Focus Essay

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Public Policy and the Challenge of Health Care Services to Women prisoners in Myanmar

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Abstract

While women's rights are seen as human rights in Myanmar to a larger extent, this is not however true for women prisoners. This disregard of rights to women prisoners is because of administrative and legal hurdles. According to the 2008 Constitution though both men and women enjoy equal rights, nevertheless on the implementation level administration and laws, which are drawn from a mix of colonial and traditional sources, makes is practically difficult to realize the constitutional guarantee. This paper explores and reflects on the issues of women prisoners' access to their basic health care rights from the human rights perspective. Furthermore, I also throw light on how various loopholes of in the public policy increase their vulnerability.

Keywords: Women prisoners, Health, Women's rights, Myanmar.

Introduction

The human right to health is enshrined in Article 25 of the UDHR and understood as an essential condition for everyone's ability to live a life in happiness and dignity. Nowadays, medical literature and education articles influence the ethics and principles of fundamental medical ethics by abbreviating and categorizing basic principles. Therefore, there are a number of international treaties such as International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), the Convention on the Elimination of All Forms of

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Discrimination against Women (CEDAW, 1979), and national constitutions that categorize health as a basic need and represent as human rights. Under these provisions, the government or the state has the responsibility to provide health care for everyone.[1] According to the constitution of Myanmar (2008) Article 367 "Every citizen shall, in accord with the health policy laid down by the Union, have the right to health care."[2] This part of the constitution exhibits how Myanmar is following its obligation of implementing the treaties into domestic legislation. But the problem is if we use the legal provisions as a benchmark or a standard of the measurement of whether rights are met or not, a legal provision alone does not highlight the real situation of rights-holders. The question is: does every citizen have the right as guaranteed by the constitution? In the constitution we find a broad and theoretical définition that might not speak to the practice and, hence, we do not use the constitution as benchmark because the constitution merely fulfills a minimum requirement upon ratification; turning the provisions of the treaties into domestic legislation. This step does not provide any information about the real situation on the ground. In the field of health, there are different terms that have been used such as right to health, right to health care, and health rights, etc. and it leads to some confusion and controversy. The term "the right to health" is often used at the United Nations level as an inclusive right and the underlying determinants of health. [3] The term "the right to health" is used in a context of the human rights situation, and it refers to more specific language contained in international treaties and principles of fundamental human rights. The broad definitions in treaties and constitutions apply to everyone (or every citizen) in theory. However, in practice we do not know how far such provisions reach the realities of female prisoners in Myanmar, for example. So, if we cannot use the constitution of Myanmar as a benchmark of whether rights are met, due to its broad character, how can we determine if the right to health for groups such as women prisoners are met or not? This paper seeks to look at this issue through the lens of the three elements of availability accessibility, and adaptability (3 A's). I argue that these three elements are a better benchmark as the broad definition, not only in the Constitution but also in human rights treaties.

Thus, this paper will explore the question: does Myanmar sufficiently ensure the key element of availability, accessibility, and adaptability, of the right to health to women prisoners? The first part will unpack the right to heath in international human rights law by reviewing legal definition and standards of right to health and explore in detail the treaties that Myanmar ratified, the meaning and the role of availability, accessibility, and adaptability and the role of state obligation under the treaties. The second section will discuss the right to health of the women prisoners by assessing the treaties that were ratified in Myanmar and comparing them with the 2008 constitution. Furthermore, the session will be analyzing the problems that women prisoners face by looking at the lenses from the 3 key elements of availability, accessibility, and adaptability. The final part will conclude how the state can make improvements in regard to ensuring everyone's rights to health are met.

Unpacking the Right to Heath in International Human Rights Law

The right to health is one of the basic needs for living a dignified life for everyone, everywhere. Nowadays, medical literature and education articles influence the ethics and principles of fundamental medical ethics by abbreviating and categorizing basic principles. The right to health is an important part of human rights because health is the most essential part of human life.[4] Before getting into health as human rights, what is the right to health? This section will explore the international human rights law of the right to health.

The right to health is mentioned in the following international treaties: Article 25 of the Universal Declaration of Human Rights (UDHR, 1948), Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), Article 24 of the Convention on the Rights of the Child (CRC, 1989), and in the article of 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965)."[5] Furthermore, the right to health is also identified in many of the regional level human rights charters, which are the Article 11 of the European Social Charter (1961) as revised, Article 16 of the African Charter on Human and Peoples 'Rights (1981) and the Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and

Cultural Rights (1988). The Commission of Human Rights and the Vienna declaration and programme of Action (1993) also proclaimed the right to health. Moreover, the United Nations Standard Minimum Rules for the treatment of prisoners (SMR), Rules 22 to 26, covers healthcare services for prisoners and the Bangkok Rules 48[6] and The Mandela Rule 28[7] have added the needs for pregnant women, breast-feeding mothers and mothers with children in prison.

In Article 25 of the UDHR (1948), the term that they use is "the right to a standard of living adequate for the health and well-being." This statement is focused exclusively on the legal definition, which is sufficient in the context of international human rights standards. How is it possible to measure the highest standard and what are the indicator for that? It is the extensive definition and the UDHR is not legally binding document. The state will not be obligated if it is not legally binding. Thus, other legal instruments like ICESCR and CEDAW state the precise the rights and standards. In the case of Myanmar, there is CEDAW and ICESCR in regards to health rights of female prisoner since Myanmar has ratified both treaties. Thus, the following session will explore more about right to health from CEDAW and ICESCR, before applying this to the specific case of female prisoners.

According to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), Article 12 addresses to eliminate discrimination against women not only in access to the health care service but also for family planning. General Recommendation No. 24 of CEDAW explains that state parties should take responsibility for appropriate and specific health care services for women. Article 12 of CEDAW has in its General Comment 24 broadly states what is the right to health of women and who is responsible for fulfilling that. It imposes a duty on states party "to implied an obligation to respect, protect, and fulfill women's right to health care"[8]. General Comments insists on implementation toward vulnerable groups of women.[9] It defines the obligation of states to implement human rights at the national level, and normative content named the three essential components: respect, protect, and fulfill women's right to health care. Thus, the state has to guarantee these and what states have to do in order and that the definition comes in. However, the right to health does not mean that to have a healthy life and it means being able to take the highest achievable and how can

the state make that sure by making sure that health care is**.** Another article that highlights the right to health is Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966). It establishes 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".[10] General Comment 14 of ICESCR (2000) explains this further: the right consists of a health protection system that provides equal access to the highest level of health care available to everyone.[11] This right should take into account a person's socioeconomic and biological needs.[12] In these regards, where health is understood as the complete physical, mental and social well-being[13], what does it mean for women in prison? When are women in prison physically, mentally and socially well? Taking into account legal provisions and broad definitions does not suffice to answer such questions. In order to assess that state obligation, we will have to look at the concept of those key element of availability, accessibility, and adaptability because they ensure that the key elements of right to health are actually met in practice.

Key elements of the right to health

The important role of availability, accessibility, and adaptability as key elements of the right to health. Thus, this part is going to discuss what is meant by availability, what accessibility means, and what adaptability is.

a. Availability

Health care facilities and adequate infrastructure such as clinics and well-trained medical staff able to support the delivery of health care services to the people, available in adequate quantity within the State party. State party is also responsible for providing essential drugs, as defined by the World Health Organization (WHO).[14] It is the duty of the state to provide health care services with sufficient infrastructure, such as the doctors or nurses, medicine, health related equipment's, clean and appropriate delivery rooms for the women; and these must available for the people throughout the country.

b. Accessibility

Health facilities, goods and services have to be accessible physically, as well as financially on the basic of non-discrimination, especially for the most vulnerable or marginalized. Also, accessibility includes

the right to seek, receive and impart information related to any health issues.[15]

c. Adaptability

The content of health care facilities and services evolves with the changing needs of society and it challenges inequalities. "Adaptability means there will be sufficient cooperation and communication to minimize the risk of harm to the patient."[16] According to Teal and Street (2009) "Adaptability in health care means being skilled at integrating a patient's cultural values or beliefs into any encounter with the awareness and ability to adapt behaviours to maximize the patient's comfort, reconcile misunderstandings, and be responsive to the patient's need."[17]

State obligations under the Treaties

Focusing on health care is an essential part of the basic need for human rights because it is a sign of dignity, respect, and equality. The state has to guarantees the right to health after the ratification of the Human Rights treaties. Everyone needs to have access to health care, and the government must take health care policies seriously according to the treaties. As part of the treaty's obligation, states are accountable to provide basic health care services for everyone. The right to health is subject to progressive realization. Implementing national legislation through provision, for example, the constitution is only the first and easiest step; the subsequent steps are far more important for the rights-holders. How successful the state is in progressive realization can be seen by applying the lenses of three A-elements, which I will do with regard to female prisoners.

Like other human rights, the General Comment 14 says the state has three types of obligations: to respect, to protect and to fulfill. To respect means "to refrain from interfering directly or indirectly with the enjoyment of the right to health" [18] for example, providing health care services and avoiding discrimination toward prisoners or vulnerable groups. Obligation to protect, the state is responsible to prevent third parties from interfering with the enjoyment of the right through regulation and legal guarantees (e.g., the state must ensure that women prisoners have access to health care information). To fulfill means that states are responsible to" adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the

right to health" (e.g., the state must take positive measure to ensure that sufficient medical facilities and services are provided efficiently for all).

Having unpacked the international standards of the right to health, I will now move forward to look at the case of Myanmar, with a specific focus on women prisoners.

Women Prisoners and the Right to Health in Myanmar

In this part I will discuss what the legal framework in Myanmar looks like. Myanmar included the right to health in the constitution after ratifying the relevant treaties. In its constitution, Myanmar also took into account the right to health and domestic legal framework in relation to its international obligations.

Myanmar has supported the Universal Declaration of Human Rights since inception at the United Nations in 1948. While not a treaty itself the declaration was explicitly adopted to define the meaning of the fundamental freedoms and human rights.[19] Myanmar has ratified Convention on the Rights of the Child (CRC) in 1991, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1997, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2017. In this context, Myanmar ratified all the rights to heath international treaties that were mentioned above. Also, as mentioned earlier, the right to health care is stated in Article 367 of the Myanmar Constitution. Chapter (8) avows "to provide the right to health to any citizen equally without discrimination relate to race, birth, religion, position, cultural, sex and wealth."[20] Provision 7 provides that mothers, children and pregnant women shall enjoy the rights prescribed by law, while provision 25 confirms that every citizen has the right to health care in accordance with the State's health police.[21] The constitution does not describe in detail the right to health care but rather just states the health policy laid down by the Union. There is no question that the provisions in the constitution apply to women prisoners, as long as they are citizens of the Union. The question remaining is: apart from the legal formation, to what extent are women prisoners' right to health realized? The legal provision of the constitution does not act as a benchmark here, as it does not say anything about the situation "in practice". According to the constitution, the state provides the right to health for every citizen, but whether it is in the constitution or not only ranks second after

the question of whether the right to health for women in prison is available, accessible and adaptable or not. This is the benchmark and guide for the ministry to go by.

Women Prisoners and three key elements

In the paragraph before, I have outlined available, accessibility, adaptably as the three key elements of the right to health. The following session will explore whether states need to enact laws that require health providers to consider these three key elements. Those three key elements can be used as a measurement of how to progressively move forward with providing health care. Thus, the following will present the analysis of the extent to which Myanmar has met those key elements with a special focus on the situation of female prisoners.

a. Availability

Regarding availability of the health care services for inmates, there is a lack of medical professionals for prisoners in Myanmar. According to the prison department, there are almost 10,000 female prisoners. Among 236 medical staff, there are only 10 female staff[22] that are providing health care services to inmates at 66 prisons in Myanmar.[23] Due to the shortage of female medical staff,[24] women prisoners who prefer to get treated by female medical staff are being denied that right. The state has to grant adequate health care facilities and services but based on the numbers presented above, the state clearly lacks the capacity to adequately provide female health care staff to female prisoners. If there is any emergency situation, such as an emergency abortion, required by the female inmate, a female doctor would not available. The next section will look at whether there are enough doctors to provide adequate services to all female inmates in the country.

b. Accessibility

The right to health should be accessible to all and no one should be denied it due to travel expense or discrimination. Medecins Sans Frontieres (MSF) share their working experiences in prison: they mention that to get access to prison health care is difficult and it depends on the goodwill of the authorities to grant permits for health care providers to enter inside the prisons. If there is any emergency health situation, MSF medical staffs are not able to help due to negligence and security concerns from the prison security and authorities.[25] That is the one of the main reasons that MSF is not able

to access prisons to provide medical assistance to inmates. Its show that doctors are available but they are not accessible to the prison. Furthermore, among the inmates one out of five are female patients who are HIV positive.[26] Although MSF were speaking in rather general terms, the situation in Myanmar prisons likely mirrors the MSF observations. My analysis has shown that for the women prisoners, there are still substantial gaps between the international obligations, which support progressive action, and the extent to which those obligations are realized by the Myanmar government - that is, the situation of the ground. The government still has to go a long way to fully realize the right to health with regard to accessibility.

b. Adaptability

Previous paragraphs stated that health care was not available or accessible for female prisoners. In this part is going to discuss about adaptability of the right to health of the prisoner. Adaptability means being able to keep up with new innovations, such as different treatments, contraception, and the need of women are not being taken into account. Oak Htan, a female prisoner from Chin State, shared her experience in prison: “I was arrested for opium trading. I did not notice that I was pregnant. The prison doctor found out that I was pregnant, but I was still told to do my prison duties. I cleaned the floors until my pregnancy was six months. They shackled me till the last minutes of before delivery. They released me during the delivery and once again shackled me even during breastfeeding time. I suffered terribly with painful swellings in my feet."[27] As mentioned earlier, the health care service needs sufficient cooperation between prison authorities and medical staffs, to reduce the risk to the patient; but in Oak Htan ’s case, she still had to do prison duties and was shackled both before and after delivery. The prison officials should adapt to and understand her situation, but they neglected to do so. Her testimony clearly shows that she did not receive any help from the prison authorities, who were responsive to the patient’s needs.

Conclusion

I would like to provide more data analysis but the current study drew on very few case studies of women prisoner experiences because studies undertaken on women prisoners' rights in Myanmar are severely limited. However, it is highly likely that those are not

singular cases and that women might face structural rights abuses. Based on my analysis, the state has to improve by providing at least one female doctor for each prison - and this doctor must have knowledge of local language. Furthermore, the authorities must adapt policy depending on a disastrous health situation of the inmates. International medical regulations are under the Human Rights Law, but the health care sector has not met the international standards and its regulations. The state should always reference back to the international human rights standard. This lead me to the conclusion that although Myanmar tries to implement the right to health in the constitution on paper, following its state obligations relative to ICESR and CEDAW, it still lacks the realization of those rights for female prisoners in practical terms regarding the three (As); and women are facing different problems while under custody, judging from the perspective of availability, accessibility, and adaptability.

Notes:

[1] National Economic & Social Rights Initiative, (2019). *Human Rights Assessment of the Medicare for All Act of 2019,* United States : NESRI.

[2] Constitution, (2008). *Constitution of the Republic of the Union of Myanmar.* Nay Pyi Taw : Ministry of Information.

[3] Toebes, B., (2001). The Right to Health. In: C. K. a. A. R. Asbjorn Eide, ed. *Economic, Social and Cultural Rights .* Dordrecht/Boston/London : Martinus Nijhoff Publishers , pp. 169-190.

[4]OHCHR, (2008). *The Right to Health, Fact Sheet No. 31,* s.l.: UN Office of the High Commissioner for Human Rights (OHCHR).

[5] Ibid.

[6] UNODC, (2010). *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary,* New York: United Nations.

[7] UNODC, (2015). *The United Nations Standard Minimum Rules for the Treatment of Prisoners,* New York: United Nations.

[8] Department of Economic and Social Affiars, (1999). *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health),* s.l.: United Nations.

[9] Department of Economic and Social Affiars, (1999). *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health),* s.l.: United Nations.

[10] OHCHR, (2000). *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12),* New York: UN Office of the High Commissioner for Human Right.

[11] Ibid

[12] Karen A. Matthews and Linda C. Gallo, (2011). This right should take into account a person's socioeconomic and biological needs. *Annual Review of Psychology* , Volume 62, pp. 501-530.

[13] World Health Orgnization, (1946). *Constitution of World Health Orgnization,* New York: United Nations.

[14] Ibid.

[15] Ibid.

[16] Jennifer M Weller, Mark James Barrow and Sue Gasquoine, 2011. Interprofessional Collaboration Among Junior Doctors and Nurses In The Hospital Setting. *Medical Education,* 45(5), pp. 478-487.

[17] RaNSforM, n.d. *RaNSforM working definition of adaptability.* s.l.:RaNSforM ,Training Requirements and Nursing Skills for Mobility in Health Care.

[18] OHCHR, (2000). *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12),* New York: UN Office of the High Commissioner for Human Right.

[19] Humphrey, J. P., (1979). The Universal Declaration of Human Rights: Its Hustory, Impact and Juridical Character . In: D. B. Ramcharan, ed. *Human Rights: Thirty Years After The Universal Declaration.* The Hague/Boston/London: Martinus Nijhoff, pp. 21-40.

[20] Constitute (2015), Myanmar's Constitution of 2008. Retrieved at http://asean-law.senate.go.th/constitution/full-const/Myanmar2008.pdf [Accessed Jan 2020].

[21] Waite, M., (2016). *How does stateless affect the "Right to Health"? An examination of the stateless Rohingya in Rakhine State, Myanmar,* s.l.: Institute on Statelessness and Inclusion (ISI).

[22] Kyaw, P. W., (2019). Prisons Dept wants to hire 1500 people. *mmtime.com.* [Online] Retrieved at: https://www.mmtimes.com/news/prisons-dept-wants-hire-1500-people.html [Accessed Jan, 2020].

[23] Phyo, P. T., (2017). Ministry seeks health grads for prison healthcare plan. *mmtimes.com.* [Online] Retrieved at: https://www.mmtimes.com/national-news/nay-pyi-taw/26464-ministry-seeks-health-grads-for-prison-healthcare-plan.html [Accessed Jan 2020].

[24] Kyaw, P. W., (2019). Prisons Dept wants to hire 1500 people. *mmtime.com.* [Online] Retrieved at: https://www.mmtimes.com/news/prisons-dept-wants-hire-1500-people.html [Accessed Jan, 2020].

[25] Biquet, J., (2014). Working in a prison in Myanmar: Médecins Sans Frontières' experience working in Insein prison. *Humanitarian Aid on the move,* Volume 14, pp. 6-11.

[26] Ibid.

[27] WON, (2016). *The Voices of Myanmar Women, Research Report in support of CEDAW Alternative Report,* Yangon: Women's Organization Network (WON).