

COERCION AND CRIMINALIZATION IN TB-RELATED PUBLIC HEALTH LAWS: INSUFFICIENT AND INCONSISTENT RIGHTS PROTECTIONS IN 20 HIGH-BURDEN COUNTRIES

SEPTEMBER 2018

Stop TB Partnership

hosted by
UNOPS

O'NEILL
INSTITUTE
FOR NATIONAL & GLOBAL HEALTH LAW
GEORGETOWN LAW

An effective response to infectious diseases like tuberculosis (TB) requires protection of core human rights as a key component of public health. This review of laws in 20 high-TB-burden countries, however, demonstrates a troubling incongruence between the espoused commitment to a “rights-based” response and domestic legal frameworks governing the TB response. Very few of the TB-related laws reviewed align with core World Health Organization (WHO) recommendations and human rights laws and principles.

States around the world have the legal responsibility and authority to address TB epidemics, including by measures to identify TB cases and prevent further transmission. States are also bound by domestic and international law to respect, protect, and fulfill a range of human rights. These laws provide frameworks and procedures that countries must adhere to when the limitation of these rights is necessary. Here we review and code laws governing these activities in key areas: isolation and confinement; entry and search of homes and medical examination of persons therein; and reporting requirements. The review shows that the norm is for laws related to TB to provide health authorities broad and essentially unfettered powers to enter and search homes and medically examine people therein as well as to detain and isolate people without the basic procedural and substantive rights protections required by human rights law and that we expect in every other area of life. The norm is also for the law to require lay people to report disease, even if they do not have the expertise to do so, and punish them with fines or incarceration for a failure to do so.

Human rights instruments and normative guidance from public health officials provide a framework for state action in this context with several components. First, liberty and security of persons are foundational rights of all people, from the Universal Declaration of Human Rights onward¹. Deprivation of liberty must be based on grounds established in law and able to be challenged in a court². The Siracusa Principles³—general principles of international law relating to the limitation of rights—clarify that, while public health needs can justify limiting liberty, these limitations cannot be arbitrary. They instead must be specifically aimed at preventing disease and cannot justify indefinite deprivation of liberty or lack of due process. WHO guidance on TB has incorporated these principles and provides that public health measures must be based on clear grounds, no more than what is necessary to address the threat, and that involuntary isolation should only be used in specific, exceptional circumstances in which voluntary measures have been refused and isolation is the only option⁴. In addition, international agreements and most domestic constitutions recognize the fundamental right to be free from arbitrary or unlawful interference in the family and home⁵. Nonconsensual searches must be based on objective evidence and are subject to authorization by an impartial authority through a warrant or other means. Even more so than the home, the physical person—the right to security of person and bodily autonomy—is protected as sacrosanct. Laws typically require considerable cause and rigorous due process for its invasion⁶.

In this analysis, we reviewed the laws of 20 countries to identify whether these core human rights protections are included in TB-related laws—which we color code below. Some countries have laws specific to TB, while broader public health laws related to infectious diseases are applicable in others. Note that where countries have federal systems this coding analysis is limited to central/federally applicable laws. Coding is, by necessity, reductive, and further legal analysis is necessary; however, this analysis shows some important trends.

Some countries in each category have enacted laws in line with human rights doctrine and best public health practice. Overall, however, we find that key TB-related laws of most countries have little or no provision for basic human rights protections. This does not, however, necessarily mean that public health officials act arbitrarily—only that these laws often empower them to do so.

The term “a rights-based approach to tuberculosis” has become an accepted feature of international and domestic discourse related to the TB response. This suggests that the TB response has embraced the language yet disregarded the content of human rights. For those who believe in human rights and the necessity of a “human rights-based approach to TB,” this incongruence demands attention and resources to support the reform of laws in order to align them with basic human rights.

1 Universal Declaration of Human Rights (UDHR), Article 3; International Covenant on Civil and Political Rights (ICCPR), Article 9.

2 ICCPR 9 (1,4).

3 United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, 1985.

4 World Health Organization. Ethics guidance for the implementation of the End TB Strategy, 2017; p 6, 37.

5 UDHR, Article 12; ICCPR, Article 17.

6 See e.g. UN Committee on Economic, Social and Cultural Rights, General Comment No. 14(8) stating that the ICCPR “includes the right to control one’s health and body ... and the right to be free from interference, such as the right to

be free from torture, non-consensual medical treatment and experimentation.”

This work was made possible by support of the Stop TB Partnership, to whom we extend our appreciation

THIS REVIEW OF TB-RELATED LAWS IN 20 HIGH-BURDEN COUNTRIES SHOWS INSUFFICIENT AND INCONSISTENT PROTECTIONS FOR BASIC HUMAN RIGHTS SUCH AS LIBERTY, PRIVACY, AND DUE PROCESS.



This review will be open to comment by each country analyzed as well as any other interested parties. Questions or challenges as to the process and conclusions of the review will be addressed as appropriate. We encourage any interested party to contact the authors.

CONTACT:
John Stephens
John.Stephens@georgetown.edu

1 REASONS FOR FORCED ISOLATION:

This indicator codes whether a country's law related to forced isolation provides limitations on when it may be used that roughly align with WHO guidance (only when necessary to prevent spread of disease, the person has refused voluntary measures, and the measures are more than necessary).⁴ Without clear limits, public health authorities may have authority to detain people even when little or no danger to the public exists or when less restrictive options would be effective. Countries are coded red when they fail to place substantive limits like these on public health authorities and green when laws align, at least loosely, with WHO guidance. The data below suggest that legal frameworks most often allow for the denial of liberty without regard for the basic criteria. These laws are unique in that they allow for the deprivation of liberty on remarkably scant bases.

2 FAIR PROCESS IN FORCED ISOLATION:

This indicator codes whether a country's law includes basic "due process" protections in which people who are subject to detention or isolation must be provided notice of why they are being detained and have a right to a hearing or appeal, either before the decision or while it is in effect. A country is coded red if its law provides for neither a notice requirement nor a right to a hearing or appeal, yellow if it provides for one of the two, and green if it provides for both. As seen, most laws include few protections to ensure a fair process. When read alongside question 1, many countries' laws do very little to delineate the criteria that justify a decision to deny liberty and also provide few if any procedural safeguards against those decisions or a process by which people may defend or regain their liberty.

3 ARBITRARY ENTRY AND INSPECTION OF HOMES:

This question asks whether a country's law requires some level of evidence to justify nonconsensual entry and inspection of homes and whether the powers of entry and inspection are subject to independent authorization such as a warrant. A country is coded red if its legal framework related to TB requires neither an evidentiary basis nor independent authorization in order to trigger the power of authorities to enter and inspect homes. A country is coded yellow if the law requires either but not both of these criteria and green if it requires both. We note there are significant differences between the countries coded yellow below—some require an evidentiary basis to justify the entry and search but set a very low bar, such as "reason to believe" that someone has TB or has been exposed, a standard that may not even require there be reason to believe there is a risk of further transmission.

4 FORCED MEDICAL EXAMINATION WHILE INSPECTING HOMES:

Some countries' laws grant power to public health authorities to inspect homes and, in the course of doing so, to compel people in that home to submit to a medical examination. This question asks whether authorities are also empowered to medically examine people within homes on the same basis that empowered the initial entry. Note that most countries' laws provide for mandatory medical examination in other contexts as well, but this indicator does not address those contexts. Countries are coded red if authorities are empowered to medically examine people in their homes on the same basis that empowered entry to the home. They are coded green if their law requires some additional grounds or procedure.

5 REPORTING OBLIGATIONS AND CRIMINALIZATION:

An effective response to TB requires a robust system through which to collect and respond to information about the spread of the disease. Such systems rely on people, typically healthcare professionals, to report cases of TB. Some laws require all people, regardless of their medical training, to report TB. Often, a failure to comply with this duty carries a fine or even imprisonment. Thus family members, teachers, employers, and fellow community members may be under a duty to report on one another, even if they have no training that would enable them to do so. Such requirements may violate the legal principle that laws must be reasonably capable of being complied with. These laws may also incentivize a culture of secrecy that drives TB underground, where the system is unable to find and treat it. Countries are coded red if their law requires lay people to report TB and creates an offence for noncompliance that is punishable by imprisonment. They are coded yellow if the offence is not punishable by imprisonment, though it may be subject to a fine. They are coded green if they do not place notification requirements on lay people or if a failure to comply with such a requirement is not an offence subject to penalty.

Country	1. Reasons for Forced Isolation: Does the country's law include substantive protections that dictate when mandatory isolation can be used, in accordance with the World Health Organization Ethics Guidance for Implementation of the End TB Strategy?	2. Fair Process in Forced Isolation: Does the country's law include procedural protections including the right to notice and appeal or challenge when coercive (mandatory) measures are used, in accordance with the World Health Organization Ethics Guidance for Implementation of the End TB Strategy?
Bangladesh	Red	Red
Brazil	Red	Red
China	Red	Yellow
Ethiopia	Red	Red
India	Red	Red
Kenya	Red	Red
Lesotho	Red	Red
Liberia	Red	Red
Myanmar/Burma	Red	Red
Namibia	Red	Red
Pakistan	Red	Red
Papua New Guinea	Red	Red
Russia	Red	Green
Sierra Leone	Red	Red
South Africa	Green	Green
Tanzania	Red	Red
Thailand	Red	Red
Vietnam	Red	Red
Zambia	Red	Red
Zimbabwe	Red	Red

Country	3. Arbitrary Entry & Inspection of Homes: Does the country's law on public health inspections have procedural protections against arbitrary entry and inspection of homes?	4. Forced Medical Examination While Inspecting Homes: Does the country's law on public health inspections have procedural protections against arbitrary use of mandatory medical examination of persons in inspected homes?	5. Reporting Obligations & Criminalization: Does the country's law refrain from placing notification or reporting requirements on lay people and creating criminal or civil offenses for noncompliance?
Bangladesh	Red	Red	Red
Brazil	Red	Red	Green
China	Yellow	Red	Yellow
Ethiopia	Yellow	Red	Green
India	Red	Red	Red
Kenya	Yellow	Red	Yellow
Lesotho	Yellow	Red	Green
Liberia	Red	Red	Yellow
Myanmar/Burma	Red	Red	Red
Namibia	Yellow	Red	Red
Pakistan	Red	Red	Red
Papua New Guinea	Yellow	Red	Yellow
Russia	Red	Red	Green
Sierra Leone	Green	Red	Green
South Africa	Green	Green	Red
Tanzania	Red	Red	Red
Thailand	Red	Red	Yellow
Vietnam	Red	Red	Red
Zambia	Yellow	Red	Yellow
Zimbabwe	Yellow	Red	Red

Note: Grey indicates laws that could not be coded

O'NEILL
INSTITUTE
FOR NATIONAL & GLOBAL HEALTH LAW
GEORGETOWN LAW

Stop TB Partnership

hosted by
 UNOPS

Georgetown University Law Center
600 New Jersey Avenue, NW Washington, DC 20001

Phone: (202) 662-9203
www.law.georgetown.edu/oneillinstitute