) and under the Banda regime, the executive had very few constraints on its actions, and the population had few legislated rights. However, under Consul rule the implicit assumption was that individuals were entitled to act as they saw fit unless that act was prohibited; during the Banda regime, individuals were entitled to act only if that act was permitted under the law. Thus, these two regimes appear similar in terms of legal rights, but the state's attitude to its citizens, and thus the rights that they could access, was substantially different. This is at least partly as a result of the capacity of the state. When Malawi was first colonised and declared a British Protectorate, the state was very limited and governed primarily those interactions involving settlers or British interests. The population was mostly left to its own devices. As the capacity of the state expanded, the areas in which it produced and enforced legislation increased. In some cases, this resulted in the population gaining formal rights, where previously they had simply had freedoms, and in other cases this resulted in limitations on previously existing freedoms. The progression of the state from mediator and border-control to fully-fledged interventionist state was fairly swift, but its retreat to a liberal democracy was far slower. The various constitutional regimes are detailed below.

The first centralised government (in the Western sense of the word) was installed in 1891, when Malawi (then called Nyasaland) was annexed by Britain. In this period, the Consul (later termed Governor) initially acted as sole authority within the territory, answerable only to the British government. In reality, the Consul's powers were limited due to the lack of resources available to him. The position depended greatly on negotiation and balancing of interest, and the ubiquitous British South African Company wielded much power, despite its limited legal role in Nyasaland, compared to its powers in Southern and Northern Rhodesia. By 1933, a Legislative Council to advise the Governor had been created. Members of this Council were appointed rather than elected, and the Governor's powers were still very large, officially.

The first period examined in this paper is 1933 to 1953. In 1933, the Governor-in-Council passed the Native Authority and Native Courts Ordinances. This gave formal recognition to traditional African political structures and courts, and granted them independent authority over African affairs, although the state reserved the right to intervene 'in cases of disobedience or inefficiency'.⁸ The Colonial government continued to control non-Africans, and any interactions between the two groups. There was limited franchise, based on a combination of property ownership, income and educational qualifications, in town council elections, but no elected positions higher than this level.

In 1953, Nyasaland joined the Federation with Northern and Southern Rhodesia. This involved relatively few changes in the domestic sphere, as the Federation constitution specifically prohibited it from intervening in regional 'native' affairs. However, certain legislation affecting political rights and civil liberties was passed and applied to Nyasaland's domestic affairs.

The first major change in domestic governance took place in the 1960s. After several years of increasing unrest, Nyasaland was granted independence and formally became Malawi in 1961. The first Independence constitution preserved much of the colonial era legislation, but expanded government power in certain areas. Shortly thereafter the franchise was extended from the propertied or wealthy and educated to the entire population. However, this was followed by the 1964 Cabinet Crisis,⁹ which ushered in the Banda regime. A new Republican constitution was adopted in 1966, which criminalised political competition and granted sweeping powers to the executive. This remained in place until 1994, when substantial legislative changes were made, to allow the first democratic elections since 1961. A new Liberal constitution was passed in 1995, which removed the franchise from members of the military and granted protection to a full complement of

⁸Nyasaland Foreign Office Report, 1933

⁹The Cabinet Crisis was sparked when some of President Banda's cabinet ministers publicly criticised his treatment of them and objected to his increasing extension of his authorities. President Banda was supported by the Parliament, and the dissident cabinet members forced to resign. However, President Banda embarked on a campaign of political oppression, exiling his opponents and at times violently clamping down on opposition supporters. This has been observed to mark the beginning of his formal suppression of opposition – previously, the government had only informally rejected competition and opposition.

liberal rights.

4.3 Interpretation of the Political Freedom index

Figure 1 is the composite political rights index for Malawi. Figure 1.b shows the index disaggregated by category. There is broad correspondence between the political periods and the behaviour of the index. However, it must be stressed again that this index measures the *de jure* situation. There were periods during the Banda regime in which enforcement of legislation varied, or politically motivated violence increased, but these will not be reflected in this index unless there was a concomitant change in law. Equally, the current government faces a situation in which it has highly progressive laws but cannot always enforce these; again, the index reflects only the legal situation.¹⁰

INSERT FIGURES 1 and 1B ABOUT HERE.

Prior to 1961, there is relatively high variability in the index, as the government expanded its control of various features of political and civil life, and responded to events such as civil unrest and World War Two. There is a slight decline in the index in 1933, following the passage of the Native Authorities and Native Courts Ordinances. In traditional courts, legal representation was not provided, and cases could be decided based on poorly codified traditional laws, leaving much room for abuse. Decisions by traditional authorities were not appealable to any higher body, although court decisions could be appealed on substantive grounds. The index suffers a break-down during the Second World War – the author has been unable to find information on the specific provisions passed in this period, although descriptions of the government’s actions suggest that ordinances limiting freedoms of person and information, and permitting considerable expropriation, were passed.¹¹ In 1946, the Civil Procedures Ordinance was passed, which gave the public rights to sue the government and its officers in tort and contract, increasing the accountability of government to its population.

The next marked change in the index occurs in the late 1950s, particularly in 1959. This shows the government’s response to the growing unrest in the African population to Federation and their political disenfranchisement generally. In 1954, the Restriction and Security Orders Act was passed, which allowed the Governor to declare as restricted any person considered to be undesirable, after which their assets could be sold to fund their imprisonment and any person aiding them was committing an offense. Further, anyone could be held for up to 28 days while a restriction order against them was considered. In 1959, in response to civil unrest, the Emergency Regulation Ordinance was passed, which gave the Governor sweeping powers of seizure, arrest and restriction on public demonstrations. The Trade Union Ordinance allowed the Governor to dissolve any trade union he considered to be acting improperly, after which their continued activities would count as those of a banned organisation (resulting in prison sentences for all members). Finally, the Riot Damages Ordinance allowed the government to levy taxes on specific individuals to fund compensation for riot damages. In 1960, a large number of laws were passed permanently increasing the Governor’s powers and putting in place measures to prevent resurgences in the violence.¹²

There is a brief improvement in the index between 1961 and 1964, immediately following Independence. The Independence constitution maintained many of the oppressive aspects of Colonial legislation, but did grant universal franchise to the population, create an independently elected legislature and transfer some of the powers previously held by the Governor to local government. However, following the Cabinet Crisis in 1964, the legislature passed a number of laws ceding power to the President and decreasing the protections available to citizens.¹³ This culminated in a new constitution in 1966, making Hastings Banda President for Life, banning all political parties other than the Malawi Congress Party and giving the president the power to appoint candidates for the legislature. Civil liberties continued to be eroded until the early 1970s, culminating with an amendment to the Penal Code which made it an offense to promulgate false news, with

¹⁰ Appendix A gives annual scores for each sub-component of the index and explanations of relevant pieces of legislation.

¹¹ Information for the period 1933 to 1962 was obtained from the annual Nyasaland Foreign Office Reports, which were not published during the war years.

¹² Preservation of Public Security Ordinance; Detained Persons (Special Provisions) Ordinance; Criminal Procedure Code (Amendment) Ordinance; Penal Code (Amendment) Ordinance; Protected Places and Areas Ordinance; Nyasaland Police Reserve Ordinance.

¹³ Constitution (Amendment) Act (Preservation of Public Security); Changes in Civil Service Regulation; Land Act; Penal Code (Amendment) Bill; Constitution (Amendment) Bill.

the relevant minister determining what false news was. From the 1970s to the 1990s, few relevant changes occurred – the oppressive machinery of the state was fully developed, and no major political crises arose which demanded new approaches.

There is a sudden spike in the index in 1994, when multiple political parties were legalised and a multi-party election was held. This led to the creation of a new constitution in late 1994, which was officially adopted in 1995. This constitution granted full civil liberties to all Malawians, limiting only the right of foreigners to own property, and excluding active members of the military from the franchise. This restriction in fact decreased the de jure equality of franchise – under the Banda regime, although in practical terms voting had little impact, all Malawian citizens could vote. In 1999, the transition to free speech and association was completed with the repeal of the Penal Code of Sedition and the Censorship Act, allowing full and unfettered freedom of the press. The passing of the Non-Governmental Organisations Act in 2001, which requires all NGOs to register with a government body and pay annual fees, is regarded as a restriction on freedom of association, but quite a marginal one. Since 1994, the courts have been vigorous in their defence of civil liberties, demonstrating substantial independence from the government and overturning several attempts to limit personal freedoms. As a result, there have been few large changes in the index since the advent of democracy. The repeal of the Penal Code in 1999 and the Non-Governmental Organisations Act in 2001 have an impact on the index, but this is small in comparison to the changes of the mid-1990s.

5 Property rights

Again, as this paper is following the techniques used in Fedderke *et al* (2001) and Gwenhamo *et al* (2008), the aim of this section is to produce a comparable index of property rights. Both these papers restricted their analysis to immovable property rights – most obviously, land. In the case of Malawi, 70% of the population is engaged in some form of agriculture, and much of this is subsistence. Individuals’ and families’ access to land is in many cases vital to their survival, and is often the safety net for those who move to the cities. Historically, Malawi has depended greatly on its agricultural exports to fund government expenditure and development. Thus, there is certainly an argument to be made that land is the most important form of property, and that changes in immovable property rights will have the greatest effect on growth. This paper also briefly examines intellectual property rights. Given the impact of intellectual property rights on developing countries, with their relationship to capital formation and knowledge transfers, this index covers an important sphere of rights for development. These are likely to be of less importance to Malawi’s development, due to its dependence on agricultural exports for growth, but can provide an interesting extension of the land rights index.¹⁴

5.1 Identification and weighting of sub-components of the index

In the case of both indices, the ratings and weighting used are those identified by Gwenhamo *et al* (2008), which used the ideal set of property rights as laid out by Honore (1961) and Waldron (1988). However, Gwenhamo compresses Honore’s 11 components to 7 criteria: the right to possess; the right to use; the right to manage; the right to capital; the right to security; the power to transfer; and liability to execution.

The right to possess is simply that; the right of an individual to own property, unrestricted by limitations on what or how much can be purchased. This right would be limited in cases in which land in certain areas cannot be bought by certain classes of individuals, or when there are quantity limits on purchases. The right to use property is the right of the owner to do as he or she sees fit with their property, including not to put it to use – for instance, in the case of patents – and to any income derived from using the property. It should be noted that the right to use property includes the right to dispose of income or products of the property; thus, a land owner’s right to sell his crops as he chooses is included in the right to use, whereas his right to choose his crop falls under his right to manage, as would decisions over others’ use of the property. The right to capital refers to the owner’s rights over the capital value of the property, while the right to security is the right to security against expropriation. An owner’s power to transfer is his right to cede his property

¹⁴References for this section are: Baker, 1993; Dickerman and Bloch, 1991; Government of Malawi, 1968-1994; Government of Malawi, 1999; Government of Malawi 2003; Government of Malawi, 2004; Government of Malawi, 2006; Lwanda, 1993; Lwanda, 1996; Pachai, 1978; Pike, 1968; Pryor, 1990.

to another individual or agent, and liability to execution means that judgements against the owner can be executed on the property.

Following Gwenhamo, the weights given to the criteria are as follows: the right to possess is assigned a weight of 20; the next four components each have a weight of 15; and the last two criteria, transmissibility and liability to execution, have weights of 10 each. As the protection of a right approaches the full and ideal scenario, the score awarded to a criterion increases.¹⁵

This paper encounters a similar problem to that reported by Gwenhamo, although it is less easily resolved. Like Zimbabwe, Malawi had a legally recognised dual-tenure system, but its existence was not due to colonial land division, but rather to continued habits of ownership. Land in urban areas was held primarily under freehold or as government land, but initially rural land could easily move out of the traditional ownership system simply by being sold to a white (or black) freehold farmer. Although this was less frequent, families could also buy land and return it to the traditional system. This flexibility continued until the late 1960s, when the government passed a set of legislation designed to encourage families to move to the freehold system of land ownership permanently. Thus, there was considerable flux in both the proportion of land under each of the systems and the percentage of the population using each system. This information is not readily available, so no effort is made to combine the two separate tenure systems.

The resultant indices are reported in Figure 2.

INSERT FIGURE 2 ABOUT HERE.

5.2 Interpretation of the Immovable Freehold Property Rights Indices

By 1932, the freehold system of tenure was well established and protected. Land under this system was predominantly owned by white farmers, or in towns. There were some rural African freehold land-owners, but the majority of rural African land was held under the traditional system. The initial decrease in the index is due to the set of laws passed in the early 1930s restricting exports and imports and the Cotton and Tea Ordinances. The former ordinance created a Cotton Board to license, regulate and buy all cotton grown in Nyasaland, and the latter ordinance banned the growing of tea (repealed only in 1947). In 1937, the government created a Tobacco Marketing Board and passed legislation giving precedence to its claims over minerals found by prospectors, even on private land. After World War Two, the government continued promulgating ordinances creating Marketing Boards and controlling the growing and selling of produce, resulting in a gradual decline of the index. However, there were also various ordinances passed increasing the rights of landowners.¹⁶

These fluctuations continued until 1965, when the Land Act signalled a sea-change in the government's attitude. This act gave the responsible minister the power to annul private leases and land agreements, and required that he be notified of and give consent for any sale of private land. In 1966 the Forfeiture Act was passed. This act allowed the confiscation of private property of any individual convicted of negligence, acts prejudicial to state interests, or designated as subversive. In 1968 the Control of Goods Act gave the government the power to impose price controls and export-import restrictions, particularly over agricultural inputs and products. The 1970 Lands Acquisition Act allowed the government to acquire public land by sale and forced acquisition whenever it was deemed in the public good. The minister responsible was required to prove the public benefit resulting from the acquisition, which did impose some limits on the use of this policy. After this raft of legislation, property rights were unchanged until 1986, when the Business Licensing Act was used to remove the rights of Asians to own or lease property outside designated areas.

In 1994, the new constitution restored most rights of owners over their lands, with an important proviso: due to the expropriations of the Banda period, any land deemed to have been acquired under duress was held in trust by the National Compensation Tribunal until it could be appropriately disbursed. The occupiers were entitled to continue using the land until that date, but did not have legal title to it. This situation continued until 2004, when the Tribunal was wound up after finalising its distributions, which turned out to be rather limited. In 1996, the Environmental Management Act created a right for individuals and communities to have a clean environment, and thus imposed obligations on property users not to pollute.

¹⁵ Appendix B gives annual scores for each sub-component of the indices and the implications of relevant laws.

¹⁶ Temporary Control of Premises Ordinance; Africans on Private Estates Ordinance (1956); Estate Duty Ordinance (1956).

The Wills and Inheritance Act increased the right to transfer private property according to the wishes of the owner, by expressly removing private property from the ambit of traditional laws and inheritance.

The resultant rights index with its sub-components is reported in Figure 3.

INSERT FIGURE 3 ABOUT HERE.

5.3 Malawian traditional property systems

Property rights in the traditional system were always weaker and more diffuse. There is not one unified system of traditional property rights in Malawi, but several distinct ones which vary among areas and cultural groups. Certain areas are matrilineal, with property passing down the female line and owned by women, while others are patrilineal and still others have communal land systems. Thus, it is slightly misleading to speak of traditional property rights in Malawi as though they were a well-defined and universal concept. In many cases, particularly under colonial rule, districts managed traditional land independently, with limited interference by the central government. However, there were national laws passed, and these became more common over the years.

In the early years of the 20th Century, there were two Land Commissions to decide 'native land policy'. The 1903 Commission argued for the protection of 'natives' living on land that had been transferred to private ownership, but did not speak in favour of reserving land for African use. The 1920 Commission instead recommended that sufficient land to support the African population should be preserved as traditional land, that African farmers should pay the same rents as White farmers, and that Africans should be able to hold residential land. African males were charged poll tax, and all Africans were charged hut tax. This caused difficulties, particularly in traditionally matrilineal areas where men did not own their huts. In 1933, a set of laws were passed that created a more unified traditional land ownership system, by treating all traditional land as communally owned and controlled by the chiefs, whether or not this was the 'traditional' system in all areas.

5.4 Interpretation of the Immovable Traditional Property Rights Index

In 1933, the year the index begins tracking changes, the Native Authority Ordinance gave explicit recognition to the fact that traditional land would be governed by traditional law, although the Colonial government reserved the right to intervene 'in cases of disobedience or inefficiency'. From 1934 onwards, African land rights were affected similarly to freehold rights by the creation of Marketing Boards and price and crop controls. African land users were also more affected by the ordinances limiting hunting and fishing, as these were activities more important to subsistence farmers.¹⁷

However, the first major change to the status of African land rights since 1920 took place in 1950, with the passing of the Nyasaland Protectorate African Trust Land Ordinance. This ordinance defined three types of land within the Protectorate: public land, owned and used by the government; private land, owned and used by individuals; and native trust land, used by Africans but owned by the state. This ordinance moved ownership rights of all traditional land from individual Africans and tribal councils to the Governor, giving him the right to dispose of it for public purposes. Thus, in 1950 the 'right to possess' sub-component of the index falls to zero, and remains at zero until 1967. In 1951, this situation was slightly improved by the Public Lands Ordinance, which recognised African claims on native trust land, but still gave its legal title to the Governor. Federation, in 1953, also increased the security of tenure of Africans on native trust land, by specifying that giving land to settlers did not fall under public purposes, and was not a legitimate reason to dispose of African land.

INSERT FIGURE 4 ABOUT HERE.

The 1965 Land Act had serious consequences for traditional land. In addition to continuing government's right to expropriate African trust land (without compensation) for public purposes, it gave the relevant minister the final say over dispositions of land within the traditional system. Thus, the minister could overrule traditional authorities or inheritance systems, even without publicising the land. However, in 1967, the government passed a series of legislation that allowed traditional land to be converted to private

¹⁷Game Ordinance (1936); Natural Resources Ordinance (1946); Fisheries Ordinance (1949).

land while remaining in the hands of its traditional users.¹⁸ Once the Minister declared an area ready for conversion from customary to modern land rights, a local Land Board, with Allocation Officers, was set up to determine the users of land. Instead of granting individual title to land, land could be registered as belonging to families. This gave ownership and control of the land to specific individuals, but allowed traditional interests to continue to be balanced. Traditional authorities ceased to have control over land, once this process was complete, and the Land Board enforced the family title thereafter. However, not many areas were ever converted by this system, and most traditional land remained in traditional ownership systems unless it was taken over by government. Local authorities were hesitant to implement a policy which would decrease their power, and the central government did not pursue these policies vigorously enough to overcome their reluctance.

The 1994 constitution removed the government's ability to expropriate or publicise traditional land. Traditional land continued to be owned and managed by the traditional authorities, which varied according to region. The provisions of the National Compensation Tribunal – to confiscate land acquired unjustly during the Banda regime – had limited effect on traditional land, as traditional land owners had typically been the victims rather than the beneficiaries of expropriation. However, the 1996 Environmental Management Act, which gives rights to individuals to not suffer from pollution or degradation of land caused by other land owners, has potentially far-reaching consequences. Much traditional land is badly degraded, contributing to environmental problems for communities, so this law could be used by individuals to restrict others' use of traditional land or even force them to engage in rehabilitation projects.

The resultant rights index with its sub-components is reported in Figure 4.

5.5 Interpretation of the Intellectual Property Rights Index

Intellectual property rights in Malawi were quite aggressively limited in efforts to prevent seditious or immoral materials entering the country, particularly during the Banda period. However, there were long periods with very few alterations in the explicit intellectual property rights regime, so this index is constructed from somewhat sparse data, and should be treated with a certain amount of caution.

Prior to 1936, intellectual property in Nyasaland was covered by the Registration of Designs Ordinance, which required that any property be registered in Nyasaland, in addition to the country of origin, to be protected. Under the 1930 Penal Code, the Governor could ban imported publications and seditious material. In 1936, the United Kingdom Designs Ordinance was passed, which gave proprietors of designs the same rights in Nyasaland as they enjoyed in the United Kingdom, without requiring local registration.

In 1954, the Restriction and Security Orders Act, passed in response to the growing unrest amongst the African population, granted the state the right to dispose of restricted persons' assets, which included their intellectual property. In 1960, the Preservation of Public Security Ordinance gave the Governor the power to prohibit, restrict or control publications. In contrast, in 1957 and 1958, the Patents and the Trademarks Acts were passed, respectively, increasing the protection available to specific forms of intellectual property.

In 1968, the Malawi Censorship Board was created, with powers to prohibit the importation or publication of books, magazines, newspapers and other publications deemed to be immoral or seditious. In 1973, the Penal Code was amended – the definition of sedition was broadened, and the penalties for sedition and possessing seditious material were greatly increased. In 1989, the Copyright Act was passed, increasing the period of control granted to the author of a publication. In 1994 the new constitution removed all threats of expropriation and banning. The Penal Code of Sedition and the Censorship Act were finally repealed in 1999.

The resultant rights index with its sub-components is reported in Figure 5.

INSERT FIGURE 5 ABOUT HERE.

¹⁸Registered Land Act; Customary Land Development Act; Local Land Boards Act.

6 Political instability

6.1 Construction of the index

The instability series is arguably the least theoretically defensible of the series. This index was constructed from the information available, rather than defined in advance according to clearly defined concepts. A variety of data, ranging from the number of publications banned to the gap between planned and actual police expenditure,¹⁹ were gathered for the years they were available, and used to construct a rough index of political instability.

In addition to this, a short series of data on comparative interest rates of World Bank loans was constructed.²⁰ According to the theory advanced by Pillay and Fedderke (2007), bond yields can be used to approximate instability within a country, as the risk premium demanded by investors increases both with time and with instability. In this case, the lack of frequent long-term bonds issued by Malawi makes their specific method hard to implement. However, an alternative is to consider the interest rates on World Bank loans. Loans issued to a national government by the World Bank should have interest rates governed largely by the perceived risk of the borrower. Thus, the difference between the rates charged to Malawi and those charged to other politically stable borrowers might give a rough index of political instability within Malawi.

6.2 Interpretation of the index

The results for the two methods are reported in Figures 6 and 7. The general instability index broadly agrees with what we would expect to see, given Malawi's history. There is an increase in instability during the 1950s, leading up to independence in 1961. However, the index fails to pick up the instability surrounding the 1964 Cabinet Crisis. The instability levels in the 1970s and late 1990s are surprisingly high, according to this measure, which argues against its validity.

The index based on interest rates also suggests high levels of periodic instability in the 1970s. Most notably, however, the index signals significant changes in differences in interest rates during the transition to democracy, after which interest rates are very close to each other. These indices appear to be fairly unreliable, however, which is to be expected given the paucity of data.

INSERT FIGURES 6 & 7 ABOUT HERE.

7 Comparison of indices

As Bollen (1990) points out, a key test of the validity of indicators for diffuse concepts such as political and property rights is whether the constructed series correlates with other authors' indicators. The political rights index is compared to the Freedom House indices for political rights and civil liberties, separately and in combination.²¹ The property rights indices are compared to the property rights index produced by the Fraser Institute.²²

Table 1 reports the correlations, with significances shown.

INSERT TABLE 1 ABOUT HERE.

The correlations among the Freedom House indices and our political freedoms index are high. The Freedom House indices are significantly and strongly positively correlated with each other, which supports the understanding of civil liberties and political rights as mutually reinforcing and, to a certain extent, indivisible. Both indices are also positively and significantly correlated with our index. However, some authors have raised concerns about the methodological basis for the Freedom House indices, so this correlation, while pleasing, is not a guarantee of the reliability of our index.²³

¹⁹Reported political deaths; number of banned publications; number of non-government newspapers; differences between planned and actual expenditure on police and defence; differences between actual and growth-proportional-to-population numbers of police and reported criminal cases; numbers of Malawi Young Pioneers trained; black market premium; and number of days required to start a business. All of these were collected on an annual basis for non-continuous time periods between 1947 and 2007.

²⁰These data were provided by the World Bank. Data are available (under copyright) on request at www.worldbank.org/data

²¹<http://www.freedomhouse.org/template.cfm?page=1>

²²<http://www.fraserinstitute.org/programsandinitiatives/economicfreedom.htm>

²³Schoultz, 1980.

Political freedom appears to be strongly positively correlated with intellectual and freehold property rights, and the correlation between it and traditional property rights is also positive, though less strong. Our three property rights indices are highly correlated with each other, but exhibit only weak positive correlation with the Fraser Institute index. This can be attributed to the different methodologies used. The Fraser Institute considers *de facto* property rights while our indices are constructed using only the *de jure* situation. This result offers support for the argument presented Glaeser *et al* (2004): in the case of dictatorial governments, *de jure* rights may be unrelated to *de facto* enforcement. In Malawi’s case, President Banda was strongly pro-Western and pro-capitalist. He encouraged the development of large-scale agriculture and most of his property rights infringements were limited to his political opponents.

8 Comparison of the Malawi, Zimbabwe and South African Indices

As mentioned above, one of the purposes of this paper was to apply the methods used in Gwenhamo *et al* (2008) and Fedderke *et al* (2001). This wider project aims to create comparable political freedoms and property rights data series for sub-Saharan African countries, and thus a logical step for this paper is to examine the three sets of indices for points of interest.

Malawi has close historical ties with both Zimbabwe and South Africa. From 1953 until 1960, Malawi (then Nyasaland) and Zimbabwe (then Southern Rhodesia) were part of the same political union, the Federation of Rhodesia and Nyasaland. Prior to that, Nyasaland had maintained largely separate politics, with greater emphasis on relations with Britain than on relations with its African neighbours. This was partly due to deep hostility to Southern Rhodesia among the black Nyasaland population, and partly due to the two territories’ different statuses and interests. Post-independence Malawi developed close ties to South Africa. Malawi was one of the few African-controlled African countries to recognise the South African Apartheid government. Due to President Banda’s rooted anti-communist views and his admiration for the West, he was quite willing to engage with South Africa. In return for his support, South Africa directed large amounts of money to Malawi and offered military training and provisions. As a result of these shifting ties and interests, the relationships between the three countries’ series are not constant.

INSERT FIGURE 8 ABOUT HERE.

Figure 8 compares political rights in the three countries. There are similarities in the trends experienced by the countries over time which are quite interesting. During the period of Federation, political freedoms in Malawi and Zimbabwe appear to move in extremely similar ways. This is partly due to the influence of Federation legislation, but as each country retained control over its domestic affairs, including internal political rights, this suggests that there were similar dynamics at work within each country. In Malawi, this was a period of increasing resistance to minority rule, which resulted in periodic crack-downs by the government, during which many rights were suspended or removed (see section 4.3). In the 1959 to 1961 period, Malawi achieved independence and Zimbabwe acquired a new constitution. In both countries, the political rights granted to the population briefly increase due to the advent of more democratic regimes. The indices for both countries display similar declines, following the long deterioration in political rights under the Banda and Smith regimes. South Africa does not exhibit any similar watershed moments in the mid-century period, as this was a time of stable and increasingly restrictive rule by the Apartheid government.

All three countries exhibit marked improvements in political rights at the moment of their respective regime-change – Zimbabwe in 1980, South Africa in the 1990s and Malawi in 1994. Post-democratisation, Malawi and Zimbabwe’s paths diverge. The Zimbabwean government has engaged in a steady assault on political rights since the mid-1980s, while Malawi’s government has displayed some authoritarian tendencies while largely respecting the constitution and legal framework established in 1994.

INSERT FIGURES 9 & 10 ABOUT HERE.

Figure 9 displays the three countries’ freehold property rights indices, and figure 10 shows the traditional property rights indices for Zimbabwe and Malawi. As no intellectual property rights indices exist for either comparison, Malawi’s intellectual property rights index is not displayed again. There is far less similarity among the countries in terms of property rights than there is in terms of political freedoms, so relatively little can be said. Whereas property rights in South Africa improved slowly over time, Malawian freehold property

rights were fully restored only in 1994, when the new constitution was adopted. Zimbabwean property rights improved more gradually than South African rights, but have decreased dramatically in the past decade.

9 Conclusion

This paper aimed to construct a new set of institutional indicators for Malawi, by applying similar methodology to two prior papers, Gwenhamo *et al* (2008) and Fedderke *et al* (2001). This has been achieved, and the results are broadly comparable to those achieved in Gwenhamo and Fedderke.

Our political freedom index correlates very well with the Freedom House political rights and civil liberties indices, but consists of a far longer time series, which can be used to examine long-run issues with greater efficacy. The extremely high correlations between the political freedoms index and the various property rights indices suggests that, in the Malawian case, lack of political freedom is associated with lack of economic freedom and security. However, the low correlation between our property rights indices and an index based on *de facto* property rights implies that this dictator chose to respect property rights, in the main, despite his legal power to abrogate them. This raises an interesting question for further investigation: which index will prove a better predictor of economic growth? Do investors, both local and international, care more about their *de jure* rights or the reality of the situation? This question could be answered either way – one of the links between property rights and growth is theorised to be the importance of security of property to investors. Thus, in a situation with poor legal protection of rights, can a dictator’s reputation for respecting ownership produce the same effect as strong institutional guarantees?

The cross-country comparisons suggest that political freedoms follow broadly similar patterns, particularly in Zimbabwe and Malawi. There is less of a match between countries on property rights issues, however. In the context of New Institutional Economics, this could provide an interesting opportunity to examine the empirical links between *de jure* property rights and growth.

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Figures:

Figure 1.a. Political Rights Aggregated

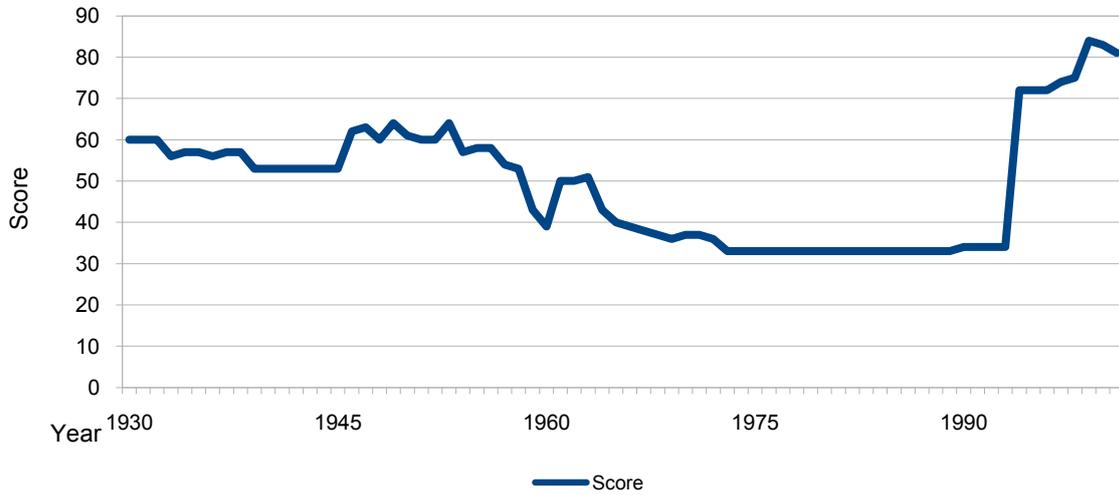


Figure 1.b. Political Rights Disaggregated

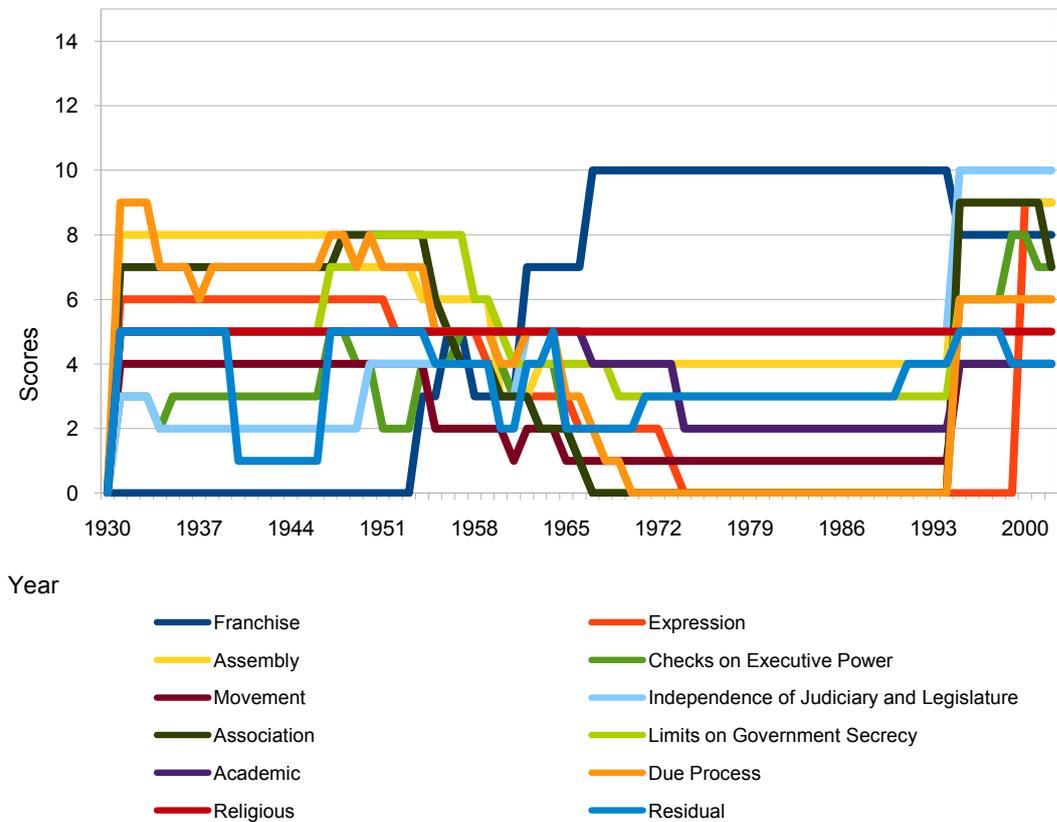


Figure 2. Property Rights

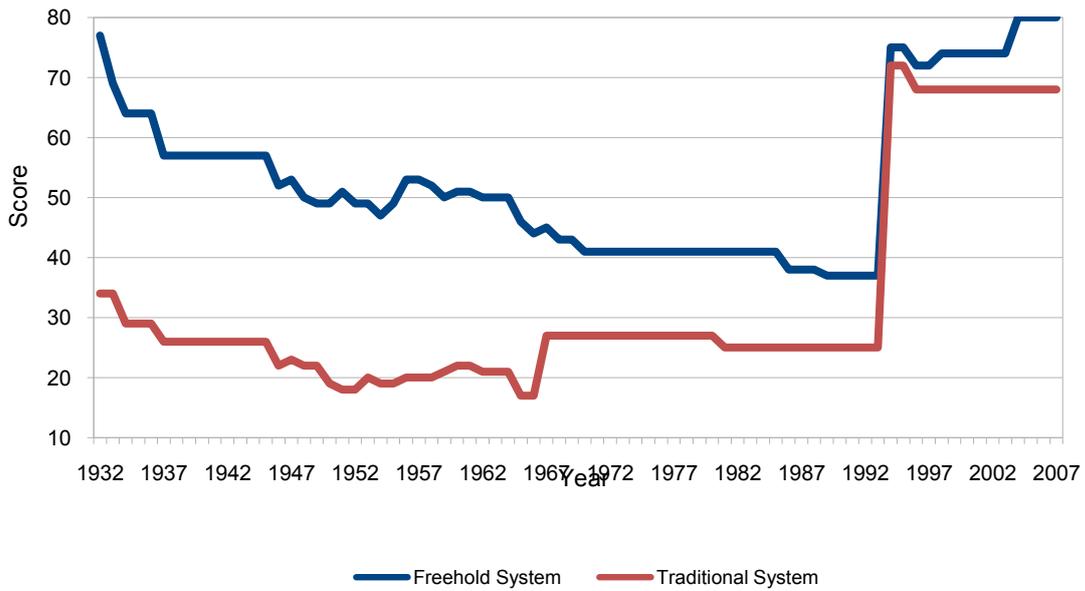


Figure 3. Freehold Land Rights

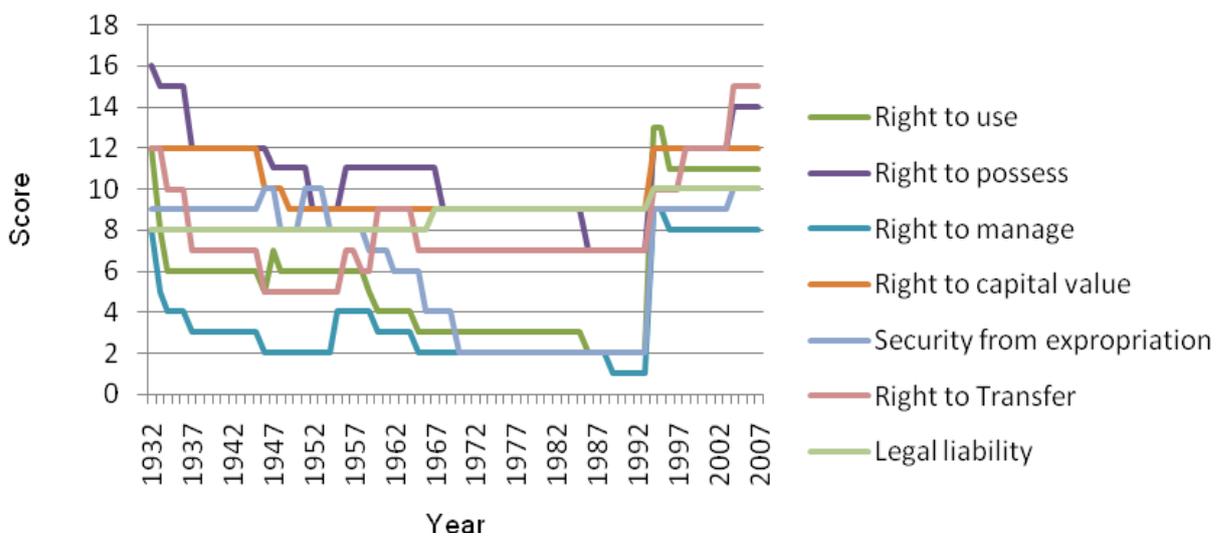


Figure 4. Traditional land rights

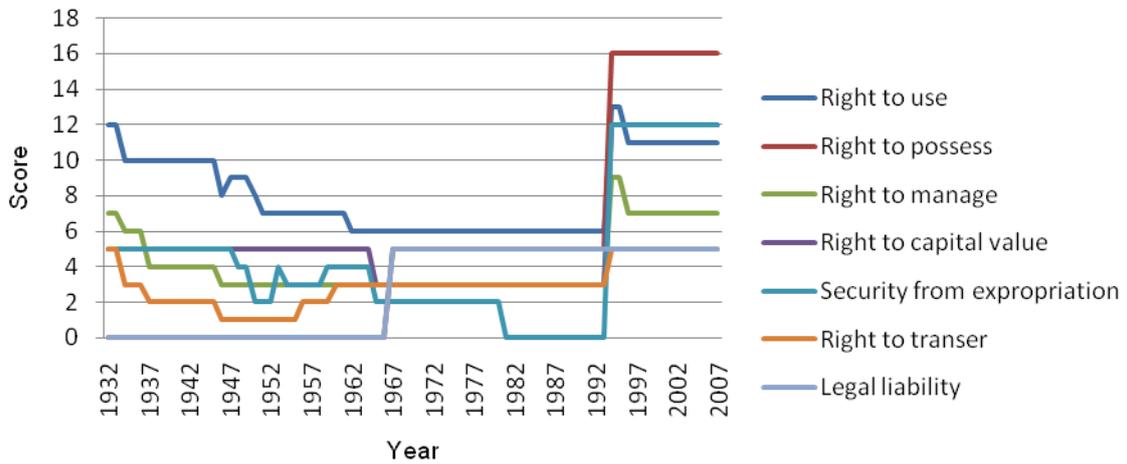


Figure 5. Intellectual Property Rights

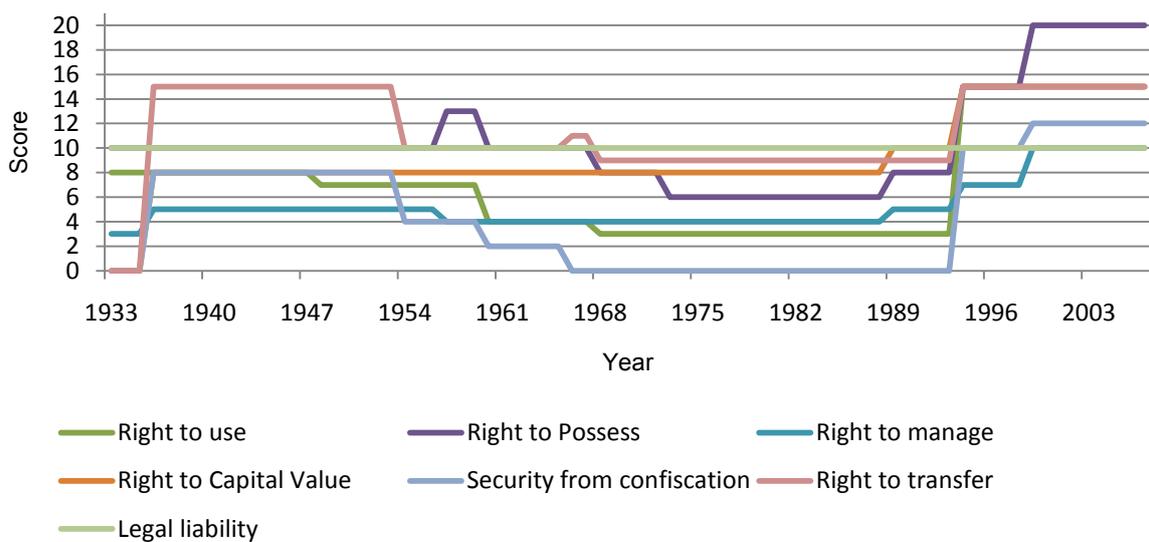


Figure 6. Political Instability

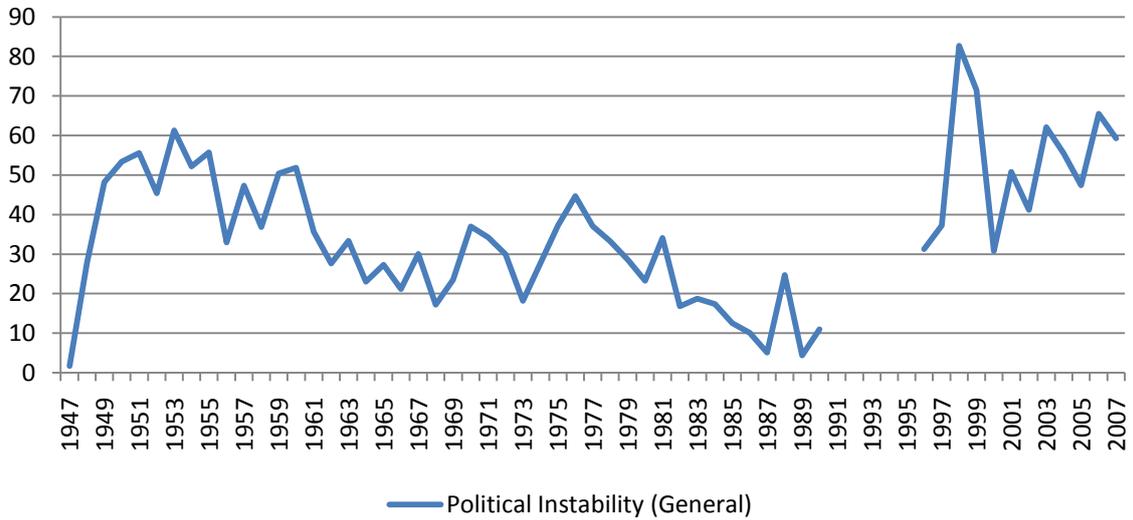


Figure 7. Difference in interest rates between official and all loans

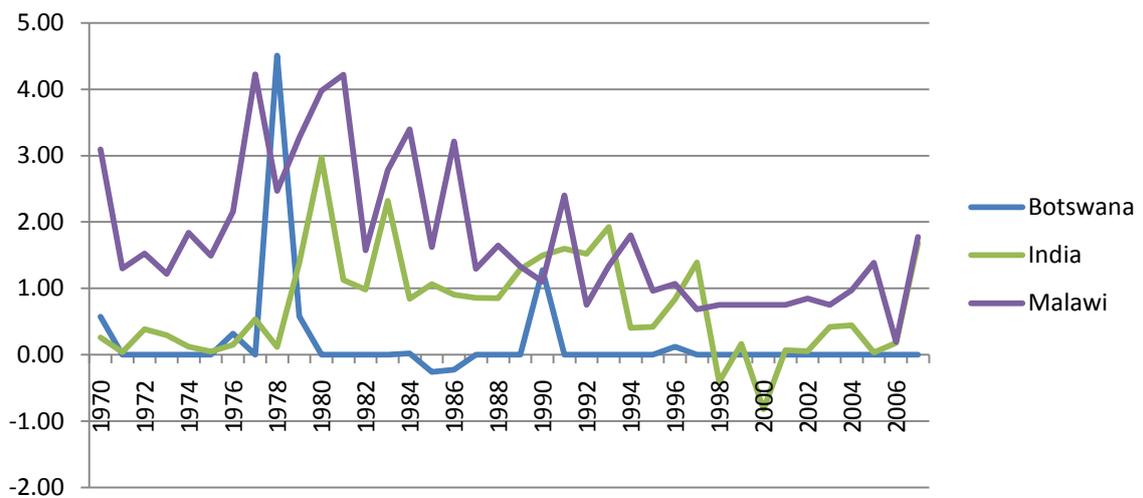


Table 1: Correlation coefficients

		Political freedom*	Freedom House Political Rights	Civil Liberties	Combined	Property Rights* Intellectual	Traditional	Freehold	Fraser Institute Property Rights
	Political freedom*	1							
	Political Rights	0.919883	1						
Freedom House	Civil Liberties	0.946815	0.854899	1					
	Combined	0.968282	0.967079	0.958775	1				
	Intellectual	0.893306	0.927222	0.957966	0.977771	1			
Property Rights*	Traditional	0.588647	0.844028	0.867426	0.887792	0.909429	1		
	Freehold	0.817158	0.827808	0.842201	0.866534	0.893202	0.995836	1	
Fraser Institute	Property Rights	-0.33113	-0.02263	0.111694	0.043486	0.281222	0.229356	0.271026	1

* Series constructed in this project.

Figure 8. Political freedoms

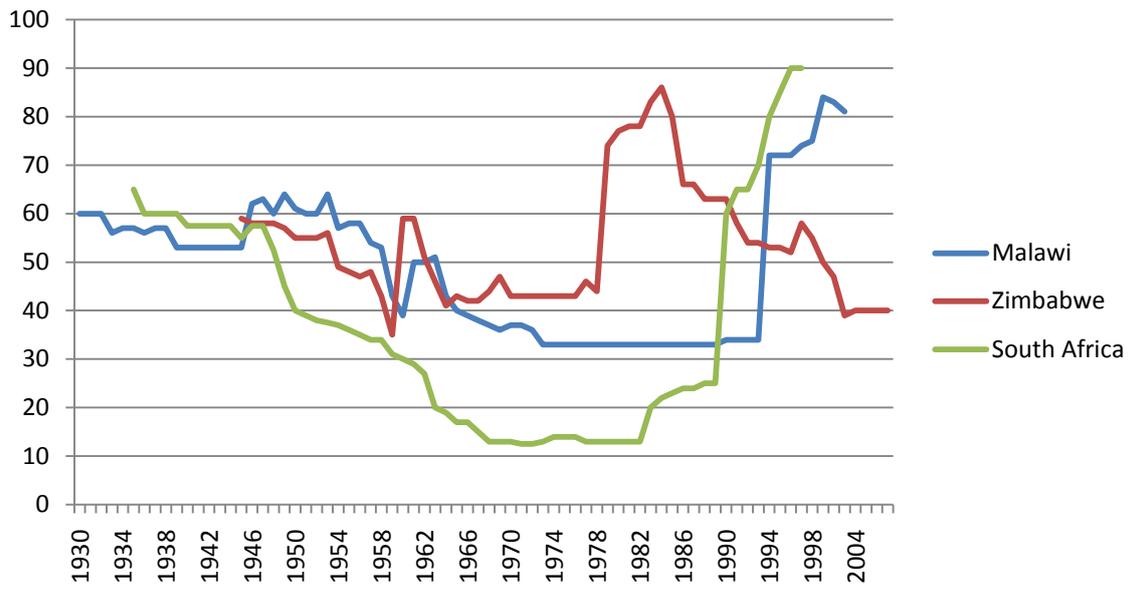


Figure 9. Freehold Property Rights

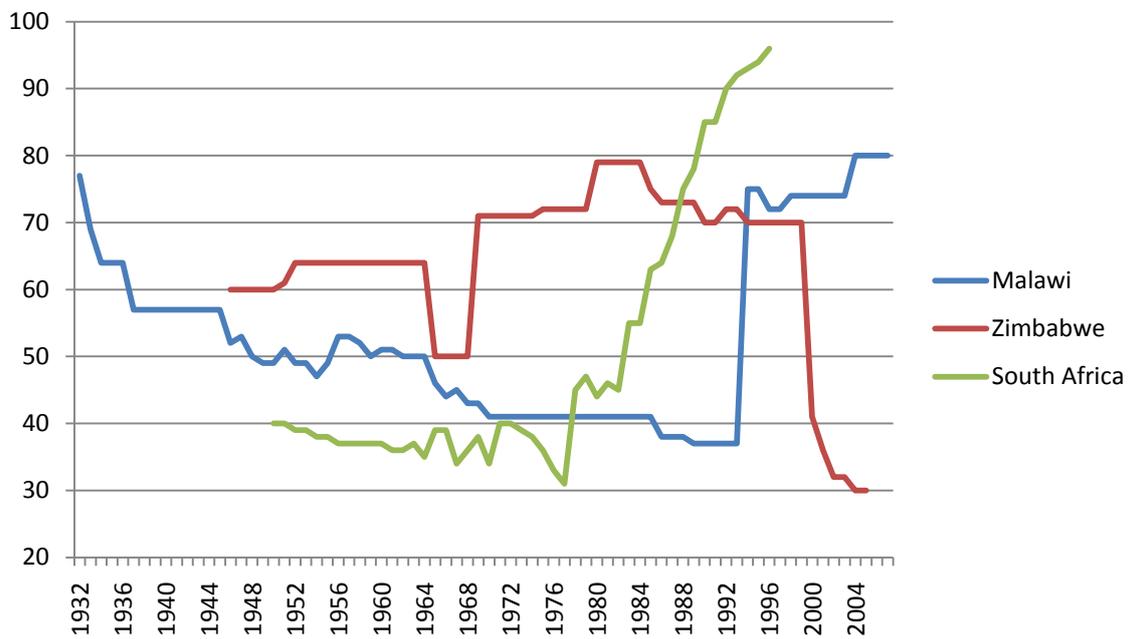


Figure 10. Traditional Property Rights

