EDITORIAL

The Limits of the Law: Abortion in the Middle East and North Africa

IRENE MAFFI AND LIV TØNNESSEN

Since the International Conference on Population and Development (*ICPD*) in Cairo in 1994, sexual and reproductive health and rights have been recognized as key parts of the international development agenda. They now form part of two Sustainable Development Goals: numbers 3 (on good health and well-being) and 5 (on gender equality and empowerment). Although the ICPD's final report did not recognize abortion as a woman's right, it emphasized that in the countries where it is legal, women should have access to safe medical procedures and that more research should be undertaken to understand the phenomenon.[1]

Many policy makers and scholars recognize the legalization of abortion as an essential step to reduce maternal mortality.[2] When governments restrict access to abortion, abortions continue to take place at roughly the same rate.[3] Restrictive anti-abortion laws are associated with high rates of "less safe" and "least safe" abortions and are therefore seen as a determinant of maternal mortality.[4] However, only the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa from 2003 (Maputo Protocol) recognizes abortion as a human right in specific circumstances. It states:

> *State Parties shall take all appropriate measures to ... protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.*[5]

Only a few North African countries have signed or ratified the Maputo Protocol, and those few have done so only very recently. In 2015, Beji Essebsi, then president of Tunisia, signed the protocol, but Tunisia did not ratify it until 2018, and laws have yet to be harmonized according to its principles. Sudan has signed but not ratified it. Algeria officially ratified the protocol in 2016, but its application is problematic, as abortion in the cases indicated above is not considered a human right under the country's laws. Mauritania ratified the protocol in 2005, but it has not changed its laws; abortion in Mauritania is still criminalized under article 293 of the Penal Code. Egypt, Morocco, and Libya have neither signed nor ratified the protocol.

The impact of abortion bans on women's health in the Middle East and North Africa (MENA) region is understudied, and reliable data on unsafe abortion in countries where access to safe abortion is difficult or nonexistent are lacking. The reason is that states where abortion is illegal do not collect data on that

Irene Maffi is Professor of Cultural and Social Anthropology at the University of Lausanne, Switzerland, and Senior Researcher at the Chr. Michelsen Institute, Bergen, Norway.

Liv Tønnessen is Research Director at the Chr. Michelsen Institute, Norway.

Please address correspondence to the authors. Emails: irene.maffi@unil.ch and liv.tonnessen@cmi.no.

Competing interests: None declared.

topic (or at least do not make them public) and "[s]ocial and political issues constrain the epidemiologic studies related to abortion."[6] Moreover, as stressed by Sarrah Shahawy in this special section, the occupied Palestinian territory is often absent from official statistics, as it is not recognized as a state. However, a 2008 World Health Organization report estimates the yearly total of unsafe abortions to be 830,000 in Western Asia, causing 600 annual maternal deaths, and 900,000 in Northern Africa (Maghreb), causing 1,500 annual maternal deaths.[7] Overall, the report estimates the total number of maternal deaths in Arab countries to be 14,000 in 2007.[8] Wars and displacement in the MENA region also contribute to high levels of maternal deaths (some of which are probably still related to unsafe abortion). The Fragile States Index, produced by the Fund for Peace, currently places five MENA countries (Afghanistan, Iraq, Sudan, Syria, and Yemen) on "very high alert" or "high alert," suggesting that these factors are likely to continue to affect maternal mortality in the near future.[9]

This special section seeks to understand the political and economic dynamics that drive, hamper, and shape the use of criminal law to regulate abortion in the understudied MENA region. It also aims to explore the effects of discourses and policies promoted by states, international agencies, local nongovernmental organizations, political parties, and Islamic organizations on medical practices and social norms shaping modern reproductive subjectivities.

Very few publications exist on abortion in MENA countries, and those that do exist tend to either give a broad overview of the legislation of different states or evaluate Islam's position on abortion.[10] Detailed fieldwork-based studies on actual medical practices, political debates, local legal implementation, moral and social norms, and the trajectories of individual women in MENA countries are very rare.[11] This special section intends to fill this gap by offering new insights into national and local practices present in the MENA region. The section also seeks to contribute to opening a comparative perspective on the region for scholars, health practitioners, and international actors working on abortion in other areas of the world.

Muslim-majority countries reflect remarkable variation in abortion legislation, and religious scholars diverge notably in their theological reasoning.[12] In contrast to extremely restrictive countries such as El Salvador and Poland, and, more recently, several US states that ban nearly all abortions, all countries in the MENA region permit abortion if the pregnant woman's life is in danger.[13] This resonates with Islamic jurists who have historically perceived abortion as generally *haram* (forbidden) after the fetus achieves "ensoulment" (the status of a person), except to save the woman's life.[14] Some MENA countries also permit abortion in cases of a risk to the pregnant woman's physical health (Bahrain, Iraq, Jordan, Kuwait, Libya, Morocco, Oman, Occupied Palestinian Territories, Qatar, Saudi Arabia, and Yemen), a risk to the pregnant woman's mental health (Algeria, Bahrain, Jordan, Lebanon, Morocco, Qatar, and Saudi Arabia), fetal impairment (Iran, Kuwait, Morocco, Qatar, Saudi Arabia, Tunisia, and UAE), or rape (Morocco, Saudi Arabia, and Sudan).

Most abortion laws in the region are punitive and were promulgated during the colonial period, when French and British regimes supported pronatalist policies to increase the population of the metropole and of the colonized lands. As colonial laws criminalizing abortion became entrenched in society, legal and medical services for women desiring abortions also became restricted.[15]

Nonetheless, according to Basim Musallam, abortion was widely practiced in Islamic societies during the colonial period, and the main Islamic schools had different opinions on abortion. Some authorized abortion until 120 days after conception, whereas others were opposed to it.[16] During the 19th century, progressive interpretations of Islam and demographic concerns, coupled with a desire to lower maternal mortality rates, led to laws allowing for abortion on demand during the first trimester in Tunisia and Turkey.[17] However, because these laws were designed not to extend women's rights but to decrease natality rates, they are often applied in a coercive way.

The articles in this special section seek to answer the following questions with case studies

from Morocco, Lebanon, the occupied Palestinian territories, Sudan, Tunisia, and Turkey:

- What are the political dynamics driving the (de) criminalization of abortion?
- What role does religion play in the (de)criminalization of abortion?
- What are the effects of (de)criminalization on different categories of women's access to safe abortion?
- How do international policies and rhetoric concerning sexual and reproductive rights affect political and legal debates on abortion in MENA countries?
- How are neoliberal reforms affecting the political economy of health and the distribution of resources in the domain of sexual and reproductive health?

The six contributions are based on qualitative work and solid long-term knowledge of the field. The authors demonstrate that in several countries in the MENA region, cuts in government health expenditures and the emergence of conservative religiously oriented parties have contributed to the restriction of publicly provided abortion services. This has occurred even in countries such as Turkey and Tunisia that have more progressive laws. The case studies from Turkey and Tunisia show that legalizing abortion is not enough to grant equal and easy access to abortion care, especially for unmarried women from lower socioeconomic classes.

Liv Tønnessen and Samia al-Nagar show how abortion is politicized through its association with illegal pregnancy. Fornication is a crime against God punishable with 100 lashes in Sudan, and pregnancy outside a marriage contract constitutes sufficient evidence of a woman's immorality. This enables a strong link between the crime of fornication and the crime of illegal abortion. Abortion does not normally appear in the domestic political debate on women's reproductive and maternal health. However, it has become politicized in the context of Islamism and militarism in the country, as implementing strict Islamic law often puts control and suspicion of women's sexuality at center stage. In addition, a number of bureaucratic barriers, as well as a strong police presence outside maternity wards in public hospitals, make it difficult for unmarried women to access emergency care after complications of an illegal and often unsafe abortion. Doctors who treat unmarried women suffering such complications are forced to maneuver between their commitment to medical ethics and their compliance with strict government laws and policies. The authors, through what they term "Hippocratic disobedience," show that these practitioners are subverting state law and policy in various ways. Although these doctors personally believe that abortion is forbidden in Islam, they object to the state's disproportionate and unfair punishment of predominantly young, unmarried, and socioeconomically vulnerable women.

In Lebanon and Morocco, criminalization does not appear to be an insurmountable obstacle for women who want to safely terminate a pregnancy under medical supervision. At least for those women who can afford to pay, it seems relatively easy to access abortion care, and most abortions take place in medical facilities with qualified clinicians. Interestingly, in Morocco, rural and poor women are still victims of high maternal mortality compared with the urban population, but in Lebanon, a woman's place of residence does not seem to be relevant. Zeina Fathallah investigates the strategies of Lebanese women to get abortion care and how their interactions with their husband/partner, family members, friends, and doctors shape their abortion itineraries and experiences. She shows that many individuals do not freely choose to terminate their pregnancies but are faced with familial, social, and economic constraints that force them to have an abortion. In most cases, despite the social and legal ban on abortion in Lebanon, women are able to terminate one or several pregnancies under medical supervision in private hospitals and doctors' offices. Health care providers of various confessional groups are ready to offer abortion care in exchange for monetary compensation that varies according to the marital status of the woman, her age, and weeks of pregnancy. Hence, the criminal-

ization of abortion does not dissuade women from terminating a pregnancy but does create and reinforce socioeconomic inequalities, as well as local patriarchal logics and constraints.

As in Lebanon, abortion is illegal in Morocco. However, Irene Capelli shows that it is widely performed by local health providers. Nonetheless, while women who can afford it can easily get abortion care in the main cities of Morocco, unmarried and marginalized women may find it impossible to pay a doctor to perform an abortion. Many such women will therefore try to abort through more or less traditional methods, including herbal remedies, mechanical methods, and cocktails of various biomedicines. Most of the women Capelli interviewed had to keep their pregnancies but received some protection from Moroccan nongovernmental organizations that take care of unwed mothers, a category that has gained visibility in the last decade. Capelli argues that local organizations have produced a new moralizing discourse on abortion that coexists with the legal sanctions. Although the notion of sexual and reproductive rights has been introduced in Morocco, abortion is not considered part of these rights. Furthermore, the state does not recognize unwed mothers as a specific group because the law does not recognize filiation outside of wedlock, and premarital sexuality is socially and legally sanctioned.

In all examined countries, social class, marital status, income, age, and education play an important role. These factors may shape the possibility of accessing abortion care, or, where abortion is legal, they help determine the type of facility women can go to and, consequently, the kinds of experience they have. Shahawy shows that access to abortion for Palestinian women depends on a woman's socioeconomic status and whether she is a resident of Jerusalem, the West Bank, or Gaza. Because abortion is illegal under Palestinian law and highly restricted in the occupied Palestinian territories, Palestinian women are forced to turn to Israeli hospitals, to expensive private Palestinian clinics, or to self-induced termination when seeking an abortion. While Israeli clinics and hospitals provide a unique option for a limited group of Palestinian women, taking advantage of this option is fraught with ethical and political implications that are keenly felt by Palestinians and complicate the abortion landscape. The barriers to accessing abortion under occupation are not only geographic and financial but also psychological and political. Thus, both the legal restrictions and the negative impact of the occupation on freedom of travel create a complex landscape that Palestinian women must navigate when seeking abortion services.

Women's economic and social capital is also crucial in Turkey and Tunisia, where cuts in the financing of the health care system have restricted women's access to abortion services in the public sector. Furthermore, increases in power of Islamist parties and Islamic conservative repertoires circulating in the MENA region help reinforce moral and social norms that condemn sexuality outside of marriage and assign women the traditional roles of wives and mothers. In both Tunisia and Turkey, these discourses have affected health care providers' attitudes and practices: some of them have begun to refuse to offer the services they should provide.

In her contribution, Ayse Dayi emphasizes how neoliberal logics have contributed to dismantling the Turkish welfare state and have caused a restructuring of the health care system. The economic reforms have deeply transformed the professional practices of clinicians in the domain of sexual and reproductive care, reducing, for example, the availability of contraceptive methods and the availability of abortion in the public sector. Dayi shows how these reforms, along with neoliberal reforms, are eroding women's sexual and reproductive rights and promoting a pronatalist and nationalistic discourse. In Tunisia, the economic crisis and the emergence of Islamist and conservative forces have made abortion on request—something that has been legal since 1973—increasingly difficult to obtain in the public sector. Irene Maffi and Malika Affes examine the abortion itineraries of seven women in a large government hospital of the capital to capture the legal, social, economic, and medical constraints that poor women face in the only Arab country where abortion is currently legal. They stress the paradoxical effects of the democratization process

during the post-revolutionary period, which has contributed to reducing, rather than increasing, women's sexual and reproductive rights.

The legalization of abortion is not a magic bullet but is nonetheless important for advancing women's sexual and reproductive rights in the MENA region. Since the *ICPD* in Cairo in 1994, 52 countries worldwide have changed their laws to allow for greater access to abortion. However, only three MENA countries are on that list: United Arab Emirates (in 2014), Morocco (in 2017), and Iran (in 2004) all extended the circumstances under which women can seek an abortion to include fetal impairment.[18] Rarely is abortion on top of the agenda of local women's movements. This is likely due to a fear of backlash, both from the states, which are often explicitly or implicitly seeking legitimacy within Islam, and from the conservative segments of societies themselves, which often aim to control and confine women and girls to stereotypical gender roles. As a new wave of popular uprisings currently sweeps over the MENA region (particularly in Algeria, Iraq, Lebanon, and Sudan), this could be a critical moment to put women's sexual and reproductive rights on the political agenda.

Acknowledgments

This special issue has been made possible by funding from the Research Council of Norway (grant number 248159) for the project "Political Determinants of Sexual and Reproductive Health: Criminalisation, Health Impacts and Game Changers" headed by Siri Gloppen, Director of the Center on Law and Social Transformation. The project funded the participation of several contributors to this special issue in a panel entitled "The Limits of the Law: Abortion in the Middle East and North Africa" at the Law and Society Association's annual conference in Toronto, Canada, in June 2018.

References

1. A. Guillaume, "L'avortement en Afrique 10 ans après la Conférence du Caire," in B. Ferry, A. Gautier, O. Samuel, et al. (eds), *La situation dans les pays du Sud: Synthèse et ensemble des contributions de chercheurs des institutions de recherches partenaires* (Nogent-sur-Marne: CEPED and United Nations, 2004). Available at http://horizon.documentation.ird.fr/exl-doc/pleins_textes/divers09-05/010041377.pdf.

2. R. Dabash and F. Roudi Fahmi, *Abortion in the Middle East and North Africa* (Washington, DC: Population Reference Bureau, 2008); G. Sedgh, J. Bearak, S. Singh, et al., "Abortion incidence between 1990 and 2014: Global, regional and subregional levels and trends," *Lancet* 388/10041 (2016), pp. 268–267.

3. B. R. Johnson, V. Mishra, A. F. Lavelanet, et al., "A global database of abortion laws, policies, health standards and guidelines," *Bulletin of the World Health Organization* 95 (2017), pp. 542–544.

4. B. Ganatra, C. Gerdts, C. Rossier, et al., "Global, regional, and subregional classification of abortions by safety, 2010–14: Estimates from a Bayesian hierarchical model," *Lancet* 390/10110 (2017), pp. 2372–2381.

5. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), art. 14; see also C. Zampas and J. M. Gher, "Abortion as a human right: International and regional standards," *Human Rights Law Review* 8/2 (2008), pp. 249–294; C. G. Ngwena, "Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa," *Human Rights Quarterly* 32/4 (2010), pp. 783–864.

6. A. Rastegari, M. R. Baneshi, S. Hajj-Maghsoudi, et al., "Estimating the annual incidence of abortions in Iran: Applying a network scale-up approach," *Iran Red Crescent Medical Journal* 16/10 (2014), p. e15765; see also World Health Organization, United Nations Children's Fund, United Nations Population Fund, et al., *Trends in maternal mortality, 2000 to 2017* (2019), p. 61.

7. World Health Organization, *Unsafe abortion incidence and mortality: Global and regional levels in 2008 and trends during 1990–2008* (Geneva: World Health Organization, 2012), p. 2.

8. Ibid., p. 6.

9. Fund for Peace, *Fragile states index: Annual report 2019* (Washington, DC: Fund for Peace, 2019), p. 7.

10. For publications dealing with state legislation, see, for example, L. Hessini, "Abortion and Islam: Policies and practice in the Middle East and North Africa," *Reproductive Health Matters* 15/29 (2007), p. 75–84; L. Hessini, "Islam and abortion: The diversity of discourses and practices," *IDS Bulletin* 39/3 (2008), p. 18–27; Dabash and Fahmi (see note 2). For publications dealing with Islam's position on Islam, see, for example, B. F. Musallam, *Sex and society in Islam: Birth control before the nineteenth century* (Cambridge: Cambridge University Press, 1989); D. L. Bowen, "Abortion, Islam, and the 1994 Cairo population conference," *International Journal of Middle East Studies* 29/2 (1997), pp. 161–184; O. Asman, "Abortion in Islamic countries: Legal and reli-

gious aspects," *Medicine and Law* 23/1 (2004), pp. 73–89; G. K. Shapiro, "Abortion law in Muslim-majority countries: An overview of the Islamic discourse with policy implications," *Health Policy and Planning* 29/4 (2014), pp. 483–494.

11. Notable exceptions include S. Hajri, S. Raifman, C. Gerdts, et al., "'This is real misery': Experiences of women denied legal abortion in Tunisia," *PLOS ONE* 10/12 (2015), p. e0145338; L. Tonnessen, "Women's rights to abortion after rape in Sudan," *CMI Insight* 2 (2015); I. Maffi and M. Affes, "La santé sexuelle et reproductive en Tunisie: Institutions médicales, lois et itinéraires thérapeutiques des femmes après la revolution," *L'Année du Maghreb* 17/2 (2017), pp. 151–168; M. Gruenais, "La publicisation du débat sur l'avortement au Maroc: L'Etat marocain en action," *L'Année du Maghreb* 17/2 (2017), pp. 219–234; I. Maffi, "Abortion in Tunisia after the revolution: Bringing a new morality into the old reproductive order," *Global Public Health* 13/6 (2018), pp. 680–691; S. Shahawy and M. B. Diamond, "Perspectives on induced abortion among Palestinian women: Religion, culture and access in the occupied Palestinian territories," *Culture, Health and Sexuality* 20/3 (2018), pp. 289–305.

12. Hessini (2007, see note 10); Shapiro (see note 10).

13. K. Lui, "A teenage rape survivor in El Salvador has been jailed for 30 years," *Time* (July 7, 2017), https://time.com/4848547/el-salvador-rape-victim-stillbirth-murder-jail/; A. Sifferlin, "It's almost impossible to get an abortion in Poland: These women crossed the border to Germany for help," *Time* (2019), https://time.com/poland-abortion-laws-protest/; L. J. Reagan, "We don't have to imagine the consequences of abortion bans: We just have to look to the past," *Time* (May 16, 2019), https://time.com/5589993/alabama-abortion-law-history/.

14. Hessini (2007, see note 10).

15. Ibid.

16. Musallam (see note 10).

17. Hessini (2007, see note 10).

18. S. Singh, L. Remez, G. Sedgh, et al., *Abortion worldwide 2017: Uneven progress and unequal access* (New York: Guttmacher Institute, 2018).