

AUTHOR ACCEPTED MANUSCRIPT

FINAL PUBLICATION INFORMATION

Family Law Reform, Gender Equality, and Underage Marriage
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The definitive version of the text was subsequently published in

The Review of Faith & International Affairs, 13(3), 2015-10-23

Published by Taylor and Francis and found at <http://dx.doi.org/10.1080/15570274.2015.1075758>

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Family Law Reform, Gender Equality, and Underage Marriage: A View from Morocco and Jordan

By Paul Scott Prettitore

Family codes in the Middle East & North Africa (MENA) region cover issues of personal status, which include marriage, divorce, child custody and support, alimony, and inheritance. In terms of marriage, codes usually cover such issues as marriage contracts, ownership of marital assets, responsibility for financial maintenance of the family, and the minimum age of marriage. There are different codes for different religions—primarily Islam and Christianity, but also Judaism—with varying degrees of similarity. Application of a respective code is based on the religion of the individual. The extent to which religious principles are reflected in respective family codes varies by country, and the extent to which certain principles are religious in nature is often open to debate. Civil marriage is rarely available, thus the vast majority of marriages are done through family courts. Many countries have specialized courts, either civil or religious, with jurisdiction over family law issues. This article explores the issue of marriage of minors as linked with the reform of family codes in Morocco and Jordan, and in particular the role of judicial bodies in providing a check on such marriages.

Family Law Reform in Morocco

In 2004, the Government of Morocco introduced a new family code, known as the *Moudawana*. These reforms considerably enhanced the rights of women in terms of equality within the family, increasing their rights within the household on two levels. Firstly, husbands and wives were provided joint responsibility in family matters, making both *de jure* heads of household. Secondly, women were no longer required to be obedient to their husbands in return for exercise of other rights, such as the rights to financial maintenance or employment outside of the home. The new *Moudawanna* also increased protections afforded women. For example, it introduced an option for married couples to sign an additional contract at the time of marriage, separate from the marriage contract, allowing for designation of a community property regime, which could greatly benefit women given the low labor force participation of married women in Morocco. It also restricted polygamy, gave women the authority to sign their own marriage contracts and allowed women access to no fault divorce.

The *Moudawanna* also enhanced protections for children. In terms of child custody, the best interests of the child could be used as basis for making custody decisions, rather than relying on less flexible formulas. Protection of children was to be increased through the inclusion in the *Moudawanna* of provisions of international conventions ratified by Morocco. On the matter of the age of marriage, it raised the age of marriage for girls to 18, equating it with the age of marriage for boys. However, it allows for marriage under the minimum age if certified by a court. To improve implementation of the *Moudawanna*, priority was given to establishing a system of competent family courts.

The preamble to the *Moudawanna* provides an overview of much of the reasoning and policy considerations that accompanied the reforms. It sets the broad policy objective of providing justice to women, protecting children's rights, and preserving men's dignity while adhering to Islam's objectives of justice, tolerance, equality, and independent juridical reasoning (*ijtihad*), all in the context of modernization and the requirements for progress on development. The reasoning underpinning this policy was elaborated in a speech by King Mohammed VI,

referenced in the preamble. In relation to the marriage of minors, this speech highlighted a number of important principles, namely: women should not be compelled to marry against their will; equality between men and women, in accordance with provisions of the Malekite school of Islam, with exceptions made only with authorization of a judge when justified; and protection of children in accordance with international human rights standards.

Family Law Reform in Jordan

The Government of Jordan modified its family code, the *Personal Status Code* (PSC), in 2010. The amendments did close some of the gaps in terms of gender equality, though not as much as the *Moudawanna*. Women's rights involving access to marriage and divorces were enhanced, but not equalized with men. Women did gain the right to add stipulations to the marriage contract that could prove beneficial to them, such as allowing a wife access to no-fault divorce, forbidding husbands from moving the family residence to a new city, restricting a husband from taking a second wife, and guaranteeing the wife's right to work outside of the home. However, men remain legally the default head-of-household, and women are still obligated to be obedient to their husbands. The minimum age of marriage was raised to 18, from 16 for boys and 15 for girls (*Personal Status Code*, Article 10). Like the *Moudawanna*, the PSC permits marriage under age 18 when deemed by a judge to be in the best interest of the minor.

The new PSC was prepared by the Office of Chief Justice of the Shari'a Courts and based on a wide array of Islamic jurisprudence (*fiqh*) with the aim of protecting the family in general, and the rights of women and children in particular. A letter of introduction to the PSC prepared by the Chief Justice of the Shari'a Courts, Dr. Ahmad Hleil, notes that Shari'a Courts had been applying provisions of the former code adopted in 1976 consistent with principles of Shari'a law and the *Constitution*. However, conditions of modern life had evolved, necessitating a reconsideration of personal status principles balanced with practicality, custom, and Shari'a law, and in accordance with the Shari'a principle that "There is no doubt that rulings change along with the change of times." The resulting law drew from different schools of Shari'a based on preponderance of evidence and the best interest of individuals, consistent with the principles of Islam in letter and spirit.

Legislative Reforms and Social Norms

As noted in the previous section, both the Jordanian and Moroccan governments were careful to paint reforms as consistent with Islam. With the revised *Personal Status Code* in Jordan drafted by the Office of the Chief Justice of the Shari'a Courts, the reforms automatically had some legitimacy in terms of consistency with Shari'a law. A first draft of the PSC was prepared by a group of Shari'a court judges from the first instance and appeals levels and Shari'a court inspectors. This draft was reviewed by a committee composed of three experts in Shari'a and three experts in *fiqh*. While in Morocco, the reference to King Mohammed VI as the Commander of the Faithful in the preamble of the *Moudawanna* provides a strong link with Islam. The enhancements to the new *Moudawanna* were based on a review and recommendations made by a royal commission of male and female experts, which King Mohammed VI, in his capacity as Commander of the Faithful, advised to remain faithful to the provisions of Shari'a and Islamic principles of tolerance, and encouraged to use juridical reasoning (*ijtihad*) while considering Morocco's commitments to international human rights.

Religion plays an important role in both countries. The World Value Survey found that 99 percent of both Jordanian and Moroccan respondents considered religion as important in their

lives, with little variation between men and women.¹ But there is room for debate as to the linkages between Islamic principles, non-religious cultural norms, and marriage of minors. And such debates are tied to the larger issue of gender equality, given that marriages of minors much more often involve girls as opposed to boys. In both Morocco and Jordan there were segments of society, particularly civil society organizations focusing on women's issues, that felt the family reforms did not go far enough in closing gaps in gender equality (Arab Women Organization 2012).

Family law is inextricably tied to women's rights, and in particular equality. Family laws in the region are a reflection of social norms related to gender roles within the family. In some cases the links with Islam are more direct, for example inheritance rights and polygamy, versus other areas where the line between Islam and other norms is less clear, such as guardianship, the ability of women to work outside the home, and child custody. The debate over marriage of minors in Islam revolves around the ability to marry a child who is deemed through court procedures to have reached maturity. Practically, maturity has come to be defined as puberty, with maturity commonly defined as puberty based on the view that an objective of marriage is procreation. The contentious link in the MENA region between family law and gender equality is highlighted by the number of countries in the region that maintain reservations to the Convention on the Elimination of All Forms of Discrimination against Women, many of which cover family issues.

Household survey data from Morocco suggests that public attitudes towards reforms of the *Moudawanna* were more positive than negative, and that awareness of the changes to family law was widespread. On the latter, the survey, conducted two years after the reforms were introduced, found that 68 percent of male and 62 percent of female respondents reported knowledge of the reforms, with awareness considerably higher in urban (72 percent) versus rural (55 percent) areas (Haut Commissariat au Plan 2006). Of those reporting awareness, women were considerably more likely than men to view the reforms positively (62 percent of women versus 36 percent of men), with little variation between urban (48 percent) and rural (51 percent) areas. Most men (37 percent) viewed the reforms as mixed, but about one fourth (27 percent) had negative views. There are no similar data available measuring the attitude of Jordanians towards the reforms.

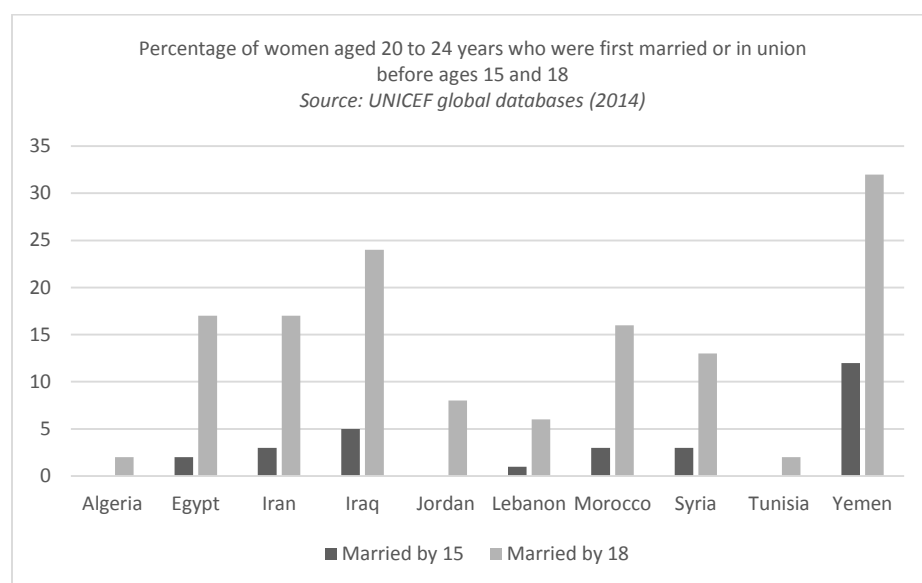
Despite the generally positive views of the reforms, it seems likely that social norms, both religious and non-religious, are at least partially restricting the general ability of women to exercise their new rights. General attitudes in both countries are not strongly supportive of gender equality, especially among men. Only 16 percent of Jordanian male and 33 percent of Moroccan male respondents to the World Values Survey considered equality of men and women as an essential part of democracy. Numbers were slightly higher for Jordanian female respondents (19 percent) compared to Jordanian men, but considerably higher for Moroccan women (60 percent). Attitudes towards traditional family roles are also strong, with nearly all respondents disapproving of women as a single parent (97 percent of Jordanian men and Moroccan men and women, and 99 percent of Jordanian women). Reforms to the *Personal Status Code* in Jordan also left a number of discriminatory provisions in effect, such as unequal grounds for accessing divorce, requirements for guardianship over women, and default legal custody of children in case of divorce. The latter provision remains in effect in Morocco as well. These attitudes can partially explain the social norms that make marriage of underage girls acceptable in society.

Women’s progress in exercising new rights is also limited. Comprehensive data on implementation of reforms is lacking. But anecdotal data suggests progress is slow. For example, only 20 percent of women married in 2011 signed their own marriage contracts, and less than 1 percent signed supplemental contracts that would allow them, among other things, to define rights in management of marital property more equally. And women who try to contravene these norms can face tough obstacles. A 2009 survey in Morocco found 19 percent of urban and 15 percent of rural women reporting domestic violence linked to their exercise of rights under the *Moudawana*—higher percentages of violence than reported for “economic” violence (Haut Commissariat au Plan, 2009).

Marriage of Minors in Morocco and Jordan

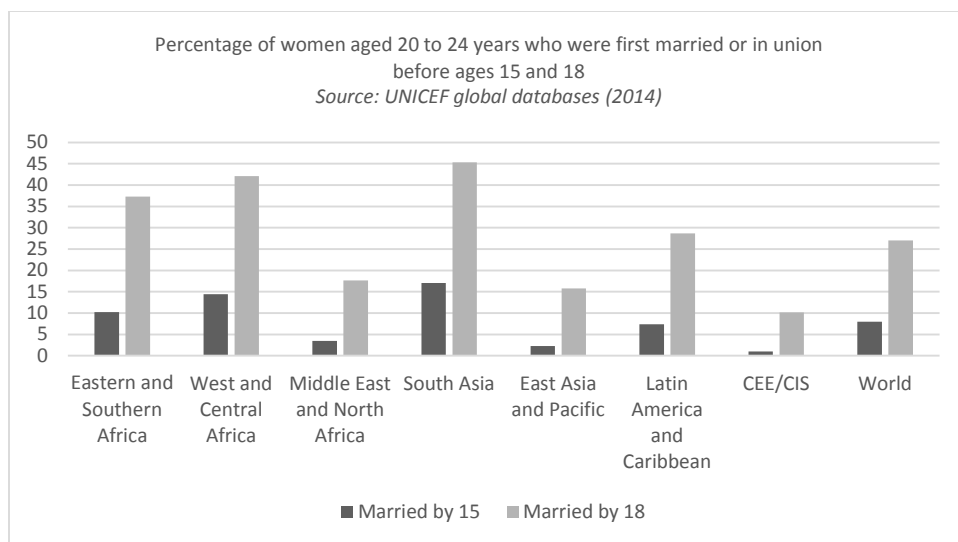
The rate of marriage of female minors varies across the MENA region. As shown in Figure 1, Jordan falls into a cluster of countries (Algeria, Lebanon, and Tunisia) where incidence is relatively low, while Morocco is grouped with countries where incidence is considerably higher (Egypt, Iran, Iraq, and Syria). Yemen is the major outlier.

Figure 1 – Incidence of Marriage of Minor Girls, MENA Comparison



From a global perspective, marriage of minors in MENA is relatively low in comparison to other regions and worldwide averages (see Figure 2, as well as Nguyen and Wodon 2015, in this issue). However, actual incidences of marriage of minors in the region may be under-reported. For example, anecdotal evidence from Morocco at least suggests that actual rates of marriage of minors might be higher, with many underage marriages hidden by the informality accorded temporary marriages conducted pursuant to customary norms.

Figure 2 - Incidence of Marriage of Minor Girls, Global Comparison



Moreover, in both Morocco and Jordan the number of marriages of minors has been steadily increasing. In Jordan, the number of underage marriages per year performed in courts increased from 6,896 in 2009 to 8,862 in 2012. In Morocco, the number of requests to courts for underage marriage increased from 38,710 in 2007 to 44,572 in 2010, though dropping slightly to 42,783 in 2012 (Haut-Commissariat au Plan 2012) (Figure 3). Though absolute numbers of underage marriages have been rising in each country, the overall percentage of marriages involving a minor has remained roughly the same in both countries over the last several years – hovering between 13-14 percent in Morocco and 11-12 percent in Jordan.

Available data from Morocco also demonstrates two other trends. The first is that the vast majority of applications for marriage of minors are approved by courts, between 86 percent and 93 percent between 2007 and 2012. The second is that underage marriage seems to affect only girls. In 2012, 99 percent of requests for certification of underage marriage made to courts involved girls, a percentage that has not changed since 2007. This data suggests that nearly all of these girls are marrying men at least 18 years old or older. Girls married as minors face certain risks. Data shows that marriages involving under-aged girls tend to result in divorce and re-marriage, with 62 percent of women in a second or greater marriage reporting their first marriage took place before age 18 (Haut Commissariat au Plan 2009). Domestic violence rates for married women are highest among younger women, particularly for those between the ages of 18 and 24. Although girls under the age of 18 were not included in the household survey on domestic violence, the data suggests the younger the age of a woman at marriage the more likely she is to be subjected to domestic violence. In addition, women whose first marriages took place without their consent were almost three times as likely to report domestic violence as those who had consented.

Table 1 – Applications for Marriage of Minors in Morocco

	Applications			Applications Accepted			Applications involving girls			Applications involving boys		
	2007	2010	2012	2007	2010	2012	2007	2010	2012	2007	2010	2012
Morocco	38,710	44,572	42,783	33,596 (86%)	41,098 (92%)	36,791 (86%)	38,331 (99%)	44,134 (99%)	42,667 (99%)	379 (1%)	438 (1%)	106 (1%)

Source: Compiled by the author.

Role of Judiciaries in Sanctioning Marriage of Minors

Pursuant to legislative reforms in both Morocco and Jordan, judiciaries in both countries have a strong role in the process of marriage of minors. In effect, judges in the Shari'a Courts in Jordan and the Family Courts in Morocco provide the final approval for the marriage, making it legal. The basis for approval of the marriage is based on consent of the minor and the parents of the minor, and the judge must consider whether the marriage is in the best interest of the minor. There is no standard definition of “best interests” of a minor. Determining the best interest of the minor includes considering a number of social and economic factors, with the well-being of the minor the primary concern.

In Jordan a judge can, with agreement of the Chief Justice, authorize the marriage of a minor who is at least 15 years of age. There are a number of criteria judges should, according to the law, take into account in approving the request. The judge should assess the capacity of the man/boy to marry the woman/girl. This involves assessing the capacity of the male to marry the female, which is based primarily on religious standing, for example a non-Muslim man cannot marry a Muslim woman, and the ability to provide financial maintenance to his wife and children, which is a legal obligation of the husband. Both parties to the marriage must consent. However, in the case of minors there are questions as to the capacity of a minor to freely consent, especially in light of strong social norms governing certain behaviors, particularly around sexual or perceived sexual activity prior to marriage. The legal guardian (*wali*) of the minor, who is normally the father or another male relative, must also provide consent through signature of the marriage contract. A judge can, in exceptional circumstances, still approve the marriage without the consent of the guardian. The necessity of the marriage is evaluated based on economic, social, and security grounds, and the need for approval should amount to a true necessity. A judge should also ascertain that the marriage serves some interest of the minor, and that the age difference between the parties is not too considerable and the marriage will not result in the end the minor's education. Once the marriage is certified by the judge, the full legal rights associated with marriage vest with the minor.

In Morocco, the application for permission to marry should be submitted by the legal guardian of the minor directly to the Family Court. Non-exclusive criteria are used for assessing the request for marriage, and these criteria are contained in the *Moudawana*. The judge should take into account the opinion of the parents, or other legal guardian, of the minor. Since both husband and wife are considered as heads-of-household in Morocco, a minor's mother also has a role in providing consent, which is not necessarily the case in Jordan. As is the case in Jordan, a judge can certify the marriage over the objections of the guardian of the minor. The judge should also consult with a medical expert to ensure the physical capacity of the minor to marry. In practical terms this means the minor has reached the age of puberty and is able to reproduce. And finally, the judge should conduct a social assessment of the minor. Since these criteria, as set in

law, are not exclusive, judges can consider other factors in determining whether the marriage should be approved.

Effectiveness of Judicial Checks on Underage Marriages

Judges are placed in a difficult position in assessing the best interests of the minor in view of social norms and criminal sanctions. They must balance risks associated with possible prosecution of the minor and threats to their security due to “honor” crimes when assessing the best interest. In such circumstances it is somewhat logical for judges to view marriage as the best option. Judges are also faced with considering economic factors. Requests for marriage of minors, usually girls, are often driven by poverty, with parents of the minor seeing marriage as the best option for the child and the rest of the family. Testimony by parents of the minor that they do not have the financial means to care for a child would be difficult for a judge to ignore, especially since financial assets are difficult to ascertain in the absence of reliable documentation, such as tax returns and bank statements, which is most likely to be the case when dealing with persons in or near poverty.

Courts alone are not going to stem marriage of minors due to the social and economic factors that undermine the legislation they are supposed to enforce. They can at best take steps to ensure approval of such marriages are the exception rather than the norm, and that the best interests of the minor are satisfied when requests for these marriages are indeed approved. With the current high rates of approval of requests for marriage of minors in both countries, it is difficult to argue that such requests are approved only when truly necessary. And the fact that the vast majority of minors involved in court-sanctioned marriages are girls raises questions as to progress on gender equality and protection of women and children as elaborated for the basis for legislative reforms. This becomes a question as to equal protection of the law for girls, namely does the law afford adequate protection to girls when it comes to their marriage as minors.

Social norms undoubtedly affect implementation of both family codes. These norms are shaped by both religious and non-religious principles whereby marriage of young girls is viewed as acceptable or even favorable. Determining the best interests of a minor in relation to marriage may prove particularly challenging for judges given the social factors that often lead to requests for marriage of minors. There is no comprehensive data on specific attitudes towards marriage of minors in Morocco or Jordan. But data available from household surveys on attitudes towards related issues can be indicative, especially in relation of underage marriage for girls. When asked whether sex before marriage was justifiable, the vast majority of respondents stated it was “never justifiable”—87 percent of Jordanians and 69 percent of Moroccans (World Values Survey, Wave 6 data 2010-2014). On this issue, there was little variation in attitudes between men and women. Such attitudes provide social pressure for marriage of minors, especially girls, where sexual relations are at least suspected, if not confirmed. When asked if they would like to have as neighbors an unmarried couple living together, 60 percent of Jordanians and 66 percent of Moroccans stated it would be a problem.

Other social norms center around views on morality, strongly linked with provisions in criminal codes. Sex outside of marriage is a crime in both countries, and in Morocco this applies only to women and girls. Having a child outside of marriage in Morocco is also a crime, as is having an abortion. Children born in such circumstances are subjected to reduced civil and social rights. In such cases marriage may be socially preferable to criminal prosecution and the resulting shame on the family. Often the perception that sexual relations, or other socially inappropriate behavior, have taken place is enough of a factor. Unmarried girls suspected to be

involved in sexual relations are also at risk of “honor” crimes, whereby they are killed by family members to protect the “honor” of the family. The fact that the act was committed to protect the honor of family is treated as a legitimate mitigating factor in these legal systems, lessening the length of imprisonment of convicted perpetrators. This risk is likely a considerable factor in assessing whether the marriage is in the best interest of a minor girl. And in Jordan, a rapist can agree to marry his victim for at least five years in order to avoid prosecution.

Social norms can also be used to bypass the court system altogether. In Morocco, customary marriages (*fatiha*) are sometimes performed outside of the court system, and must later be formalized through court proceedings. This mechanism is often used to hide underage marriage, with the *fatiha* performed when a girl is still a minor, and upon reaching age 18 the marriage is then legalized. Furthermore, civil society organizations have raised complaints that such marriages are formalized through the courts only when requested by the husband, and not the wife. Without formalization, the wife will not enjoy any of the legal rights or protections associated with marriage.

Conclusion

The experience of family reforms in Morocco and Jordan, and their impacts on underage marriage, offer some interesting lessons across three broad issues that are central to discussion of marriage of minors. Both the Morocco and Jordan examples add information to the debate on the links between religion, social norms, and legislative reform. In both countries, officials responsible for drafting revisions were able to link reforms with general Islamic principles, adding some strength to the view that religious texts can be interpreted with social modernization in mind. Doing such likely had a positive impact in limiting opposition to reforms by eliminating the religious argument against the new rights and protections contained in the new laws. The stronger backlash was from those believing the new laws did not do more to close gender inequality gaps. And indeed, both family laws contain gaps when viewed in terms of respective constitutional provisions on equality and international human rights norms.

Understanding the link between legislative reforms and social norms, both religious and non-religious, is important in terms of exercising new rights and ensuring new protections. While the reforms to both family codes were carefully linked with Shari’a principles, to certain extents both clash with entrenched social norms on gender roles and family. In addition to general attitudes that are weak on gender equality, the norms most closely linked with underage marriage include: protection of girls’ reputations against accusations of pre-marital sex and the impacts on family reputation; violence against girls in the name of family honor; extremely negative views of single mothers; and the view that male guardians, usually a father or another male family member, are most able to determine a woman’s best interests. These social norms are at least partially responsible for non-implementation of new legislation. Biased delivery of services linked to new rights, namely discrimination against women, by public sector officials also remains a problem. Evaluating the continuing interaction between social norms and legislation, and associated initiatives to overcome social obstacles to implementation of law, in both countries will provide beneficial lessons to protecting girls from underage marriage.

Experience in both countries suggests that judicial checks on underage marriage, in the absence of attention to social and economic factors, are unlikely to reduce instances of such marriages. Neither judiciary seems to be effectively limiting approval of these marriages on an exceptional basis clearly linked to the best interest of the minors involved. There are a number of factors behind these failures: lack of clear legal criteria for use by judges in determining the best

interests of the minor in terms of marriage; economic factors pushing parents to marry off their minor children; social factors, including attitudes around pre-marital, or suspected pre-marital, sex; and lack of sensitivity of judges to the possible immediate and longer-term social and economic impacts of the marriage on the minor. Courts, in the absence of other policies to address the social and economic incentives behind child marriage, will not be the most effective tool in stemming underage marriage. However, judiciaries should be accountable for what appears to be the rubber-stamping of requests for underage marriage and the failure to adequately assess the best interests of the minor in individual cases. Stricter criteria for determining best interests would be helpful. The continual monitoring and evaluation of the role of judiciaries in both countries in dealing with requests for underage marriage, linked to shifting public policies and social norms, will provide valuable information for the larger debate on limiting underage marriages.

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¹ Data from the World Values Survey can be found at <http://www.worldvaluessurvey.org/wvs.jsp>.