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# THE CONSTITUTION AND THE KADHIS

## WOMEN'S LAND OWNERSHIP RIGHTS AND DEMOCRACY IN KENYA

By Vennela Sai Gosukonda

Though Kenya has been democratizing since the 1990s, this progress has stagnated when concerned with women's rights to inheritance and land ownership—especially when comparing Muslim and non-Muslim women. The prevalence of legal pluralism, in which multiple judicial systems exist, navigating between common law courts and Islamic courts proves to be a greater challenge when dealing with inheritance. Under religious dictation, Muslim women are entitled to only half of what their brothers are entitled to in matters of inheritance, while non-Muslim women and their brothers have equal access to inheritance. An example from the Indian Hindu Succession Act of 1956 demonstrates the magnanimous power equal inheritance gives women; namely, a chance to engage independently in the economy, contribute to the labor force and accelerate modernization.<sup>1</sup> By following a similar model and reinstating equal access to inheritance for all women, regardless of religious affiliation, Kenyan women too can have increased access to land ownership rights. These rights allow them to become autonomous and independent players in the local economy and contribute to greater productivity for the state along with more economic mobility for themselves and their families.

### I. Introduction

There exists an unfair and inaccurate assumption in the minds of many world leaders and influential figures that the most important way to measure progress is through legal proceedings. While the importance and magnitude of passing legislation cannot be discounted, the reality is that legal rights are only a part of the equation to ensure and protect the rights of all people within a nation. Passage of legislation does not ensure implementation, which is a crucial determinant of whether decisions made at the top actually have a trickle-down effect and impact the lives of the people. Progress is multi-pronged, and its impact hinges on a variety of factors including navigating cultural and religious barriers for successful implementation. In Kenya, this progress is explained by one key indicator: democratization.

This paper identifies religion as an explanation for Kenya being classified as a partially-free democracy as opposed to a complete democracy. Specifically, I argue that Muslim and non-Muslim Kenyan women do not have the same access to inheritance, property, and land ownership rights as dictated in the Kenyan constitution and other legislative documents. Though these rights and freedoms are granted unequivocally in theory, there is not much implementation of these rights; women still face many challenges when attempting to own land or inherit

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<sup>1</sup> Rachel Heath and XuTan, "Intrahousehold Bargaining, Female Autonomy, and Labor Supply: Theory and Evidence from India," *Journal of the European Economic Association* 18, no. 4 (2019): 1928–68. <https://doi.org/10.1093/jeea/jvz026>.

property that is rightfully theirs. I will use Freedom House, Polity, and V-Dem to demonstrate Kenya's partially-free categorization.

According to Freedom House, Kenya is classified as a "partly free" country, scoring 52 out of 100. Freedom House breaks this score down into two categories: Political Rights and Civil Liberties. Kenya scores 55% in political rights with 22 out of 40 points awarded, and scores 50% in civil liberties, gaining 30 out of 60 points. While this suggests Kenya's political democratization, based on more robust and maximal definitions of democracy—which encompass social equity—it is still lagging behind. Based on VDem's parameters, Kenya's democratic status has been rising since 2012. Yet, as an electoral democracy its status is uncertain, and experts fear the country's classification could change from electoral democracy to electoral autocracy.

Kenya was an electoral autocracy for decades before briefly becoming an electoral democracy. Since the 2010s, it has been oscillating between being classified as an electoral democracy and an electoral autocracy. Numerically, however, in the year 2022, Kenya was given a score of 0.42 out of 1 and ranked 80th in the world for liberal democracies. Its score for electoral democracies was higher (0.52 out of 1), but the country was ranked 88th in the world. This metric indicates that the score has "improved over the past 10 years, substantively and at a statistically significant level."<sup>2</sup>

Based on the data presented by Polity, it is clear that Kenya has been steadily democratizing since 1997. At the same time, the country's autocracy score has fluctuated previously, but has been steadily scored zero since 2002. Based on these figures, we can conclude that Kenya is at least a partially democratic state working towards improving its democratic status in the future; the foundation has been laid, but there must be more progress for the country to flourish into a fully functioning democracy.

However, analysis of democracy in Kenya is multifaceted and when considering women's and minority rights, Kenya's score decreases quite significantly. Kenya is ranked 149 out of 177 by the Women Peace and Security Index in 2024, making it one of the 30 worst countries in the world for women. Given that the institution of legal pluralism is causing Kenya to fall short of the maximalist definition of democracy, the court system must be examined. In 2023, Freedom House gave Kenya a score of 1 out of 4 for the question "Does due process prevail in civil and criminal matters?" Though there are legal provisions that have been codified, the civil court system is highly ineffective; when combined with the overwhelming power and influence of religious courts like the Kadhis, it is clear that this combination creates a dangerous environment for women and perpetuates the cycle of legal but not practical rights.

After establishing the legal basis for the equal rights for women in Kenya, in the theoretical section, I argue that Kenya is a partial democracy under the maximalist definition of democracy because of religious gender inequality and women's disproportionate access to property and land rights on the basis of religion. The independent variable in this case study is religion, and I focus on how religion through Muslim and non-Muslim women's access to inheritance and property rights affects democratization in Kenya.

## II. Existing explanations

In this section, I discuss two alternative arguments for the stagnation of democratization in Kenya: 1) the lack of fully free and fair elections and 2) corruption. These two factors serve as a benchmark in Kenya's process of democratization; there has been progress made since the 1990s, but there are still certain obstacles that must be overcome in order to recognize the Kenyan state as fully democratic.

Freedom House gives Kenya 3 out of 4 points for "current national legislative representatives" being "elected through free and fair elections." Though the process may be presented as free and fair, the qualifications or requirements to even run render the system ineffective. Within sub-Saharan countries, incumbent politicians have a much greater advantage over their opposition and that "electoral uncertainty caused by a low level of party institutionalization" creates a significant hurdle to the execution of free and fair elections.<sup>3</sup> Additionally, during Kenya's 2007 presidential election an extremely close race caused an eruption of violence, demonstrating the

2 "V-Dem [Kenya 2023] Dataset v14."

3 Michael Wahman, "Democratization and electoral turnovers in sub-Saharan Africa and beyond," *Democratization* 21, no. 2 (2012): 220–43. <https://doi.org/10.1080>.

instability of the electoral process and the failure of systems.<sup>4</sup> Though this demonstration of political revolt was an outlier, it underscores the need for checks and balances.

The issue of corruption is also inextricably linked to the political system and those consolidating governmental power. Despite how far democratization has come in Kenya, it still has not been able to fight this problematic abuse of power—most commonly seen through the practices of neopatrimonialism and clientelism—where powerful leaders give state resources only to their supporters, who are usually those of a shared ethnic group.<sup>5</sup> Additionally, due to a lack of public accountability, this feeds into a vicious cycle where both leaders and their constituents fall into the complacency corruption provides, without attempting to change the institutional weakness that makes this corruption possible.<sup>6</sup> This demonstrates how even through a rigorous democratization process, there are certain intrinsic gaps within political institutions that create barriers to reaching the maximal definition of democracy.

However, the most important factor that explains the stagnation of democratization within Kenya is women's unequal access to inheritance and land rights based on their religion. Kenya gained independence in 1963 and went through a wave of democratization similar to other sub-Saharan African countries in the 1990s. In fact, the Kenyan constitution declares all people, regardless of gender, to be equal and have access to equal opportunities.<sup>7</sup> For instance, the 1981 Law of Succession guaranteed women and men equal rights to inheritance.<sup>8</sup> Pre-independence, Muslim women's access to inheritance was dictated by Islamic law; they were allowed half of what their male counterparts would receive while women of other religions had even less access to inheritance. Once the Law of Succession was implemented, all women, regardless of religion, had equal access to inheritance for a period of time, but eventually, Muslim women's rights were reverted back to Islamic law, while women of the remaining religious groups continued to have equal access to inheritance as compared to men.

Even though the Kenyan Constitution and the Law of Succession are touted as powerful and egalitarian documents, they end up being largely performative when it comes to the implementation of the rights outlined in them. When considering theory versus reality, there is greater work that needs to be done in enacting these decrees in communities around the country.

### III. Theoretical argument

Kenya is a partial democracy under the maximalist definition of democracy because of gender inequality. A key manifestation of this is the lack of women's access to property and land-owning rights. Though the constitution guarantees equal rights for all Kenyans regardless of gender, the application of this principle is flimsy.<sup>9</sup> In reality, because of the use of religious courts to resolve many conflicts, the national courts and provisions made in secular law are not applied specifically to members of the Muslim community. This separation from other Kenyans creates a system of legality through which access to rights, especially for women, are unequally distributed.

The religious courts in Kenya are called Kadhis courts, and they are exclusively for Muslims to resolve issues within their communities based on Islamic principles and law.<sup>10</sup> This means that inheritance rights for Muslim women are also determined through these courts. Based on Islamic law, women are entitled to one-half of their male siblings' inheritance, but for other Kenyan women, they are entitled to equal inheritance under

4 Daniel Branch and Nicholas Cheeseman, "Democratization, sequencing, and state failure in Africa: Lessons from Kenya," *African Affairs* 108, no. 430 (2008), <https://doi.org/10.1093/afraf/adn065>, 3.

5 Dominic Burbidge, "The Shadow of Kenyan Democracy Widespread Expectations of Widespread Corruption," 2015. [https://openlibrary.org/books/OL28826726M/Shadow\\_of\\_Kenyan\\_Democracy](https://openlibrary.org/books/OL28826726M/Shadow_of_Kenyan_Democracy), 54.

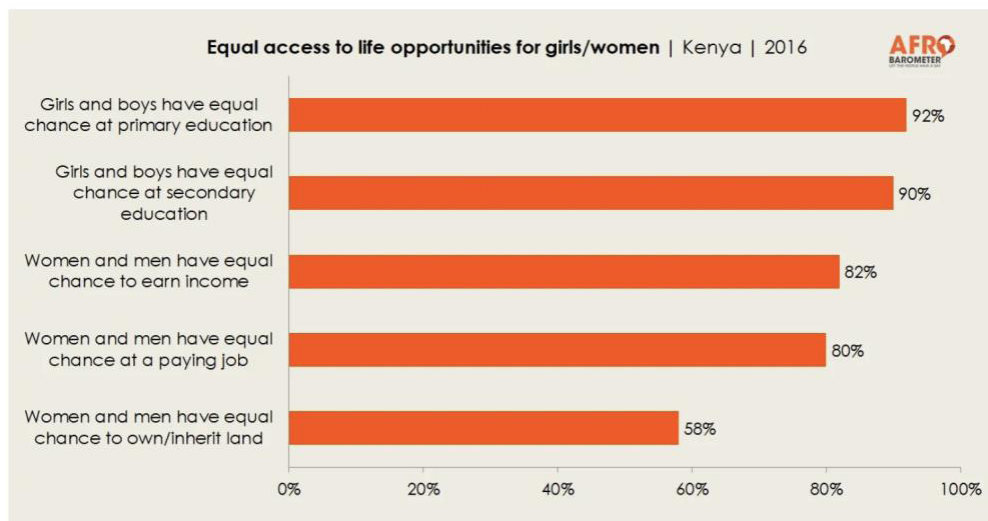
6 Kempe Ronald Hope, "Kenya's corruption problem: Causes and consequences," *Commonwealth & Comparative Politics* 52, no. 4 (2014): 493–512, <https://doi.org/10.1080/14662043.2014.955981>.

7 Kenya Constitution, 27.

8 "Constitutional Amendment History," Kenya Law, <https://kenyalaw.org/kl/index.php?id=9631>.

9 Kenya Constitution, 27.

10 Rebecca Osiro, "Women's Views on the Role of Kadhi's Courts: A Case Study of Kendu Bay, Kenya," in *Shari'a in Africa Today*, BRILL eBooks, 195–212. 2014. [https://doi.org/10.1163/9789004262126\\_010](https://doi.org/10.1163/9789004262126_010).



**Figure 1.** Equal access to life opportunities for girls/women.

the Succession Act.<sup>11,12</sup> Because not all people have the same and equal rights, this is an indication that Kenya's democracy is limited, and cannot evolve until all women, regardless of religion, have the same access to inheritance and property rights and land ownership.

According to a study done by Afrobarometer in 2016, women only have a 58% likelihood of having the chance to own or inherit land as compared to their male counterparts. This is a staggering statistic, and it is critical to note that having access to land is what gives people economic mobility. This is demonstrated in figure 1.

The relationship between land access and economic mobility, best explained through the theory of modernization, is what leads to democratization. This theory states that “modernization is a total social process associated with (or subsuming) economic development in terms of the preconditions, concomitants, and consequences of the latter.”<sup>13</sup> A study done in 2018 shows that women “who own land alone have a significant relationship for formal account ownership and formal savings.”<sup>14</sup> Access to these financial mechanisms is what allows women to become active members of society, contribute to the economy and engage with money. By participating in the economic system, women are able to improve internal—familial, communal, and societal—development, leading to greater democratization. This internal development can take varied forms, including decreased child mortality rates, improved child nutrition indices, decreased child marriages, increased girl child school age and attendance, and more. These markers of development can indicate the democratization level within a country and a greater presence of these markers signifies a higher level of democratization within the state. Because these markers are a result of economic development spurred by women's rights to land and inheritance, it is critical that women of all religions and backgrounds have equal opportunity to access; this will help secure a better life for themselves and their families while also contributing to greater national democratic development.

#### IV. Historical overview

A former British colony, Kenya gained its independence in 1963. The decade prior, the British colonial government faced a serious threat, the Mau Mau Rebellion, which was an insurgency led by the Kikuyu tribe and Kenya

11 Kenya Law: “The Constitutional Amendment History.”

12 Joseph Ajefu, Efobi Uchenna, Nadia Singh, and Shayequa Zeenat Ali, “Women's Inheritance Rights and Child Health Outcomes in Kenya,” *Journal of Family and Economic Issues* 45, no. 1 (2023), <https://doi.org/10.1007/s10834-023-09895-y>, 3.

13 Henry Bernstein, “Modernization theory and the sociological study of Development,” *Journal of Development Studies* 7, no. 2 (1971), <https://doi.org/10.1080/00220387108421356>, 141–42.

14 Senthil Arasu Balasubramanian, Thenmozhi Kuppusamy, and Thamaraiselvan Natarajan, “Financial inclusion and land ownership status of women,” *International Journal of Development Issues* 18, no. 1 (2019), <https://doi.org/10.1108/ijdi-06-2018-0091>, 52.



African Union, a nationalist organization.<sup>15</sup> In order to thwart the efforts of these Kenyans, the British government preemptively began allowing Kikuyu tribe members into the administration. There were also other groups, but the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU)—the two main African political parties—held opposing views which were eventually mitigated with British guidance.<sup>16</sup> This is what led to the constitutional agreement that paved the way for Kenyan independence. Parliamentary elections were held in May of 1963, and KANU, led by Jomo Kenyatta, received a majority in both the Senate and the National Assembly, and thereafter, a KANU-led government was instituted with Jomo Kenyatta as the new prime minister of Kenya.<sup>17</sup>

After gaining independence on December 12, 1963, Kenyatta transformed the nation from a colony into a fully autonomous republic and assumed the role of president.<sup>18</sup> Kenyatta's goal in the early years post-independence was to stimulate economic growth through industrialization, and within the first decade after independence, the economy recorded about a 36 to 38 percent increase in income per capita.<sup>19</sup> However, Kenyatta also began the process of consolidating power, centralizing regional power, quelling dissent, and prohibiting the opposition party from competing in elections.<sup>20</sup> He was also accused of favoring the Kikuyu ethnic group, whose members dominated politics.<sup>21</sup> Kenyatta passed away in office in 1978 and was succeeded by Daniel Arap Moi. Jomo Kenyatta's son, Uryu Kenyatta, also eventually assumed the presidency. Kenyatta is a controversial figure in Kenyan politics; the white colonists treated him with great disdain, while he was revered across the African continent as a staunch anti-colonialist. However, his presidency was also a marker of the slow creep of authoritarian control over the nation of Kenya.

Daniel Arap Moi held power for 24 years between 1978 and 2002. His presidency was also quite authoritarian, with many allegations of human rights abuses and corruption—especially concerning neutralizing any political opposition.<sup>22</sup> He continued the trend of centralization and personalization of power and laid the foundation for a dictatorship, making him the supreme authority with virtually no other bodies to check or restrain him or his power.<sup>23</sup> In 1982, under his rule, the National Assembly amended the constitution and officially made Kenya a one-party state, criminalizing the existence of an opposition, and it remained that way until 1991, when a multiparty political system was introduced.<sup>24</sup> Debatably, this marks the beginning of democratization in Kenya as an opposition candidate did not win the presidential election until 2002.<sup>25</sup>

## V. The process of democratization

To reiterate, Kenya's democratic status can be classified as "partly free." Though it has been rising since 2012, the country's oscillation between being classified as an electoral democracy or electoral autocracy proves to be a hindrance when considering the maximalist definition of democracy, which includes greater social freedoms.

15 John Newsinger, "Revolt and Repression in Kenya: The 'Mau Mau' Rebellion, 1952–1960," *Science & Society* 45, no. 2 (1981), <https://www.jstor.org/stable/4040231>, 164–66.

16 John Spencer, "Kenyatta's Kenya," *Africa Report* 11, no. 5 (1966): 6–8. <http://www.africabib.org/rec.php?RID=P00053485&DB=p>.

17 Clyde Sanger and John Nottingham, "The Kenya general election of 1963," *Journal of Modern African Studies* 2, no. 1 (1964): 1–40. <https://doi.org/10.1017/s0022278x00003645>.

18 Peter Anyang' Nyong'o, "State and society in Kenya: The disintegration of the nationalist coalitions and the rise of presidential authoritarianism 1963–78," *African Affairs* 88, no. 351 (1989): 229–51, <https://doi.org/10.1093/oxfordjournals.afraf.a098162> 234.

19 Anyang' Nyong'o, "State and society in Kenya," 234.

20 Anyang' Nyong'o, "State and society in Kenya," 234.

21 Korwa G. Adar and Isaac M. Munyae, "Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978," *African Studies Quarterly* 5, no. 1 (2001). <http://www.africabib.org/rec.php?RID=P00000594&DB=p>, 1.

22 Adar and Munyae, "Human Rights Abuse in Kenya," 1.

23 Anyang' Nyong'o, "State and society in Kenya," 234.

24 Anyang' Nyong'o, "State and society in Kenya," 234.

25 K. Masime and G. Kibara, "Regime transitions and the institutionalization of democracy in Kenya: The December 2002 elections and beyond," *East African Journal of Human Rights and Democracy* 1, no. 1 (2003): 13–29. <http://www.africabib.org/rec.php?RID=Q00036109&DB=p>.

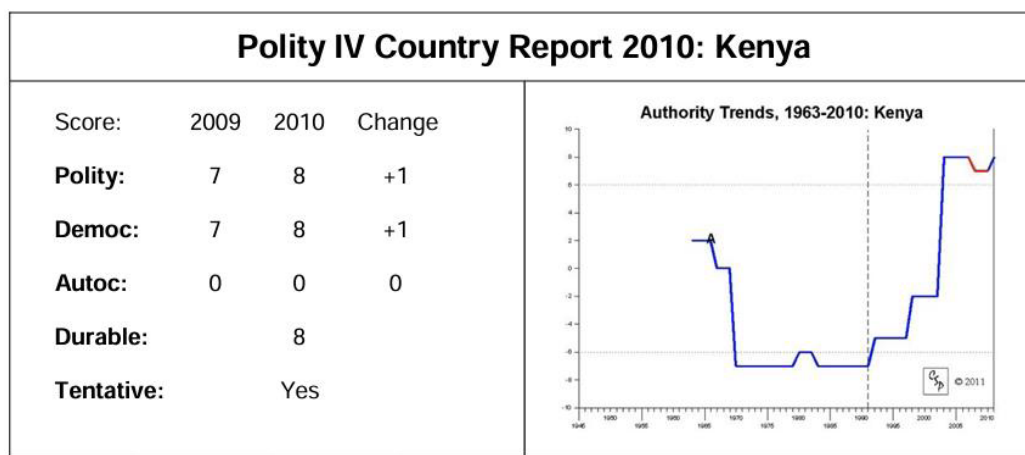


Figure 2. Polity IV country report.

Still, there has been significant improvement over the last decade for political democracy.

Kenya's democratization is due to a variety of factors, including the end of one-party rule and the reintroduction of the opposition party into politics leading to multiparty elections, constitutional reforms, and judicial independence.<sup>26,27,28</sup>

In figure 2, the x-axis denotes the year, and the y-axis denotes the Polity score, which is calculated by subtracting the "Autoc" score from the "Democ" score. On this scale, a score of 10 indicates a fully democratic regime, while a score of -10 indicates a full autocratic regime. Based on this context and the data presented by Polity, it is clearly seen that Kenya has been steadily democratizing since 1997 with consistent upward growth until 2010, which is where the data ends. The steadily rising democratic score starting in the 1990s corroborates this claim. Figure 3 shows the raw Polity V data until 2018, which still supports the idea of consistent democratization since the 1990s. At the same time, the country's autocracy score fluctuated previously but has been steadily scoring zero since 2002. Based on these two figures, we can conclude that Kenya is at least a partially democratic state working towards improving democratic status in the future.

Quantitative assessment is only one part of the picture. The democratic status of a state can also be determined qualitatively, such as through news reports and publications that divulge information about the actual inner workings of a country's government and political structure. According to a new report by a Kenyan media group, KTN News Kenya, the country shows promising democratic characteristics because of its multiparty system. This is further corroborated by an article by John Mbaku, a professor at Weber State University, who explains that the strong presence of opposition parties within Kenyan politics paints a promising picture of the country's current and future democratic workings, with the caveat that this future hinges on both sides of the political divide performing their duties properly.

Thus, based on these various measures, Kenya's democratic status can be classified as a partial or working democracy. The foundation has been laid, but there must be greater progress for the country to flourish into a fully functioning democracy.

## VI. Religion and women's property rights

In this paper, the independent variable I will focus on is religion and the dependent variable that will be affected is democratization in Kenya. Specifically, I want to examine how religion impacts the access women have to land ownership rights as seen in Muslim versus non-Muslim communities within the country. I will show that pre-independence, Muslim women in Kenya had more access to land ownership through religious endowments than women of other religions, but after independence and constitutional reforms, Muslim women do not have the same access to land and property rights as other women; they are only entitled to what is outlined in the Quran and

26 Kenya Constitution, 27.

27 Anyang' Nyong'o, "State and society in Kenya," 234.

28 Branch and Cheeseman, "Democratization, sequencing, and state failure in Africa," 3.

A	B	C	D	E	F	G	H	I	J	K	L
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	1	5011976	501 KEN	Kenya	1976	0		0	7	-7	-7
	1	5011977	501 KEN	Kenya	1977	0		0	7	-7	-7
	1	5011978	501 KEN	Kenya	1978	0		0	7	-7	-7
	1	5011979	501 KEN	Kenya	1979	0		0	6	-6	-6
	1	5011980	501 KEN	Kenya	1980	0		0	6	-6	-6
	1	5011981	501 KEN	Kenya	1981	0		0	6	-6	-6
	1	5011982	501 KEN	Kenya	1982	0		0	7	-7	-7
	1	5011983	501 KEN	Kenya	1983	0		0	7	-7	-7
	1	5011984	501 KEN	Kenya	1984	0		0	7	-7	-7
	1	5011985	501 KEN	Kenya	1985	0		0	7	-7	-7
	1	5011986	501 KEN	Kenya	1986	0		0	7	-7	-7
	1	5011987	501 KEN	Kenya	1987	0		0	7	-7	-7
	1	5011988	501 KEN	Kenya	1988	0		0	7	-7	-7
	1	5011989	501 KEN	Kenya	1989	0		0	7	-7	-7
	1	5011990	501 KEN	Kenya	1990	0		0	7	-7	-7
	1	5011991	501 KEN	Kenya	1991	0		0	5	-5	-5
	1	5011992	501 KEN	Kenya	1992	0		0	5	-5	-5
	1	5011993	501 KEN	Kenya	1993	0		0	5	-5	-5
	1	5011994	501 KEN	Kenya	1994	0		0	5	-5	-5
	1	5011995	501 KEN	Kenya	1995	0		0	5	-5	-5
	1	5011996	501 KEN	Kenya	1996	0		0	5	-5	-5
	1	5011997	501 KEN	Kenya	1997	0		5	1	4	4
	1	5011998	501 KEN	Kenya	1998	0		5	1	4	4
	1	5011999	501 KEN	Kenya	1999	0		5	1	4	4
	1	5012000	501 KEN	Kenya	2000	0	0	5	1	4	4
	1	5012001	501 KEN	Kenya	2001	0	0	5	1	4	4
	1	5012002	501 KEN	Kenya	2002	0	0	8	0	8	8
	1	5012003	501 KEN	Kenya	2003	0	0	8	0	8	8
	1	5012004	501 KEN	Kenya	2004	0	0	8	0	8	8
	1	5012005	501 KEN	Kenya	2005	0	0	8	0	8	8
	1	5012006	501 KEN	Kenya	2006	0	0	8	0	8	8
	1	5012007	501 KEN	Kenya	2007	0	0	7	0	7	7
	1	5012008	501 KEN	Kenya	2008	0	0	7	0	7	7
	1	5012009	501 KEN	Kenya	2009	0	0	7	0	7	7
	1	5012010	501 KEN	Kenya	2010	0	0	8	0	8	8

**Figure 3.** Polity V annual time series, 1946–2018. Source: Pemstein et al (2024).

not to equal endowments like other women. All citizens being treated equally in a state is indicative of democracy; when that is not the case, as proposed here, that demonstrates a stagnation in democratic development in Kenya.

Out of a population of about 55 million people, about 80% of the Kenyan population is Christian, 8% is Muslim, and the remaining people follow minority religions such as Hinduism, Baha'i, and other ethnic religions.<sup>29</sup> Figure 4 visually represents this information.

Figure 5 also shows the various religions present in Kenya. In this figure, the multiple Christian sects are separately identified.

Figure 6 shows the total population of Kenya from 2011 to 2021 by sex. Based on this figure, it can be determined that the sex ratio in Kenya is almost 50%, meaning that there is an even split in the population between the male and female sexes.

Under Article 27 of the Kenyan constitution, citizens are protected from all types of discrimination, including gender or religion. However, there is a qualifying clause that precedes this one. Article 24 of the Kenyan constitution states that “equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis’ courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.” These two articles within the constitution are what set up the conflict in women’s inheritance and land ownership rights. Navigating the complexity of both respecting citizens’ religious beliefs and practices while ensuring all of its citizens have equal rights under the constitution is what makes this case so convoluted.

Kenya has also ratified and subscribes to various other conventions and treaties with non-discrimination agreements, including “the Universal Declaration on Human Rights (1948); the International Covenant on Economic, Social and Cultural Rights (ICESCR 1966); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW 1979); and the African Charter on Human and People’s Rights (1981).”<sup>30</sup> All of these actions reinforce the notion that Kenyan leaders and peoples believe in gender equality and providing and creating opportunities for women.

Land ownership leading to democratization within a country can be understood through the modernization

29 “National/Regional Profiles”

30 Federation of Women Lawyers, Kenya, “Women’s land and property rights in Kenya,” IGAD Land Governance Project, July 17, 2018. <https://land.igad.int/index.php/documents-1/countries/kenya/gender-3/625-women-s-land-and-property-rights-in-kenya>. 3.



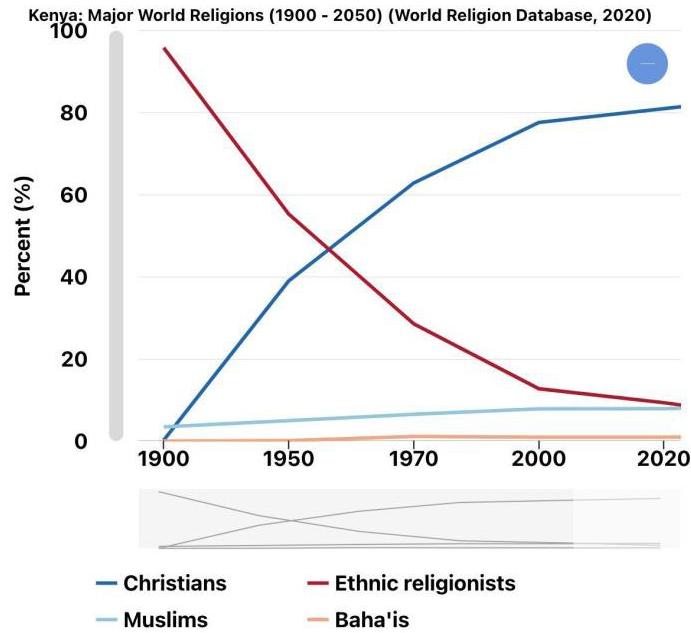


Figure 4. National profiles.

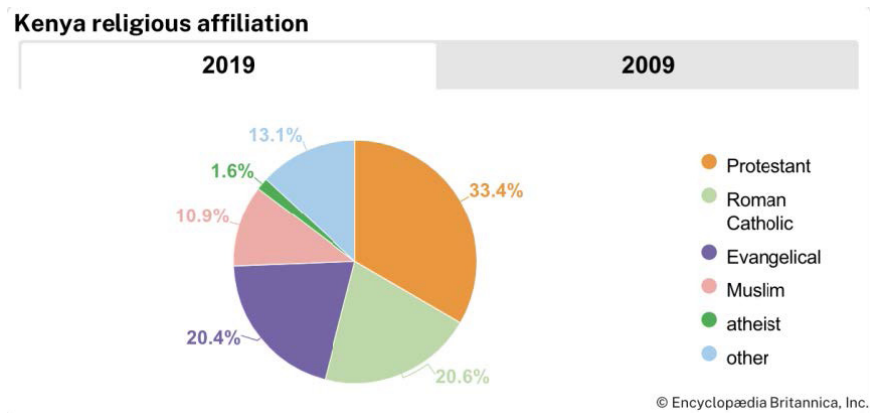
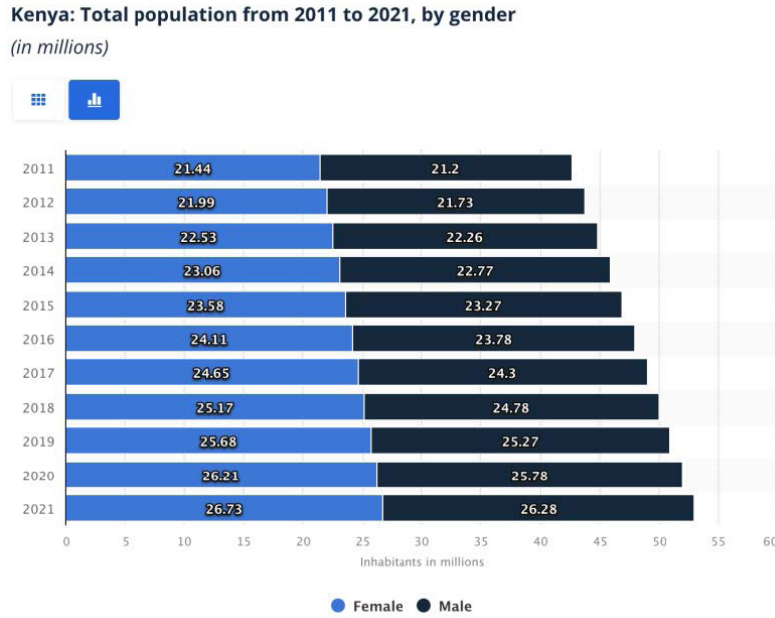


Figure 5. Kenya religious affiliations.

theory. This theory essentially states that as traditional societies invest in education, urbanization, and industrialization, that investment leads to greater development and the state becomes more modernized.<sup>31</sup> Land and property ownership rights are paramount to women's full political participation because they provide women with an opportunity to create a better life for themselves and their families. If women cannot inherit land, they do not have economic security and then they cannot participate in politics. Having full citizenship theoretically guarantees political participation, but that does not factor in real barriers to that participation. One needs money to take time off of work to go to the ballot and cast a vote, and even more money to actually contest in elections; when women lack basic rights guaranteed to their male counterparts, it is not possible for them to have the financial capital to exercise their citizenship to its fullest.

According to the Kenya Land Alliance, despite constitutional and other legal provisions, women own only about 2% of the total land within the nation. This means that half of the population owns 98% of the land within Kenya. Considering that Muslim women already have less access to land ownership as compared to women of other religions, these numbers represent extremely disproportionate and dismal conditions for democratic development. Simply because legal provisions are made does not ensure their implementation, as demonstrated by the figures below.

31 Robert F. Inglehart and Christian Welzel, "How Development Leads to Democracy: What We Know About Modernization," *Social Science Research Network*, March 15, 2009. [https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID2391678\\_code2178430.pdf?abstractid=2391678&mirid=1](https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2391678_code2178430.pdf?abstractid=2391678&mirid=1). 37-9.



**Figure 6.** Kenya: Total populations from 2011 to 2021, by gender. Source: Ingham et al.

Figures 7, 8, and 9 from African Data Hub show various configurations of land ownership in Kenya based on gender and age.

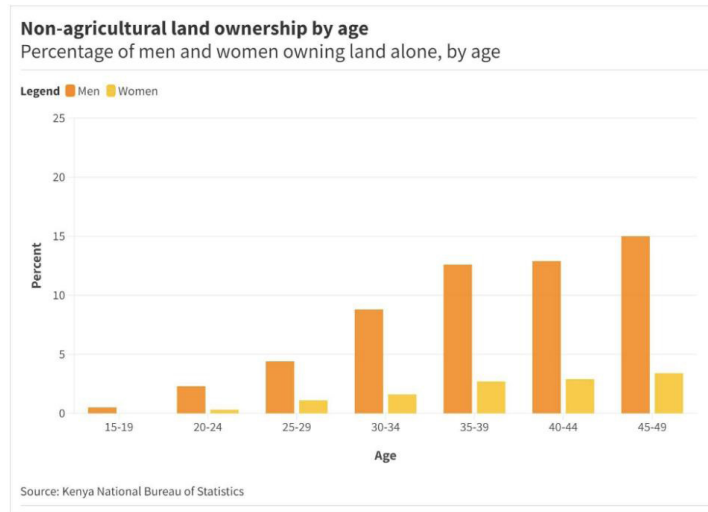
Figure 10 confirms that though the gender ratio is nearly 50:50 and actually leans more towards women, there is a gross disparity in their access to property and land ownership rights.

Lack of access to land rights has devastating consequences for women and their families. The table above shows child health outcomes in comparison with Muslim and non-Muslim women’s inheritance rights in Kenya. As demonstrated by the data, Muslim women’s children are consistently more underweight, stunted, and wasted as compared to non-Muslim women’s children. This is modernization theory at work—the more women have access to some kind of economic enfranchisement, their families, children, and communities benefit via ripple effect. This economic traction is what leads to more democratization. Because Muslim women have consistently less access to inheritance rights as compared to non-Muslim women in Kenya, their communities also do not perform as well economically, nor do they live as healthily. This disparity between citizens is the paramount example of why Kenya is still in the process of democratization—not all Kenyan women are given the fair opportunity to become equal contributors to their families, communities and nation.

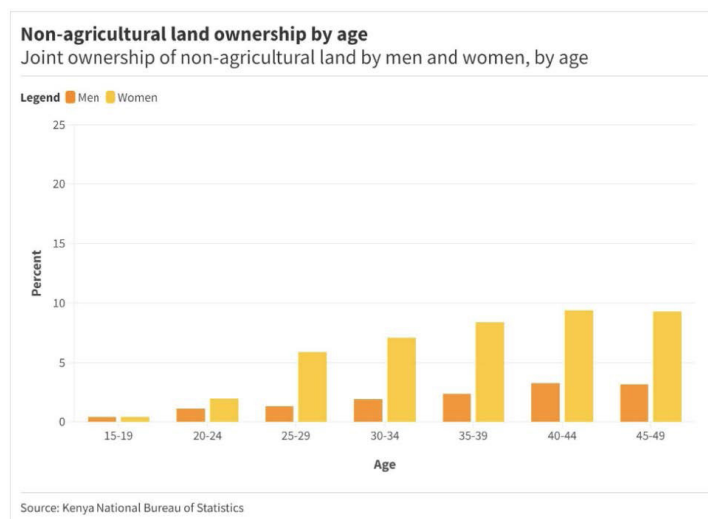
## VII. Perspectives in debate

So far in this paper, I have made the argument that because not all Kenyans have the same and equal rights, this is an indication that Kenya’s democracy is limited. The solution then, is to ensure that all women, regardless of religion, have the same access to inheritance and property rights and land ownership. Something to consider, however, is a conversation about whether cultural relativism holds merit. Cultural relativism is a notion that believes that one cannot judge a different culture or hold it to the standards of one’s own, as all cultures have intrinsic characteristics that are normal to it. The idea of modern democracy as we know it is one that is undeniably western, originating from (or at the very least popularized by) Athenian society before spreading across the western world. Could it be that holding other countries, especially non-western countries, to the standard of democracy is overstepping, regardless of it being intentional or unintentional? How can westerners and western institutions believe themselves to be understanding and accepting of all cultures and people while still propagating a very specific idea of governmental organization?

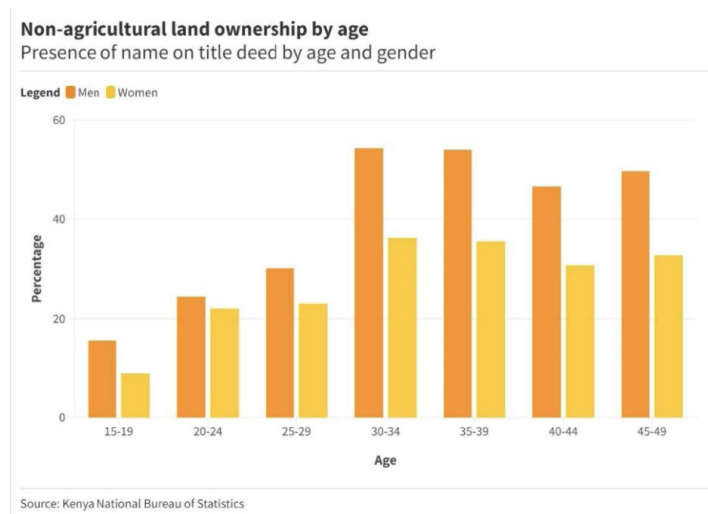
In the case of Kenya and Kenyan women, perhaps a legally pluralistic system is what is right for their people, allowing them to respect their religious provisions while still participating to the fullest extent possible as a Kenyan citizen. For Muslims, Islam is a way of life and a set of tenets that guide their every decision, not



**Figure 7.** Non-agricultural land ownership by age (percentage).



**Figure 8.** Non-agricultural land ownership by age (joint).



**Figure 9.** Non-agricultural land ownership by age (name on title).

something they can pick and choose.<sup>32</sup> Abolishing the system as a whole seems like a radical notion, and frankly does not seem like a realistic way for Kenya to improve its maximalist definition of democracy concerning equal rights for all Kenyan women regardless of religion.

## Table 1 Summary statistics of outcome variables

### From: Women's Inheritance Rights and Child Health Outcomes in Kenya

	All sample	Muslim	Non-Muslim
Child is underweight, stunted, and wasted	0.229	0.285	0.223
	[0.420]	[0.451]	[0.416]
Child is underweight	0.303	0.359	0.300
	[0.459]	[0.479]	[0.456]
Child is stunted	0.312	0.332	0.310
	[0.463]	[0.470]	[0.462]
Child is wasted	0.234	0.311	0.225
	[0.423]	[0.463]	[0.417]
	70,289	7671	62,524

**Figure 10.** Summary statistics of outcome variables.

Many other studies on this topic have focused on the perception of the effectiveness of Kadhis courts based on public sentiment or interviews with Kadhis court officials or magistrates.<sup>33</sup> Of course, there is evidence to suggest that these courts have been beneficial to women because of a variety of features, including ease of access; these court systems are generally easier to navigate and waiting for decisions is not as long-term of a process compared to secular courts. However, many studies lack in one serious area: they fail to “interrogate the experience of Muslim women within these [c]ourts.”<sup>34</sup> Because of this, I specifically wanted to focus on experiences of other Muslim women living in societies that are overseen by Islamic courts, to compare with the Kenyan case.

Rebecca Osiro’s 2014 work “Women’s Views on the Role of Kadhi’s Courts . . .” examines this phenomenon through conducting interviews with women in Kendu Bay and Kisumu, Kenya, regarding their relationship with the Kadhis judicial system. Something of note examined within this work is the fact that a significant number of the women interviewed had converted to Islam upon their marriage; their husbands were Muslim, but they were raised predominantly Christian, meaning they lacked the knowledge about the law of dini, religion, and were “ill-prepared in matters of Islamic legal duties and rights prior to marriage”, and “even after marriage, [they] were more concerned with raising their families and making a living than understanding prescriptions provided in Muslim Family Law.”<sup>35</sup> This left them even more vulnerable, as they were unfamiliar with navigating the Islamic courts and did not have easy access to the common law courts.

Here, I will insert statements from the various interviews conducted by Osiro to demonstrate the general beliefs held by the women of this region:

“ . . . there are some who do not know dini but claim to be Muslims.”<sup>36</sup>

“ . . . Muslim men do not marry their Muslim girls. They go for women from mission families who do not know the law of dini. . . . It is the women of my [caliber] who are married by Muslim men, brought here and dumped like imbeciles who cannot articulate issues.”

“Although I had been in Islam for long, I did not know exactly what mahr [bridewealth] meant because no one explained it to me. Once you are married here, you don’t get to know things because there is no time for it.”<sup>29</sup>

“It is said that you should ‘ilm [knowledge] . . . how can they know Islam if they do not learn?”<sup>29</sup>

33 Kevin Wanyonyi, *The Kadhis’ Courts in Kenya: Towards Enhancing Access to Justice for Muslim Women*, thesis for: MSc in Development Studies, Lund University, [https://www.researchgate.net/publication/306263431\\_The\\_Kadhis'\\_Courts\\_in\\_Kenya\\_Towards\\_Enhancing\\_Access\\_to\\_Justice\\_for\\_Muslim\\_Women](https://www.researchgate.net/publication/306263431_The_Kadhis'_Courts_in_Kenya_Towards_Enhancing_Access_to_Justice_for_Muslim_Women).

34 Wanyonyi, *The Kadhis’ Courts in Kenya*.

35 Osiro, “Women’s Views on the Role of Kadhi’s Courts,” 199.

36 Osiro, “Women’s Views on the Role of Kadhi’s Courts,” 199.

“If you observed our fellow Muslims who live on the town’s periphery . . . closely, you will find that they do not know ways of dini well . . .”<sup>37</sup>

And this statement, the most enlightening of all:

“Here, women do not go to the Kadhi for help. When the situation gets too difficult for them, they take off to their places of birth. They stay for some time then they decide to come back hoping that the situation will have improved.”<sup>38</sup>

Based on these interviews, it is clear that, at least for women from the Kendu Bay and Kisumu regions of Kenya, the division between common law courts and religious courts does not prove to be beneficial; neither system is particularly accessible to them. Whether due to a lack of religious education or fear of family or community backlash, the existence of Kadhis courts, a seemingly simple alternative to the convoluted civil court system, is not particularly open or accessible to Muslim women.

Thus, though the notion of cultural relativism may hold merit, critical examination of the system reveals undeniable results: for all Kenyan women, regardless of religion, access to equal property and inheritance rights as their fellow male citizens depends on a system that is unintuitive, unhelpful, and ineffective.

### VIII. The Indian example

In order to examine the Kenyan case, we can compare it to a similar example: India. Legal reform in India that gives women equal inheritance rights has increased their ability to participate in the economy — allowing them to contribute to the formal economy (as opposed to the traditionally informal economy). This economic development is what leads to modernization and brings with it a greater democratization process. As this was successful in India, its replication in Kenya could yield similar results.<sup>39</sup>

The Hindu Succession Act codified inheritance law in India, explicitly making daughters coparceners in the estates of “individuals that died without a will.”<sup>40</sup> Originally introduced in 1956, it went through multiple iterations between 1976 and 2005 before being nationally ratified in 2005. This was a monumental moment for Hindu women in India; it “greatly improved [their] ability to inherit property, thereby increasing their lifetime unearned income and their bargaining power.”<sup>41</sup>

There are some factors that could complicate the comparison between the Hindu Succession Act in India and the Kadhis Courts in Kenya. Firstly, the Hindu Succession Act applies to Hindu women, while the Kadhis Courts are Islamic courts in Kenya. Secondly, the Hindu Succession Act applies only to unmarried women, while the Kadhis Courts have jurisdiction over Muslim women in Kenya despite their marital status. Despite this, the fundamental premise of the Hindu Succession Act can be applied to the Kenyan case: regardless of religion, women should be guaranteed equal access to inheritance rights. Giving women this autonomy provides them with a sense of self-confidence that can be channeled into economic participation. This contributes to the country’s formal labor force, increasing the speed of modernization and ultimately leading to greater democratization within the nation. An educated woman is the key to a healthy and successful household, community, and society.

### IX. Conclusion

Kenya’s strides towards democratization in the decades since post-independence have been massive, but the process has faced some hurdles. The main obstacle for Kenya to become a fully democratic state is the lack of gender equality. Legally, the Kenyan Constitution and a multitude of other documents guarantee equality for all

37 Osiro, “Women’s Views on the Role of Kadhi’s Courts,” 199.

38 Osiro, “Women’s Views on the Role of Kadhi’s Courts,” 199.

39 Osiro, “Women’s Views on the Role of Kadhi’s Courts,” 199.

40 Osiro, “Women’s Views on the Role of Kadhi’s Courts,” 199.

41 Wanyonyi, *The Kadhis’ Courts in Kenya*.



Kenyan citizens in the eyes of the law, but this promise looks quite different in practice. Qualifying this promise of equality by allowing religious exceptions causes a complex issue that has yet to be resolved for Kenyan citizens, unable to make right on the promise of equal rights for all its citizens. Quantitative data shows the vast discrepancy between male and female landowners of all ages and this lack of inheritance and ownership creates a cycle of negativity for all Kenyan women—Muslim Kenyan women in particular. Their children are consistently underfed and suffer worse health conditions than non-Muslim Kenyan women's children, all due to their mother's lack of ability to participate in the economy and gain social mobility for themselves and their families. As a result, Kenya's democratization process has stagnated given it is unable to develop into a fully-fledged democracy.

Current explanations for Kenya's stagnating democratization include the lack of fully free and fair elections and corruption. Although both play a role in Kenya's slowing democratization process, they do not fully explain why and how Kenya is currently only a partial democracy. In fact, Freedom House scores Kenya 3 out of 4 points for legislators being elected through free and fair elections, indicating that progress has been made on that front. Furthermore, issues of patronage and clientelism are common struggles for most sub-Saharan African countries, resulting from a sense of complacency from both leaders and constituents about expectations of leaders in power regarding the allocation of state resources. Though this resource distribution is based on ethnic divisions, there are ways to overcome these divisions, including endorsements from trusted figures of other ethnic groups and coalitions. Thus, my argument that women's disproportionate lack of access to property and land rights on the basis of religion addresses Kenya's issue of slow democratization more comprehensively and conclusively.

Though my research has provided fruitful conclusions, it is important to consider the implications of further religious stratification in sub-Saharan African countries. When addressing these issues of unequal access to rights based on religion, it is imperative for both religious and political leaders to work together. They must determine how to best resolve the issue without unnecessarily making it a partisan, ethnic, or religious matter, which could create more tension in the political landscape. The Constitution guarantees equal rights to all of its people, and that is what they deserve, without caveats or loopholes.

## X. Bibliography

- Afrobarometer. "AD170: Kenyans See Gains in Gender Equality, but Support for Women's Empowerment Still Uneven." <https://www.afrobarometer.org/publication/ad170-kenyans-see-gains-gender-equality-support-womens-empowerment-still-uneven/>.
- Adar, Korwa G., and Isaac M. Munyae. "Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001." *African Studies Quarterly* 5, no. 1 (January 1, 2001). <http://www.africabib.org/rec.php?RID=P00000594&DB=p>.
- Ajefu, Joseph, Efobi Uchenna, Nadia Singh, and Shayequa Zeenat Ali. "Women's Inheritance Rights and Child Health Outcomes in Kenya." *Journal of Family and Economic Issues* 45, no. 1 (April 1, 2023): 137–50. <https://doi.org/10.1007/s10834-023-09895-y>.
- Nyong'o, P. Anyang'. "State and Society in Kenya: The Disintegration of the Nationalist Coalitions and the Rise of Presidential Authoritarianism 1963–78." *African Affairs* 88, no. 351 (April 1, 1989): 229–51. <https://doi.org/10.1093/oxfordjournals.afraf.a098162>.
- Balasubramanian, Senthil Arasu, Thenmozhi Kuppusamy, and Thamaraiselvan Natarajan. "Financial Inclusion and Land Ownership Status of Women." *International Journal of Development Issues* 18, no. 1 (April 1, 2019): 51–69. <https://doi.org/10.1108/ijdi-06-2018-0091>.
- Bernstein, Henry. "Modernization Theory and the Sociological Study of Development." *Journal of Development Studies* 7, no. 2 (January 1, 1971): 141–60. <https://doi.org/10.1080/00220387108421356>.

- Branch, Daniel, and Nicholas Cheeseman. "Democratization, Sequencing, and State Failure in Africa: Lessons from Kenya." *African Affairs* 108, no. 430 (November 28, 2008): 1–26. <https://doi.org/10.1093/afraf/adn065>.
- Burbidge, Dominic. *The Shadow of Kenyan Democracy: Widespread Expectations of Widespread Corruption*. 2015. [https://openlibrary.org/books/OL28826726M/Shadow\\_of\\_Kenyan\\_Democracy](https://openlibrary.org/books/OL28826726M/Shadow_of_Kenyan_Democracy).
- Fahnbulleh, Miatta. "In Search of Economic Development in Kenya: Colonial Legacies & Post-independence Realities." *Review of African Political Economy* 33, no. 107 (March 1, 2006): 33–47. <https://doi.org/10.1080/03056240600671258>.
- Federation of Women Lawyers, Kenya. "Women's Land and Property Rights in Kenya." IGAD Land Governance Project, July 17, 2018. <https://land.igad.int/index.php/documents-1/countries/kenya/gender-3/625-women-s-land-and-property-rights-in-kenya>.
- Gaafar, Reem. "Focus on Land in Africa: Linking Property Rights and Development." Landesa.Org. Washington, D.C., United States of America. <https://cdn.landesa.org/wp-content/uploads/Focus-on-Land-in-Africa-Wuethrich-Veit-Gaafar-March-2014.pdf>.
- Gez, Yonatan N., and Yvan Droz. "It's All Under Christianity: Religious Territories in Kenya." *Journal of Africana Religions* 7, no. 1 (January 1, 2019): 37–61. <https://doi.org/10.5325/jafireli.7.1.0037>.
- Heath, Rachel, and Xu Tan. "Intrahousehold Bargaining, Female Autonomy, and Labor Supply: Theory and Evidence from India." *Journal of the European Economic Association* 18, no. 4 (July 22, 2019): 1928–68. <https://doi.org/10.1093/jeaa/jvz026>.
- Hope, Kempe Ronald. "Kenya's Corruption Problem: Causes and Consequences." *Commonwealth & Comparative Politics* 52, no. 4 (September 10, 2014): 493–512. <https://doi.org/10.1080/14662043.2014.955981>.
- Inglehart, Ronald F., and Christian Welzel. "How Development Leads to Democracy: What We Know About Modernization." Social Science Research Network, March 15, 2009. [https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID2391678\\_code2178430.pdf?abstractid=2391678&mirid=1](https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2391678_code2178430.pdf?abstractid=2391678&mirid=1).
- Freedom House. "Kenya." Freedom House. <https://freedomhouse.org/country/kenya/freedom-world/2023>.
- Ingham, Kenneth, Mwenda Ntarangwi, and Simeon Hongo Ominde. "Kenya: People, Map, Flag, Religion, Language, Capital, & Election." *Encyclopedia Britannica*, July 8, 2024. <https://www.britannica.com/place/Kenya/People>.
- Kenya Law. "The Constitutional Amendment History." <https://kenyalaw.org/kl/index.php?id=9631>.
- KTN News Kenya. "Party Democracy: State of Multipartyism in Kenya Praised." September 29, 2023. <https://www.youtube.com/watch?v=xoV2PKCt6D4>.
- Masime, K., and G. Kibara. "Regime Transitions and the Institutionalization of Democracy in Kenya: The December 2002 Elections and Beyond." *East African Journal of Human Rights and Democracy* 1, no. 1 (January 1, 2003): 13–29. <http://www.africabib.org/rec.php?RID=Q00036109&DB=p>.
- Mbaku, John Mukum. "Kenya's Political Dialogue Is a Welcome Sign of Democracy at Work – If Both Sides

Understand Their Roles.” The Conversation. <https://theconversation.com/kenyas-political-dialogue-is-a-welcome-sign-of-democracy-at-work-if-both-sides-understand-their-roles-211129>.

National Profiles. “World Religion.” <https://www.thearda.com/world-religion/national-profiles?u=121c#IRFDEMOG>.

Newsinger, John. “Revolt and Repression in Kenya: The ‘Mau Mau’ Rebellion, 1952-1960.” *Science & Society* 45, no. 2 (January 1, 1981). <https://www.jstor.org/stable/40402312>.

Osiro, Rebecca. “Women’s Views on the Role of Kadhi’s Courts: A Case Study of Kendu Bay, Kenya.” In BRILL eBooks, 195–212. 2014. [https://doi.org/10.1163/9789004262126\\_010](https://doi.org/10.1163/9789004262126_010).

Pemstein, Daniel, Kyle L. Marquardt, Eitan Tzelgov, Yi-ting Wang, Juraj Medzihorsky, Joshua Krusell, Farhad Miri, and Johannes von Römer. “The V-Dem Measurement Model: Latent Variable Analysis for Cross-National and Cross-Temporal Expert-Coded Data.” V-Dem Working Paper No. 21, 9th ed. 2024. University of Gothenburg: Varieties of Democracy Institute.

Sait, Siraj, and Hilary Lim. *Land, Law, and Islam: Property and Human Rights in the Muslim World*. Zed Books, 2006.

Sanger, Clyde, and John Nottingham. “The Kenya General Election of 1963.” *Journal of Modern African Studies* 2, no. 1 (March 1, 1964): 1–40. <https://doi.org/10.1017/s0022278x00003645>.

Spencer, John. “Kenyatta’s Kenya.” *Africa Report* 11, no. 5 (January 1, 1966): 6–8. <http://www.africabib.org/rec.php?RID=P00053485&DB=p>.

Wahman, Michael. “Democratization and Electoral Turnovers in Sub-Saharan Africa and Beyond.” *Democratization* 21, no. 2 (November 6, 2012): 220–43. <https://doi.org/10.1080>.

Wanyonyi, Kevin, *The Kadhis’ Courts in Kenya: Towards Enhancing Access to Justice for Muslim Women*, thesis for: MSc in Development Studies, Lund University, [https://www.researchgate.net/publication/306263431\\_The\\_Kadhis'\\_Courts\\_in\\_Kenya\\_Towards\\_Enhancing\\_Access\\_to\\_Justice\\_for\\_Muslim\\_Women](https://www.researchgate.net/publication/306263431_The_Kadhis'_Courts_in_Kenya_Towards_Enhancing_Access_to_Justice_for_Muslim_Women).