

TUBERCULOSIS

IN PRISONS:

A PEOPLE'S

INTRODUCTION TO

THE LAW

By John Stephens

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INTRODUCTION

This is the issue: Tuberculosis (TB) in prisons is a crisis all around the world and right now those of us who fight for justice and human rights are not winning. But prisons systems must change; we have to win because lives depend on it. The law can help us, especially if lawyers who think like activists and activists who think like lawyers work together. That's what this guide is about. It is an introduction for activists on how to use the law. While it focuses on TB in prisons, lots of it applies elsewhere as well; it can help activists understand and use the law in campaigns for justice related to many different issues.

This guide is not about the law in one specific country—it's better than that. It explains basic legal principles, as well as the basic infrastructure of law, and gives helpful tricks to help activists be confident when they use the law in their campaigns. Throughout this guide, you might find yourself thinking, "But we do that differently in my country." That's good. You're thinking like a lawyer, and it's OK if some of the things in here don't apply to your country. It's even OK if some of the things in here would be plain wrong in your country. The point is to empower TB activists to understand and use the law at a general level. We can worry about details later. Indeed, after going through this guide, you should feel confident to go out and figure out some of those details yourself.

You needn't try to catch everything in this guide all at once, although you probably could. You might just read it through and try to take away a few things, whatever strikes you as helpful as you think and strategize like an activist-lawyer. Then the most important part: use that thinking to take action—because that, after all, is what activists do.

A FEW BASICS ON HOW GOVERNMENTS WORK

Most people reading this live in a country with a constitution. That constitution almost certainly says that the government has three main parts: the executive, legislative, and judicial “branches.” You may have learned somewhere that the legislative branch makes laws, the executive branch implements and enforces laws, and the judicial branch interprets laws. But just hearing that breakdown probably isn’t enough. This section goes into a little bit more detail.

For some of you, this section will seem very basic. We need to understand some of the basics to understand the other things we want to talk about. If you already know this stuff, feel free to skip this section.

The legislative branch, also called “parliament” or “congress,” makes laws. It does so by voting. These laws affect every part of our lives.

This is more or less how it works. One or more of the members of congress says to the rest of congress, “Here’s a draft law, and we should vote on whether it should be a real law.” Then, the members of congress debate the draft law or, as it is often called, the “bill.” They might agree on changes and make revisions. After this process, which is often very long, there is normally a procedure, sometimes a vote, to bring the bill to the “floor.” This just means the draft law is being presented to congress so that its members can vote on whether it should become a law. Then the members of congress vote.

In many countries, there are two parts of the legislative branch (one will often be called “the house”). In that scenario, normally both parts will have to vote in favor of the draft law in order for it to become law. If enough members of the legislative branch vote

yes, the draft law becomes a real law—and that means it is ready to be enforced and implemented.

This is oversimplified. But it's good enough for our purposes now. We'll go into a little more detail about the process when we talk about different ways to use the law.

The branches of government and where prisons come from

Implementation brings us to the executive branch. There is normally one person at the head of the executive branch, and that person is normally called the president. Laws don't just come out of the legislative branch and jump from the page into reality—the executive branch is responsible for taking the law from the page to the people. It is supposed to implement the laws that the legislature passes.

Imagine that the legislative branch has passed a law called the Prisons Act. The Prisons Act says there will be a prisons system and sets out the basics of how it should work. The Prisons Act says that the president should appoint a Minister of Prisons. The Prisons Act also gives the Minister powers and responsibilities. So, what now?

This is where the executive branch comes in. The president appoints a Minister of Prisons. The Minister is, by the way, also a member of the executive branch (in most countries, all the ministers together are referred to as the president's "cabinet").

Acting "pursuant to" the Prisons Act, the Minister, a part of the executive branch, builds prisons and hires staff, and so forth. The Prisons Act also says (or should say!) that prisoners must have access to healthcare, so the Minister makes sure (or should make sure!) that the prisoners get the medicine and other health services they need.

And so on. The executive goes about making what the Prisons Act says on paper into a reality in the world. The executive branch is breaking the law when it doesn't do what the things the Prison Act says it's supposed to do. The government can be sued when it breaks the law.

Litigation brings us to the judicial branch. The judicial branch is all about courts and judges and lawsuits. When people can't or won't agree on whether a law has been broken or what a law means, they can turn to the judicial branch and ask it to resolve the disagreement. This is what people mean when they say the judicial branch "interprets" the law*. The judicial branch is made up of courts where judges hear cases and make decisions on how cases should be resolved. Lots of times, judges will write down the reasons for their decisions in "judgments." These judgments are another source of law. We will talk more about them, and about courts, in the next section.

See how these pieces work together? You'll almost certainly have heard that government has a system of "checks and balances." The relationship between these three branches is normally what they are talking about. The idea is that no one branch should have too much power, so each branch acts as a check and balance on the other.

Checks and balances between the branches and beyond

A lot of countries will have another, or several more, institutions meant to be part of the system of checks and balances. Your constitution may establish a Human Rights Commission and give it powers to ensure the fulfilment of human rights. If that's the case in your country, the details of how the Commission should work

would be set out in a piece of legislation that is probably called something like the Human Rights Commission Act. More details on how the Commission should work would probably be set out in regulations and policy. Keep this in mind when you read the next section.

It is also possible that your country has a specific institution meant to keep tabs on prison conditions. It's normally called the "Prisons Inspectorate" or something like that. Normally, the Prisons Act will create this institution and set out its powers. But it needn't be that way. The Prisons Inspectorate could be established in its own special piece of legislation or in another piece of legislation.

* You might say that "interpreting" the law sounds an awful lot like "making" law. You'd be right. Whatever we call it, courts decide what the law is or means on a case-by-case basis, whereas the legislature makes law by passing legislation.

The details of how these additional parts of the system of government work are different in every country. At the broad level, though, they are probably more alike than unlike.

In any event, the details aren't important for now. What is important is that you get the big picture and feel confident about your ability to find out the details and then think about how to use these institutions in your campaigns.

So, how do we find the details? The next section talks about just that.

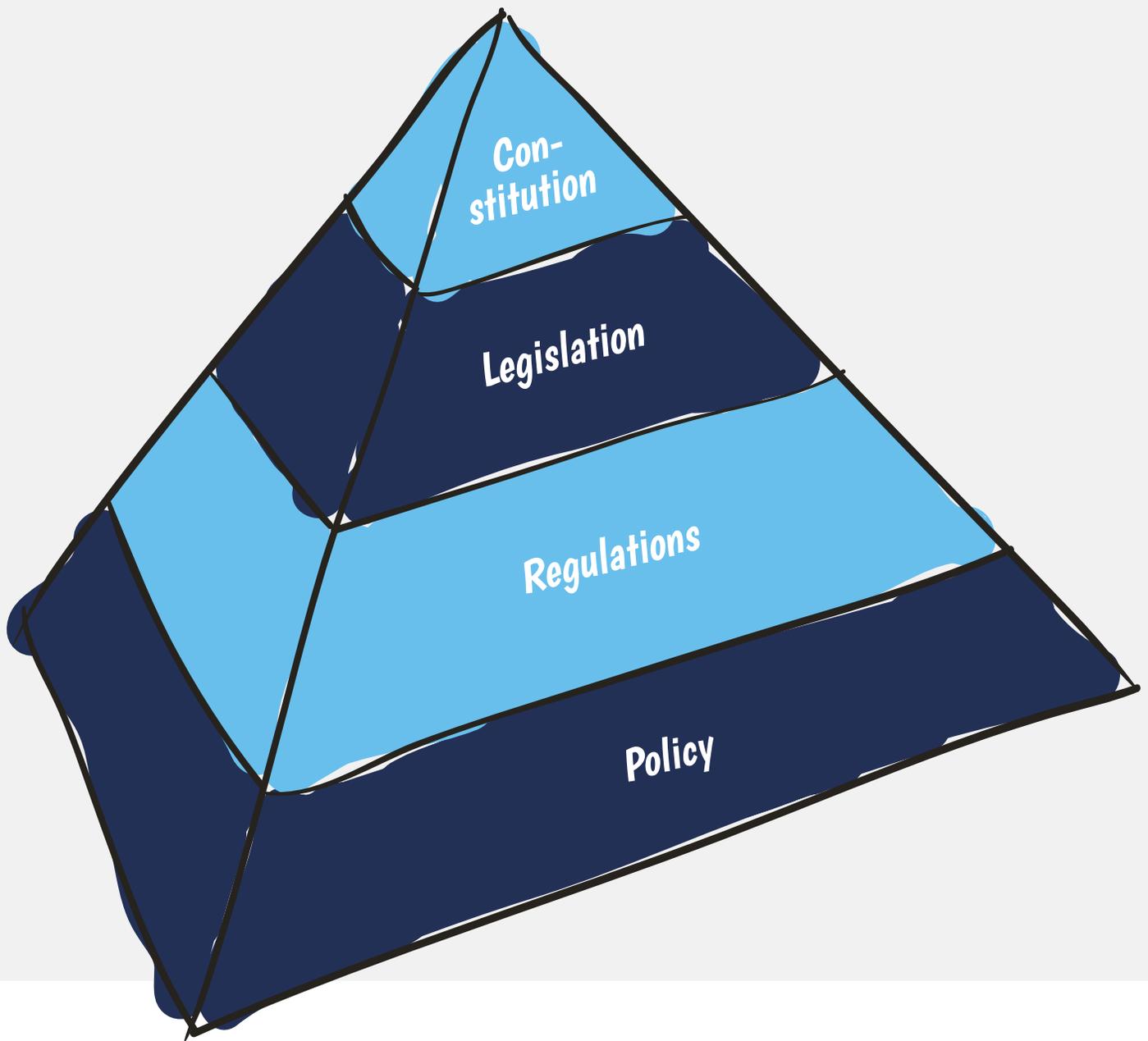
SOURCES OF LAW: WHERE TO FIND THE LAW AND A BIT ABOUT HOW IT WORKS



For the most part, the law is easy. In law, most of the answers are written down somewhere—all you have to do is find the right somewhere and read what it says. Or even have someone read it to you.

Where can one find the law? This section answers that question. Let's get started.

The law is different in every country, but a lot of the basics stay more or less the same in many countries. Most of the main sources of law are shown in the pyramid on the next page.



This basic structure applies in most (but not all) countries. There are a few twists that don't fit well into a pyramid, like law found in judgments from courts and international human rights law. We'll talk about them later. Forget about them for now.

Not surprisingly, the types of law lower down on the pyramid have way more detail than those at the top—that's why the bottom is bigger than the top. Also, the further down the pyramid you go, the more frequently the rules change. This is on purpose: We made the stuff at the bottom easier to change than the stuff at the top. Policy changes the most often, and the constitution changes the least.

We're going to discuss each level of the pyramid and how they all fit together.

THE CONSTITUTION (THE BOSS OF ALL LAWS)

Your country probably has a constitution, most countries in which people will use this guide do. The constitution is at the top of the pyramid because it's the boss. It says what the government must do, what it may do, and what it cannot do; everything the government does or doesn't do must be in line with what the constitution says. Also, it follows, all other laws must be consistent with the constitution. In other words, if a law contradicts the constitution, that law is invalid and can't be enforced.

These are important principles—we'll keep coming back to them throughout this guide. But don't stop and try to memorise them, you'll learn them as we go.

The hierarchy of laws

Here's a rule: The law has a hierarchy—every level of law in the pyramid has to comply with each level above it. For example, if legislation (a law passed by the legislative branch of government) contradicts the constitution, the constitution wins and the legislation is “invalid,” which means it can't be enforced or implemented. The same goes all the way down the levels of the pyramid. If regulations are inconsistent with either legislation or the constitution, those regulations are invalid. And so on. This is an important part of an important concept called “rule of law.” Rule of law is a big deal, and the term is often used so vaguely that it confuses people. It's one of those terms people often use to show off or to hide that they don't know what they want to say. Don't worry, you'll understand what people mean (or you'll know that they don't know what they mean) by the time we are done.

The constitution in your country has a bunch of different parts. Most of the constitution will be about how government works. It will set up the branches of government and explain what they do and how they do it. It will tell you how elections should work. It will probably identify an official language or languages. Things like that. It will, almost certainly, also have a section that describes the rights of people. This section will probably be called “the Bill of Rights.” (Don't let the word “bill” confuse you. We talked earlier about how laws are called bills before the legislative branch passes

them. The Bill of Rights is law.) The Bill of Rights is important to activists. It's a very good idea to read it and know it.

LEGISLATION

Most countries have a main piece of legislation (law made by the legislative branch) that sets up the prisons system. The law will probably be called something like “the Correctional Services Act” or “the Prisons Act.” The law will set out the basics of the whole prisons system—how things should and shouldn't be done, and which people should and shouldn't do them.

Setting things up: legislation and how to read it

Most of the time, these “Acts” will also have a purpose statement, often something very dramatic that sounds great. South Africa's, for example, says the prisons system exists “to contribute to maintaining and protecting a just, peaceful and safe society.” That sounds wonderful, but you wouldn't think that's what

South African prisons are meant to do if you stepped inside many of them. It's important for activists to notice things like this. We can use observations like this to make arguments, whether for campaigns or litigation or both. You'll be doing lots of that when we're done.

There are a few tricks that you'll want to know when you read legislation. One is that legislation is usually organised into sections and subsections. Don't let them intimidate you, just break them down. The graphic on pages 18 and 19 shows how.

Let's say that we want to know what the Prisons Act says about medical examination of new prisoners before they enter prison. Section 24(1)(a)(i) of the Namibian Prisons Act 9 of 2012 says something about that. So, let's find that section. Think about "section 24(1)(a)(i)" as a set of directions and follow the directions step by step:

- First, go to section 24.
- Then, find subsection 1 within section 24. Now you're at section 24(1).
- Underneath subsection 1 is another subsection, this time indicated by a letter. Find subsection "a." Now you're at section 24(1)(a), most of the way there!
- Underneath subsection "a" is yet another subsection, this time indicated by "numerals." Look for the one that says "i." Now you're at the section we want to find section 24(1)(a)(i).
- And so on and so forth. If this doesn't make sense to you, have a look at the visual on pages 18 and 19 and it probably will.

A few handy tricks for reading and interpreting laws

Also, remember this: Most pieces of legislation have a part at the front, a table of contents or index, that says where everything is. Always look at it. Make it a practice, like brushing your teeth in the morning. Not only will it help you find stuff, it will also help you get an understanding of how the legislation works as a whole. Just try it. You'll see. It's very helpful. It's also simple, but most lawyers don't want people to know that.

Another trick: Sometimes one provision of legislation will refer to another provision. It gets annoying, because it's a hassle to skip back and forth between the different parts. So, section 24(1) may refer to section 23(3)—and you'd have to go check section 23(3) in order to really understand what section 24(1) means. Check out the visual, you'll see that this is exactly what is done there. Sometimes, one piece of legislation will even refer to an entirely different piece of legislation—and you will have to go see what that other law says in order to fully understand what the law you

are reading means. This can be annoying and confusing, and it requires some patience.

Finally, a big trick you'll want to remember: the words mean what they say. Simple. Sadly, this is not always true. But it's almost always true.

If you're a good activist, you have, or soon enough will, come across a clever lawyer, politician, or official who uses complex and slippery arguments to say that you're wrong about what you think the law or policy is. Stand your ground—read the words and apply what they say in a plain and straight way. You'll probably be right. Invite the fancy lawyer to explain how the words mean something other than the obvious interpretation. See what happens. Lawyers have a habit of thinking that only lawyers could possibly know what the law is. They're wrong—legal thinking doesn't require a license to practice or a fancy education; it just requires that you apply your mind, something good activists know how to do well.

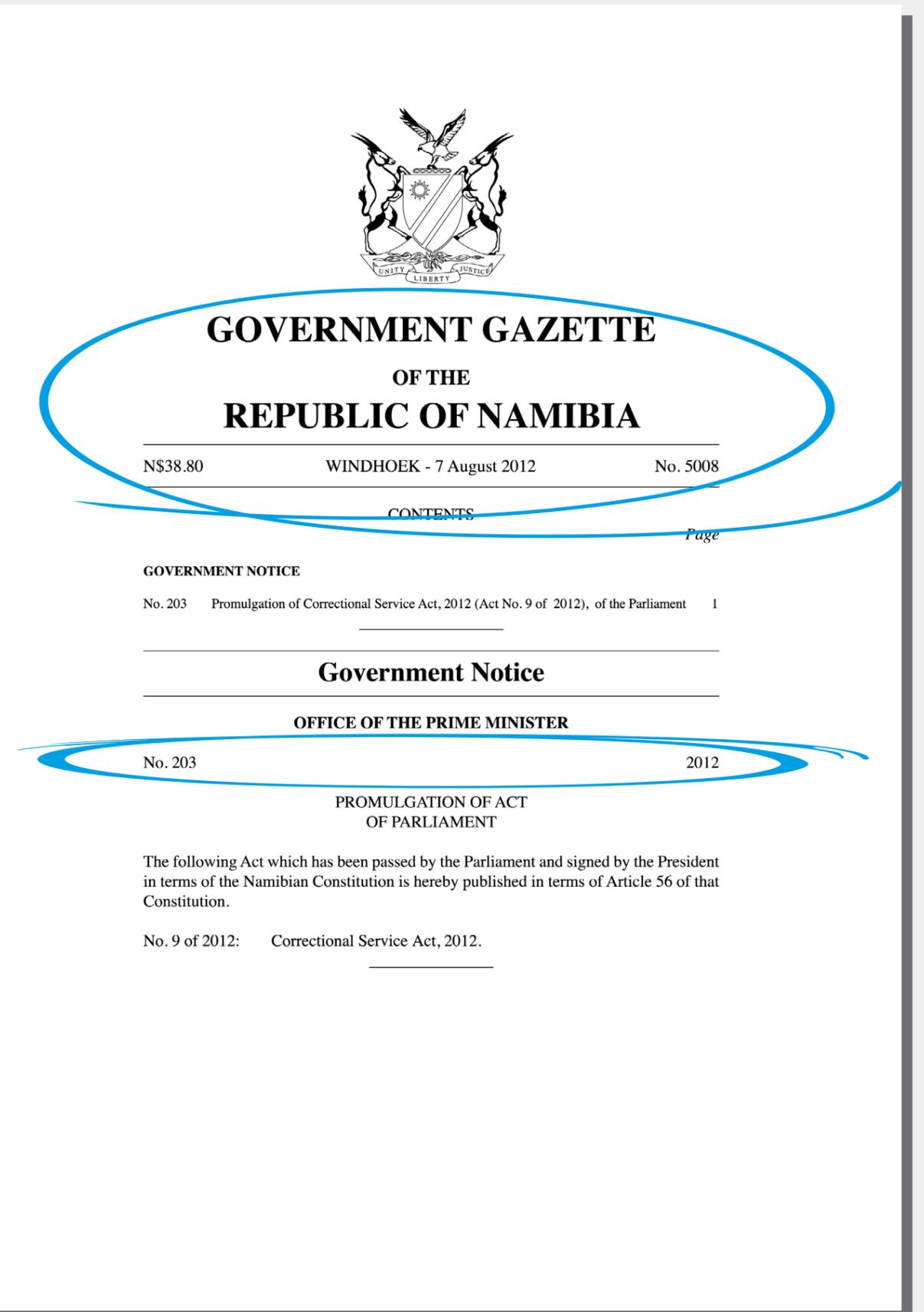
Summing up a few quick tricks:

- 1. Referring to and finding a provision of law**
- 2. Using the table of contents**
- 3. Reading different provisions together**
- 4. Interpreting the words**

This is Namibia's "Correctional Services Act." The first page of legislation will often look something like this. There is a lot of information on this first page, but one can't be expected to understand it without a little explanation of how it works. That's what we do below.

Laws are normally published in official government publications. In lots of countries, this official government publication will be called the "Government Gazette." Here, you see that this law was published on 7 August 2012 in Government Gazette Number 5008. You'll often see "Government Gazette" shortened to just G.G. or even GG. People will sometimes reference the Government Gazette number when they refer to a law.

The government normally gives notice to the public that a new law has been passed. They do it by publishing the new law in the official government publication, here the Government Gazette. The publication itself also gets an identification number, here it is No. 203 of 2012; in other words, the 203rd Government Notice of the year 2012. Government Notice is often shortened to G.N. or GN. Like with the Government Gazette number, you might see reference to the Government Notice number when a law is cited. You might see references to both numbers, it would say something like "GG 5008 GN 203 of 2012."



The image shows the cover page of the Government Gazette of the Republic of Namibia. At the top center is the national coat of arms of Namibia, featuring a shield with a sun, a gear, and a scale, flanked by two lions and topped with an eagle. Below the coat of arms, the title "GOVERNMENT GAZETTE OF THE REPUBLIC OF NAMIBIA" is printed in bold, uppercase letters. Underneath the title, the price "N\$38.80", the issue date "WINDHOEK - 7 August 2012", and the issue number "No. 5008" are listed. A "CONTENTS" section follows, with a table listing the "GOVERNMENT NOTICE" section. The table has two columns: "No." and "Page". The first entry is "No. 203 Promulgation of Correctional Service Act, 2012 (Act No. 9 of 2012), of the Parliament" on page "1". Below the table, the title "Government Notice" is printed in bold, uppercase letters. Underneath, the "OFFICE OF THE PRIME MINISTER" is mentioned. A table lists the notice number "No. 203" and the year "2012". Below the table, the title "PROMULGATION OF ACT OF PARLIAMENT" is printed in bold, uppercase letters. The text states: "The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution." Below this, the notice number "No. 9 of 2012:" and the title "Correctional Service Act, 2012." are listed.

GOVERNMENT GAZETTE
OF THE
REPUBLIC OF NAMIBIA

N\$38.80 WINDHOEK - 7 August 2012 No. 5008

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Government Notice

OFFICE OF THE PRIME MINISTER

No. 203	2012
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PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 9 of 2012: Correctional Service Act, 2012.

This tells us that this is the ninth law that the legislative branch passed in the year 2012. You might see the name of the law written something like "Correctional Services Act 9 of 2012" in reference to this.

This is the purpose of the law. This one is pretty plain. Sometimes this section will say a lot more. We talk about why the purpose matters on page 22 in the "subordinate legislation" section and on page 41 in the "rationality or reasonableness" section.

Remember to use the table of contents or, as it's called here, the "arrangement of sections." It will help you find what you're looking for and also understand how the different sections of the law work together as a whole. Make it a practice to look over the table of contents whenever you open any new law or policy.

We spoke about how the law has to set up the whole prisons system.

Here's what we are looking for! The table of contents tells us that the stuff about healthcare services can be found in Part III of the Act.

2 Government Gazette 7 August 2012 No. 5008

Act No. 9, 2012

CORRECTIONAL SERVICE ACT, 2012

ACT

To provide for the establishment of the Namibian Correctional Service and for matters incidental thereto.

(Signed by the President on 20 July 2012)

ARRANGEMENT OF SECTIONS

1. Definitions

PART I
ESTABLISHMENT, FUNCTIONS AND ADMINISTRATION OF
NAMIBIAN CORRECTIONAL SERVICE

2. Establishment of Namibian Correctional Service
3. Functions of Correctional Service
4. Principles that guide Correctional Service
5. Appointment and functions of Commissioner-General
6. Removal of Commissioner-General
7. Commissions by President
8. Appointment, promotion, demotion, discharge or resignation of correctional officers
9. Correctional officers assigned to any part of Namibia
10. Assistance by members of police in emergency
11. Temporary correctional officers
12. Establishment and constitution of Council and terms of office of members
13. Functions of Council
14. Meetings of Council

PART II
ESTABLISHMENT, ADMINISTRATION AND CONTROL OF CORRECTIONAL
FACILITIES AND CORRECTIONAL COMMUNITY CENTRES

15. Establishment of correctional facilities
16. Temporary correctional facilities
17. Male and female inmates to be confined separately
18. Officer in charge
19. Inspection of correctional facilities
20. Security levels
21. Establishment of correctional community centres
22. Temporary correctional community centres

PART III
HEALTH CARE SERVICES FOR OFFENDERS AND HYGIENE

23. Guiding principles and appointment of medical officer
24. Functions of medical officer
25. Observation of inmates in solitary confinement or correctional hospital
26. Duty upon death of offender
27. Observation and transfer of mentally ill inmates
28. Transfer of inmate to State hospital
29. Custody of inmate in state hospital or mental institution
30. Hygiene

Now we've cut out a bunch of the text of the law and skipped ahead to Part III to help show you a few tricks.

See here? Section 24(1) refers back to section 23(3). You have to read them together to know what section 24(1) is talking about. This one's pretty easy because section 23(3) is right above section 24(1). Sometimes one provision of law will even refer to a section in an entirely different law. In that case, you'd have to go find that law and read the relevant section to know what the first section means. It can be a hassle to jump back and forth, but it's the only way to understand what the law means.

Back on page 12 we decided we want to find out what the Act says about medical examination before prisoners come in to prison. We followed the steps to section 24(1)(a)(i) and here it is!

18 Government Gazette 7 August 2012 No. 5008

Act No. 9, 2012

CORRECTIONAL SERVICE ACT, 2012

- (b) reasonable access to non-essential mental health care with an emphasis on the inmate's rehabilitation and successful reintegration into the community; and
- (c) access to preventative health measures.
- (2) The Correctional Service must take into consideration an inmate's state of health and health care needs -
 - (a) in all decisions affecting the inmate, including decisions relating to placement, confinement, observation, supervision, transfer and segregation; and
 - (b) in the preparation of the inmate for release.
- (3) Each correctional facility must have a medical practitioner appointed or assigned to it, to serve as medical officer for such facility.

Functions of medical officer

- 24.** (1) The medical officer appointed or assigned under section 23(3) -
- (a) is responsible for the health care of all inmates in the correctional facility for which he or she is appointed or assigned and must -
 - (i) where practicable, ensure that every inmate is medically examined on admission to, and discharge from, that correctional facility;
 - (ii) where practicable, ensure that on admission to the correctional facility, every inmate is kept apart from other inmates until such time that such inmate has been examined as contemplated in subparagraph (i);
 - (iii) where practicable, visit the correctional facility daily or at other regular intervals or when so requested by the officer in charge, and inspect the hygiene condition of the correctional facility and medically examine inmates at such times as he or she may consider necessary;
 - (iv) keep a record or cause a record to be kept of the state of health of every inmate; and
 - (v) report to the officer in charge any circumstance or condition regarding the correctional facility, an inmate, or treatment of an inmate which may, in his or her opinion, require consideration on medical or health grounds; and
 - (b) must, for the purpose of safeguarding or restoring the health of any inmate or preventing the spread of or risk of any disease, take such action or direct such action to be taken with regard to such inmate in his or her care, including -

SUBORDINATE LEGISLATION OR “REGULATIONS”

Sometimes, a piece of legislation (like the Prisons Act or Correctional Services Act, or whatever it's called in your country) will give a certain person power to make “subordinate legislation.” Normally, that person is the Minister of whichever department or ministry is relevant to the legislation. Most often, we call this type of law “regulations.” But not always—sometimes they are called “orders,” or something like that. So, we'll use the term “subordinate legislation” just to include everything.

Often, the legislature gives the Minister power to make subordinate legislation but tells her she can't make it alone. She might have to consult with a certain committee or go through a certain process. You can find out the specifics by checking the legislation.

Sometimes the legislative branch lets someone else make laws. Here's how it works

“Subordinate legislation” should be imagined as little mini laws that do the bidding of the constitution and legislation—the grunt work to enact the vision of the big laws. The Prisons Act (the one most countries have in some form) normally lists a bunch of stuff the Minister can make regulations about.

Indeed, the Prisons Act will normally have also created the position of Minister of Prisons—otherwise, neither the person nor her powers would exist! Why? Because of what we learned earlier about how public power must be exercised in accordance with law—this is another aspect of the “rule of law!” All public power comes from and must be exercised according to law. The government doesn't just exist and can't just do stuff. Law creates the government and says what it can do.

This is a good time to think back to something we learned in the first section. Which branch of government makes law? The legislative branch! And haven't we learned that each branch of government has to stay in its lane and can only do the stuff the law says it can do? And haven't we learned that the Minister of Prisons is a member of the executive branch? So, how can the

Minister of Prisons make mini laws (like regulations) that control the lives of prisoners? Here's how it goes, more or less:

1. Before the constitution, there was nothing. Or, at least, imagine it that way.
2. Then, people created the constitution, the boss of all laws. Remember from earlier that all government power originates in this document. The power may be set out in more details elsewhere, but it has to come from the constitution originally—like a stream comes from a spring if you follow it far enough.
3. The constitution says that the legislative branch can make laws. Technically, there shouldn't be a prisons system or anyone with the power to oversee it unless the legislative branch has passed a law to set it all up.
4. But, the legislature did pass the Prisons Act—and that Act establishes the prisons system and says that there will be a person called the “Minister of Prisons” who is responsible for overseeing the system.
5. The Act also gives, or “delegates,” to the Minister the power to make regulations. It's as if the legislature made an Act that, in effect, says, “Here you go, Minister, have a little bit of our power to make law.” If the Act hadn't done so, the Minister would have no right to make regulations. This is a legal rule. Try to remember it, but don't worry if you don't—we'll remind you anyway. Remember also that the legislature can always change or take away the Minister's power to make regulations. It just has to pass another law to change or “repeal” the Prisons Act. But, and this is important, it cannot make the Minister do one thing or another unless it passes another law—once the legislature gives, or “delegates,” power to the Minister, it has to let the Minister do her thing. It can only tell her what to do in legislation. The legislative branch acts through passing laws. That's its power. It's a big one. But it has to stay in its lane, just like everyone else. This is why the legislature is often very careful about the powers it gives away.

That's how it works, in a nutshell.

Most of the time, the Prisons Act will have a long list of topics about which the Minister can make subordinate legislation. Often, it will also have a “catch all” part that says something like, “The Minister may make regulations regarding all matters necessary and expedient to fulfilling the purposes of this Act.” That’s a very broad power. But it has limits. If you’re thinking like a lawyer, you’re probably thinking about the words “necessary and expedient” and considering what does and doesn’t fit that description. Remember that while the Minister has power to make “subordinate legislation,” the law she makes is beneath or “subordinate” to the Prisons Act.

We’re going to pause for a second and hammer home a legal rule: All state power has to be conducted in terms of the law. In other words, people in the government can only do things that the law allows them to do. This is part of the concept of “rule of law.” This is important: The Minister can’t make subordinate legislation on any and everything she pleases—she can only make subordinate legislation according to the powers the Prisons Act gives her. This is because the constitution says that it is the job of the legislative branch to make law, and the executive branch to enforce the law. In essence, when the legislative branch gives the Minister power to make regulations, it is saying,

“We made this law called the Prisons Act, but we know that there is a ton of detail and other stuff that needs to be done for the prisons system to work. We don’t really have the time or expertise to deal with all of that. But you do, Minister. So we’re giving you power to make some miniature laws about all that stuff. BUT, you have to do it according to the procedure and rules we put in the Prisons Act. Because we’re still the legislative branch, and we’re still in charge of making laws.”

POLICY

Policy is at the bottom of the pyramid. There’s tons of it, and it is (or should be) very detailed and give lots of information. Normally, when you want to know something like, “How many toothbrushes will the guards give me this year?” the place to look would be in policy. It might not be that specific, but you get the point. Policy is normally made by the Minister or the Department of Prisons (or whatever it’s called in your country).

The many meanings of the word “policy”

English can be strange. The word “policy” is strange. We often use it to refer to formal policy written down in policy documents issued by the relevant governmental department or ministry. But sometimes we also use the word “policy” simply to refer to what we normally do in a situation—a practice.

Imagine there is an official policy, written down and regarded as policy by the Department of Prisons, that sets out how prisoners can form TB support groups and how those support groups should operate. What if, even though the TB support group policy exists on paper, prison officials don't allow TB support groups to exist at all in real life? For our purposes right now, we're going to say the policy is what's in the document, and the practice on the ground is in violation of the policy. That's a good way to think of it for now. But you could also imagine times where it might be strategic to use the word “policy” to help make your arguments more persuasive. So, imagine the law and official policy say that all prisoners should have access to TB treatment, but in practice the prison officials do not give treatment to inmates who they regard as gay or transgender. As activists, we might say, “The Department of Prisons has a policy of discriminating against gay and transgender inmates!”

In some countries, the Minister is free to make policy and/or regulations all by herself. In others, she needs to consult with certain bodies or people. Sometimes, the Prisons Act will set up different committees to suggest or advise on policy in a certain area, and it will require the Minister to consult them. Sometimes certain procedures have to be followed. Some stuff is out of bounds, and the Minister or Department can't make policy about it.

The rules vary. You can find the rules for your country by checking the legislation and regulations. This is powerful stuff: Imagine that the Minister of Prisons passes a terrible new policy (or regulation) that would make the TB crisis even worse, but you check the law and find out that she followed the wrong procedure or doesn't actually have the power to pass that policy. You intervene and avert disaster! It happens.

“Jurisprudence” is a fancy word with a few different meanings. People often use it to refer to the way courts have thought about and dealt with a particular issue in case law. So, you might say something like “there is a need to further develop the jurisprudence on the significance of the TB epidemic for the State’s constitutional obligations relating to conditions of detention.”

CASE LAW

A LITTLE BIT ABOUT COURTS AND HOW THEY WORK

You didn't see the term "case law" in the pyramid on page 9 because it's different. But it's an important source of law and it's important for activists to understand what it is, how to use it, and even how to make it! Case law is found in judgments from courts. You know about judgments, no doubt. Let's talk about them—maybe you'll even win some of them.

Most people think about legal systems as being either "common law" or "civil law." The basic distinction is that in common law countries more law is found in cases in the form of judgments from courts whereas civil law countries rely more on legislation. The role of courts (and judges and lawyers working in them) will be a little different depending on what kind of legal system you have. Still, one can't always make neat distinctions because many legal systems borrow from both traditions. In any event, we don't need to get tripped up on the distinctions now—it's enough to know that your country may do things different depending on whether it is more of a civil or common law country.

Before we learn about case law, we have to learn about courts. In almost every judicial system, there is one court on top, normally called something like "the Supreme Court" or "the Constitutional Court." When a person wants to clarify that they are talking about the highest court in a country, they might call it the "apex court." This court is like the boss of all courts—whatever it says, goes—and lower courts have to follow it. So, judgments from this court are especially important. Below the apex court will be several more layers of courts. There will probably be one, two or more layers of appeals courts. Then, below the appeals courts will be a layer of courts that will normally be referred to as the "high court" or something like that. These are normally courts that can hear most cases—if you had to guess where a case should go first, it's probably best to guess the high court. Then, there is normally another layer of courts that hear issues that are regarded as smaller or less serious (even though they often aren't). There may be several different types, but one type is typically called a magistrate's court. Finally, there are probably a variety of special courts that hear very particular types of things. Often, there will be a special court to handle disagreements about competition practices amongst businesses, for example. Stuff like that. There may be a lot of them. You could be a lawyer for a long time and never have anything to do with some of the special courts. On the other hand, a particular special court might be very important to your cause. It just depends.

This is what the court system looks like in Kenya. The court system in your country is probably similar in lots of ways.

The Supreme Court is the boss. Whatever it says, goes—and all the other courts have to follow. It normally only hears cases after the Court of Appeal has made a decision on them. The top court in your country may be called something else.

You might come to the Court of Appeal if you don't agree with how the High Court decided your case. A party that loses in the Court of Appeal may be able to appeal to the Supreme Court.

These courts are special. They handle cases related to specific issues. Their names tell you the issues they deal with. Your country probably has a variety of special courts that deal with specific issues.

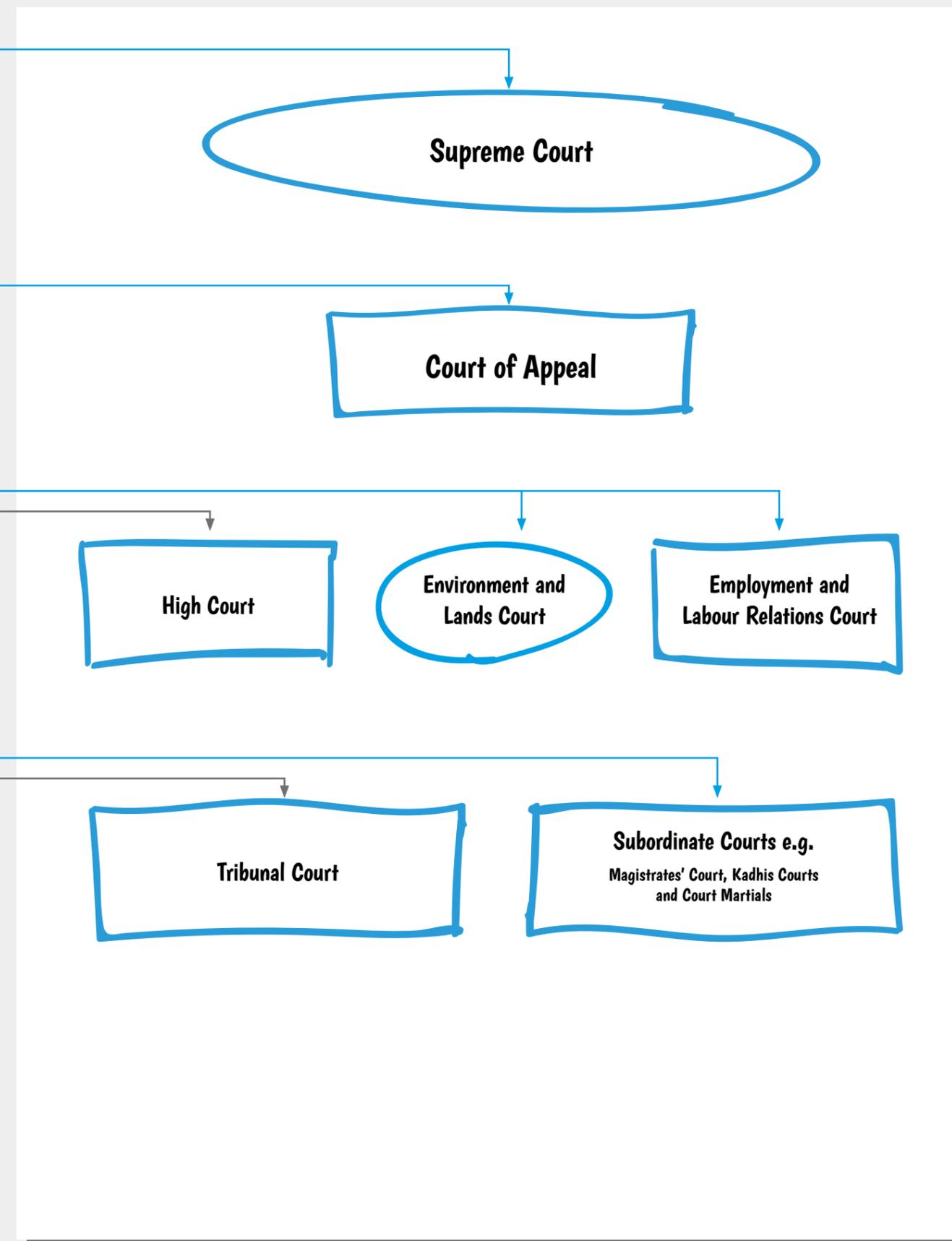
This is the High Court. Lots of cases start here, although even more start in Magistrate Courts. Most activists bringing a case to challenge a government action or policy would probably start out in a High Court.

There are lots of Magistrate Courts and they handle the most cases. You might be able to appeal from a Magistrate Court to the High Court.

The Kadhis' Courts can hear cases about Muslim Law related to things like marriages or inheritances. Everyone involved has to consent to have their case heard in this court, otherwise the case would go to a Magistrate Court. Other countries may have similar special courts, or court-like bodies, to handle cases involving special law, like traditional law.

“Courts Martial” deals with stuff related to people in the military. Most countries have special courts for this purpose.

The legislative branch can set up tribunals to deal with all sorts of things. There are a bunch of them. In Kenya, there's a Sports Disputes Tribunal that deals with disagreements related to national sports. There's even an HIV and AIDS Tribunal that is supposed to deal with things related to a law called the HIV Prevention and Control Act 14 of 2006. Each tribunal is different.



A court will often write a judgment when it makes a decision about a case. The judgment will probably make one or more “rulings” or “orders.” A judgment could say that a certain part (or “provision”) of a piece of legislation is not consistent with the constitution and can’t be enforced or must be changed. It might say that a Minister or other member of the executive branch isn’t doing her job in implementing laws, and it might order her to do better. The list goes on and on—you probably know examples of the kinds of orders a judgment can give. There is a really good resource called “Tuberculosis, Human Rights and the Law: A compendium of case law.” It goes over major judgments related to TB in prisons in different countries and explains what the courts said and the orders they gave. It’s available at the website below*. Or you could search online using the title, it should come up.

Back to checks and balances—limitations on the power of the courts

The thing about courts is this: They can boss everyone around, including the other two branches of government. So, if a court tells the president that she has to do something, the president has a legal duty to do that thing. Why? Because the constitution says so. The same goes for the legislative branch. The same goes for a corporation—and the same goes for you and me.

But the courts do not have unlimited powers. They are constrained by several principles. One of the most important is the “separation of powers.” Recall the discussion about branches of government from pages 5 to 8. Courts are expected to respect the different roles of each branch and stay in their lane. They shouldn’t be drafting new legislation, for example. This is because making law is the job of the legislative branch, which is elected by the people. The idea is that the laws the legislative branch makes should reflect the will of the people, who elect members of the legislature when they vote.

Another limitation on courts is that they can only make decisions when they are presented with cases. They can’t just reach out and

* <http://www.stoptb.org/assets/documents/resources/publications/acsm/TB%20Human%20Rights%20and%20the%20Law%20Case%20Compendium%20FINAL.pdf>

give a judgment on any and everything if nobody has asked them to. They can only decide cases that are brought to them. So that's our job—to bring cases to court that will help our cause.

One last thing: As a general matter, there are two main types of lawsuits.

“Criminal” cases are those in which a person has been charged with a crime (like murder or theft.) Activists are sometimes involved in criminal cases because they are arrested at a protest or demonstration, for example.

“Civil” cases are everything else—cases about broken contracts, car accidents, challenges to government action, challenges to the legitimacy of a law or policy—anything that's not a criminal case. There's a brief discussion on page 45 about the need for better ventilation regulations in many countries. You'll see it coming up. If we were to bring a lawsuit—if we were to sue somebody—about it, we would be bringing a civil case.

PRECEDENT

A “precedent” is something that happened in the past that we use as a guide when similar issues come up later. Lawyers and judges use the word in more or less the same way. In law, a precedent is a principle or rule established in a case and, normally, explained in a judgment. As you've seen, courts have a hierarchy. Lower courts have to follow precedents set by higher courts. You've probably heard people use the word “bound” or “binding” to talk about this—the lower courts are “bound” by precedent from higher courts.

Imagine there are two courts that are equal. Two different provinces or states or cities might each have their own high court, for example. Imagine one high court decides a case and writes a judgment, and then a similar case comes to the high court in the other area. The second high court would probably take into account and consider the judgment from the first, but it wouldn't be required to follow it. We sometimes call this “persuasive precedent.”

THE ANATOMY OF A JUDGMENT

It can be intimidating to read a judgment. Here are a few tips to help you get into it. The visual on pages 32 to 35 should help you see how all of this comes together in practice.

At the top of the first page, you'll generally see the name of the court that is giving the judgment.

On the right side near the top (normally) of the first page, you'll see the "case number," usually a combination of the year in which the case was heard followed by a number. That number is often determined by how many cases the court has heard in the year. So, for example, if a case was heard in 2017 and it was the 135th case the court heard that year, the case number might be "17-135." Usually

the case number will be written like this: "Case No. 17-135." The case number can be important, because it is how the courts keep track of each case.

Quick tips and tricks for reading case law

Below the name of the court and the case number, you'll have the parties—the people or entities in the dispute. In a civil case, whoever is bringing the lawsuit (the party suing the other side) is normally called the "applicant," and the party being sued is normally called the "respondent."

The applicant or applicants (there could be one or several) are normally listed at the top, and the respondent or respondents are below.

In a criminal case, technically, "the state" or "the people" are prosecuting the person accused of a crime, who is called the "defendant."

Below all of that, you'll see the body of the judgment.

Normally, paragraphs in judgments are numbered—you'll see the numbers to the left of each paragraph. These are helpful because they make it easy to refer to a particular paragraph.

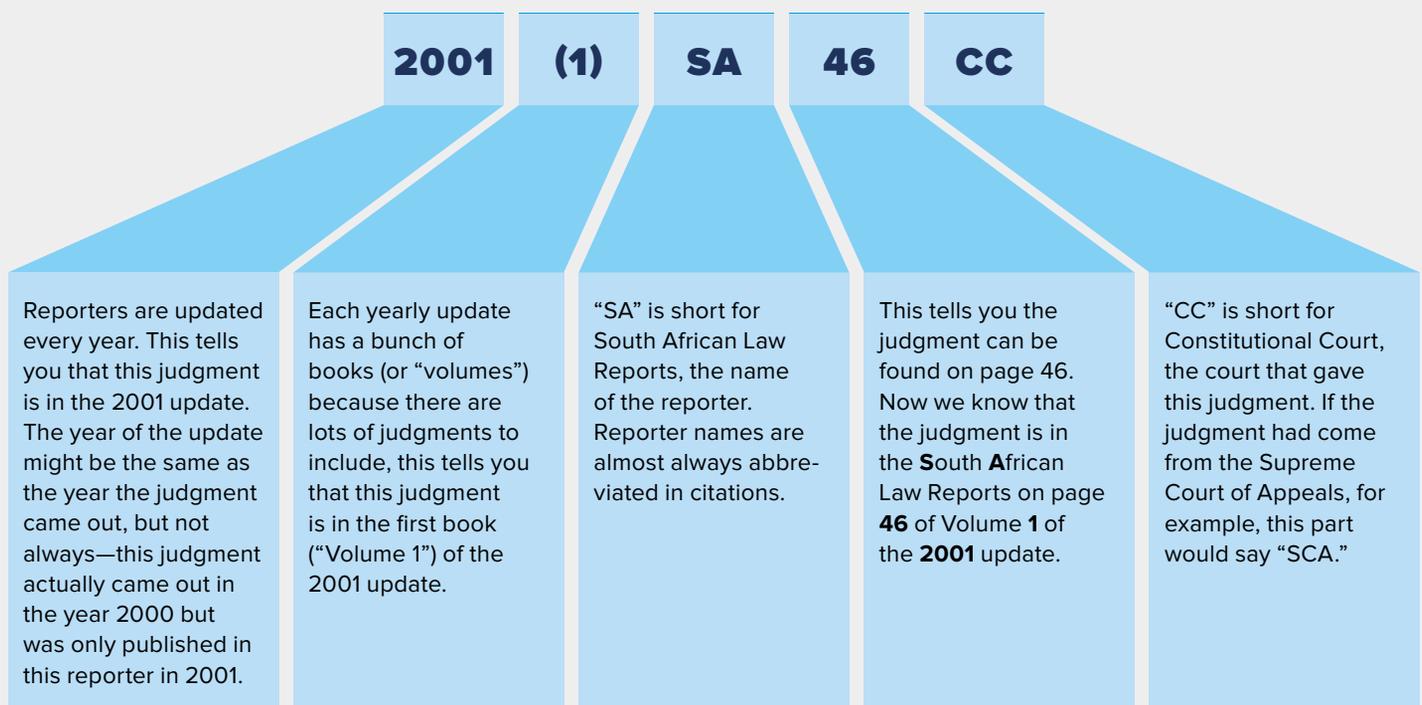
For example, there's a famous case in South Africa called *Government of the Republic of South Africa and others v. Grootboom and others* 2001 (1) SA 46 (CC)*. It's a somewhat long judgment, but there is a short section of it that is really wonderful, and every activist should read it. It's at paragraphs 39 to 46. You can go and find it.

Most judgments start with a description of the parties. Then, they normally summarise what happened (the facts). Then, they normally discuss the legal issues. Then, they reach a conclusion and, finally, give an “order.”

The “order” is often the most important part. It's normally on the last page or one of the last pages of the judgment. Sometimes it's also on the very first page. In some countries, it's the practice to just scatter different orders in different places throughout the judgment; this is a very confusing way to do it. The orders tell the parties what they must do. Normally, there are several parts to an order, and each part is numbered.

*2001 (1) SA 46 CC

You may see numbers and letters that look like this after a case name. It's a citation and it tells you where you can find the whole judgment in an official “reporter.” “Reporters” are regularly updated collections of judgments. You might normally find judgments online and that's great, but it's helpful to know how to read citations like this so that you can direct others to the judgment and to be sure that you're using the right and official judgment. People do citations differently in different places, but they typically have more or less the same elements and with a little practice you can decipher them.



THE ANATOMY OF A JUDGMENT

This is the first page of a judgment from a Kenyan case, *Daniel Ng'etich & 2 others v Attorney General & 3 others*. We will use it to learn some tricks on how to read case law. You might see cases referenced in a number of different ways. Here, you see the parties (Daniel Ng'etich & 2 others v Attorney General & 3 others), the year of the judgment (2016), and the source in which the judgment can be found ("KLR" is short for "Kenya Law Reports", a regularly updated collection of judgments from Kenya's courts). Have a look at the Have a look at the graphic on page 31 for an explanation of how to read another case citation.

This identifies the court that gave the judgment, the High Court of Kenya at Nairobi. Nobody appealed this judgment, but you could go back to the visual on Kenya's court structure and see where the case might have gone if someone had.

This tells you that this was the 329th case filed in 2014. You might see this information included in some references to the case. Note that the date of judgment will be different (later) than the date of filing. You can see the date of the judgment on the next page.

These are the parties. Those who brought the case, the ones who sued the other side, are called the "petitioners" here and each one gets a number; the 1st Petitioner is Daniel Ng'etich, the 2nd is Patrick Kipng'etich Kirui, and so forth. The people who bring the case might also be called "applicants" or something else in other cases. The other side, the ones being sued, are called respondents here and each one of them also gets a number (1st Respondent, 2nd Respondent, and so forth.) Have a look at the orders on paragraph 77 and you will see that the judge orders the 4th Respondent to do certain things. In other cases, the people being sued might be called "defendants" or something else.

The paragraphs are numbered in most judgments. This makes it easy to refer to a specific part of the judgment. Most judgments have a short summary of the case near the beginning. Here, you see it in the very first paragraph. That's great. I don't need to tell you what this case is about because paragraph 1 does so.

Daniel Ng'etich & 2 others v Attorney General & 3 others [2016] eKLR



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 329 OF 2014

BETWEEN

DANIEL NG'ETICH.....1ST PETITIONER
PATRICK KIPNG'ETICH KIRUI2ND PETITIONER

KENYA LEGAL AND ETHICAL ISSUES NETWORK
ON HIV AND AIDS (KELIN).....3RD PETITIONER

VERSUS

THE HON. ATTOORNEY GENERAL.....1ST RESPONDENT
THE PRINCIPAL MAGISTRATE'S COURT AT KAPSABET.....2ND RESPONDENT
PUBLIC HEALTH OFFICER.NANDI CENTRAL DISTRICT
TUBERCULOSIS DEFAULTER TRACING COORDINATOR.....3RD RESPONDENT
THE MINISTER FOR PUBLIC HEALTH AND SANITATION.....4TH RESPONDENT

JUDGMENT

Introduction

1. This petition relates to the constitutionality of certain actions taken against the petitioners purportedly pursuant to section 27 of the **Public Health Act** (hereafter "**the Act**"). The provision has been used by public health authorities to have persons who have infectious diseases, notably tuberculosis (hereafter "**TB**"), and have defaulted in the treatment of the diseases, arrested, charged and confined to prison on the orders of a Magistrate's Court. The petitioners argue that the use of the provisions of the Act to have them committed to prison for the purposes of treatment amounts to a violation of their constitutional rights including the right to dignity, the right to freedom from torture and other cruel and degrading treatment, and the right to freedom of movement.

<http://www.kenyalaw.org> - Page 1/17

This is the last page of the judgment. Here, the “orders” are listed in paragraph 77. This is where the court tells the parties what they have to do. The orders normally come at or near the last page. But not always. Courts normally number each order if there is more than one, here the judge does so with numerals.

This tells you the exact date the judgment was given. This is important because, as you can see in paragraph 77, the orders give the 4th Respondent specific timelines by which it must do things. The petitioners, and activists, will be counting the days to make sure the 4th Respondent complies with the orders on time.

This tells you the judge, Judge Mumbi Ngugi, who wrote the judgment and gave the orders. This information normally appears either on the first or last page of the judgment.

These are the lawyers who represented each side. The lawyers are normally identified on the last page.

Daniel Ng'etich & 2 others v Attorney General & 3 others [2016] eKLR

Health Act, Chapter 242 of the Laws of Kenya, does not authorise the confinement of persons suffering from infectious diseases in prison facilities for the purposes of treatment and that the 4th respondent inform the Court and the petitioners in writing once the circular has been issued. They also seek an order compelling the 4th respondent, within three months, to develop a policy on the involuntary confinement of individuals with tuberculosis that is compliant with the Constitution and incorporates principles from the international guidance on the involuntary confinement of individuals with TB.

76. Under section 28 of Part 1 of the Fourth Schedule of the Constitution, the national government is responsible for the formulation of a national health policy. However, section 2 of Part 2 of the Fourth Schedule places health services under the jurisdiction of county governments. Consequently, the national government has the responsibility, in cooperation with county governments, of ensuring that there are appropriate policies and facilities for the treatment of infectious diseases such as TB, and that where involuntary confinement is required as in the case of the 1st and 2nd petitioners, such confinement takes place in appropriate health facilities, not in prisons.

77. Consequently, I direct as follows with respect to involuntary confinement of patients with infectious diseases who default from treatment:

i. That the 4th respondent does issue a circular, within Thirty (30) days hereof, directed to all public and private medical facilities and public health officers clarifying that section 27 of the Public Health Act, Chapter 242 of the Laws of Kenya, does not authorise the confinement of persons suffering from infectious diseases in prison facilities for the purposes of treatment;

ii. That the 4th respondent does, in consultation with county governments, within Ninety (90) days from the date hereof, develop a policy on the involuntary confinement of persons with TB and other infectious diseases that is compliant with the Constitution and that incorporates principles from the international guidance on the involuntary confinement of individuals with TB and other infectious diseases.

iii. That the 4th respondent does, within Ninety (90) days from the date hereof, file an affidavit in this Court detailing the policy measures put in place on the involuntary confinement of persons with TB and other infectious diseases.

78. With respect to costs, as this matter raises serious issues of great public concern, I direct that each party shall bear its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 24th day of March 2016

MUMBI NGUGI

JUDGE

Mr. Maleche & Ms. Odamna instructed by the firm of Allan Achesa Maleche & Co. Advocates for the petitioners.

Mr. Obura instructed by the State Law Office for the respondents.



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INTERNATIONAL HUMAN RIGHTS LAW

You didn't see international human rights law in the pyramid on page 9 because it's different and doesn't quite fit.

Your country is probably a member of the United Nations and may be a member of one or more regional bodies such as the African Union, the Council of Europe (which is different to the European Union), the Organization of American States, the League of Arab States, or others. When we say "international human rights law" in this guide we mean laws from these groups and their courts.

Let's talk about the United Nations for now because it's the biggest. It has a number of documents, normally called treaties or conventions or something like that, that declare the rights of people. This probably sounds like what your constitution does in its Bill of Rights. Because these documents have a bunch of different names, you might have heard them called "instruments." We're going to use that word because everyone else does, even though it's strange to call a document an "instrument." Many of these instruments are international law, including the International Bill of Human Rights. Other instruments have different and sometimes more complex status, what they mean for you probably depends on your particular country and context.

The International Bill of Human Rights and other "instruments"

Some of the main instruments are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Put all these together and they are called "the International Bill of Human Rights."

The United Nations is made up of countries that are members, they're normally called "member states." Member states can choose if they want to sign or "ratify" these instruments. Signing an instrument is not the same as ratifying an instrument. The act of signing the instrument is sort of like saying "hey, we agree with what this document says." It's a much bigger deal to ratify an instrument—when a country ratifies an instrument it is agreeing to be bound by what that instrument says. In most countries,

ratification gives the instrument the same status as other law passed by the legislative branch, which often means people can enforce it in courts. Each country has different rules about how to “ratify” an instrument. Most countries require the involvement of the legislative branch to ratify an international law. You can probably guess why—because, as we learned earlier, making law is the job of the legislative branch.

Some of the international bodies, like the United Nations or African Union, have courts that hear cases related to these international laws. Judgments from these courts are another source of international human rights law. Each of these courts works different and how you, as an activist, might use these courts will depend on the law and context of your country. Other international bodies are not courts and may not have any formal power to enforce rights. But that doesn't mean they can't be useful. For example, the Human Rights Council is the body within the UN that deals with things related to human rights. It appoints “Special Rapporteurs” to deal with certain themes or countries. There is a “Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and a “Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.” Special Rapporteurs normally view engagement with civil society and activists as part of their job and the addition of their voice to your cause could carry some weight.

One recent international instrument is called the “United Nations Standard Minimum Rules for the Treatment of Prisoners” or, for short, “the Mandela Rules.” The Mandela Rules set out a bunch of standards for how prisoners should be treated. There's some good stuff in the Mandela Rules and it might be a good idea to use them in your campaigns. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is another instrument relevant to TB in prisons.

How and whether you should use international human rights law depends on your context. In many countries, it is a good idea to refer to international law alongside the law from your country. In other countries, the law at home is lacking and it's helpful to refer to international law in order to argue the law at home, the “domestic law”, should be changed in order to align with the international law. Sometimes, it is not strategically wise or helpful to use international law. For example, because it is not enforceable in your country or for political reasons. You'll have to think about these issues as you develop arguments and campaigns.

THE MANDELA RULES

The General Assembly is the main decision-making body of the United Nations.

This is the reference number. You might see this reference number used instead of or with the name of the instrument, it might look something like this: *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) A/RES/70/175*.

Documents from the United Nations often have lots of language like this up front. It's not always the most important stuff and it can be tiresome to read, but it does matter sometimes.

Here's a good one. Once you get past the formalities, you get to the rules. Rule 24(2) especially is one TB activists might use.

United Nations A/RES/70/175



General Assembly

Distr.: General
8 January 2016

Seventieth session
Agenda item 106

Resolution adopted by the General Assembly on 17 December 2015
[on the report of the Third Committee (A/70/490)]

70/175. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)

The General Assembly,

Guided by the principal purposes of the United Nations, as set out in the Preamble to the Charter of the United Nations and the Universal Declaration of Human Rights,¹ and inspired by the determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, without distinction of any kind, and in the equal rights of men and women and of nations large and small, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained and to promote social progress and better standards of life in larger freedom,

Recalling all standards and norms in crime prevention and criminal justice developed at the request of the Commission on Crime Prevention and Criminal Justice and adopted or recommended by the General Assembly, or adopted by a

Health-care services

Rule 24

1. The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.
2. Health-care services should be organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care, including for HIV, tuberculosis and other infectious diseases, as well as for drug dependence.

Rule 25

1. Every prison shall have in place a health-care service tasked with evaluating, promoting, protecting and improving the physical and mental health of prisoners, paying particular attention to prisoners with special health-care needs or with health issues that hamper their rehabilitation.

Shortcuts to the answers

It's important to understand how the above sources of law work and how to use them. Going directly to the law itself is often the best way to find law that helps build or support your campaigns. But you're not going to go through all the cases and regulations every time you want to know the law. You know how to search for stuff to find answers fast. Keep doing it. But be smart: Just as you wouldn't run out and start a campaign on the basis of facts that you haven't double-checked, you wouldn't do the same on the basis of legal analysis without double-checking that you're right. As activists, we don't have as much money, time or other resources as those we oppose—but we have our passion, wits and integrity. We work hard to show people that we have that last one, and it helps to always be right.

A FEW IMPORTANT LEGAL PRINCIPLES

We've covered a lot. We're going to move on soon. But first, we should discuss some legal basics that will help you make your arguments.

We've already talked enough about "rule of law" for the time being. It's an important legal principle that would be covered in this next section if we hadn't already covered it.

RATIONALITY OR REASONABLENESS

Almost every country has a form of the basic legal principle that the government must act rationally or reasonably. Lots of countries use both words, and often the two words have slightly different meanings. The details don't matter for now.

The basic idea is that the government must have a rational explanation for what it does. Most often, we think about it as the requirement for a rational connection between the government's actions and the goal that those actions are meant to achieve—or, in another word, the government's "purpose" for taking the actions. Normally, the action that the government takes must be reasonably capable of achieving the outcome the government wants. In other words, a reasonable person should be able to look at the action and say, "Yeah, it's possible that you could achieve the desired outcome if you take that action." Imagine that the government says they want to decrease TB transmission in prisons. This is the government's purpose. In pursuit of this purpose, the government proposes to buy the president a new yacht. It's hard to imagine a rational connection between the act of buying the president a new yacht and the goal of decreasing TB transmission. If put to the task, you could probably come up with some clever arguments to defend the plan; but it's not a case I'd like to take.

This principle is very powerful in the hands of activists, especially health activists. This is because, for example, we use it to argue that the government cannot ignore science—because to do so is irrational. We also use it to argue that government cannot continue to use tactics to fight TB that have been proven ineffective—it is irrational to do something when it has been proven not to work.

If there is a single most important tool that you should take away from this guide, it might well be the practice of analyzing government action for rationality and knowing that irrational government action is unlawful.

The requirement that government action be rational does not, however, mean that government action must be smart or that the government must always adopt the best plan, even if it's obvious to everyone else that it is the best plan. The government has a right to do dumb things, just not irrational things. Rationality is a very powerful principle, but it is not a very high bar. The remedy to a government that does dumb, but not irrational, things is the vote and other forms of political pressure.

DUE PROCESS

You've probably heard this term. It has a lot of meanings, and people disagree about them a lot. It can get tricky. But we don't need to worry about the tricky parts. There is one meaning that is most important for us now, and it is pretty straightforward.

When we talk about due process, we are often referring to a legal principle that says the government can only limit or take away rights if it follows a certain process. That process should be set out in a law that applies to everyone. If the government wants to take away or limit a right of a person—the right to liberty, for example, is taken away from prisoners—the government may only do so through a fair and adequate process that applies to everyone equally.

Normally, we think of the type of due process required as being proportional to the limitation of the right. The right to liberty is a big deal, for example, and if the government wants to put me in prison it better give me considerable due process. It's not as big a deal if the government wants to make me pay a small

fine for speeding. Therefore, less due process is required in that case. Maybe a chance to challenge the ticket with a clerk of the Department of Roads (or whatever it's called in your country) is enough. It just has to be proportional.

RESTRICTING AND BALANCING RIGHTS

For the most part, rights are not absolute, and the rights of any one person often have to be balanced with the rights of others. There's a famous saying that "My right to swing my fist stops at the tip of your nose." Another famous example is that the right to free speech does not include the right to shout "FIRE!" in a crowded building where there is no fire.

Most legal systems have established ways in which they approach the balancing of rights. Sometimes the test or approach is set out in the constitution itself. Other times, the answer is in case law (in judgments from courts.) Most of the time, the tests or approaches make intuitive sense. We can't say much more without knowing how it's done in your country—but the point is that rights must often be restricted and balanced, and you should find out how your courts think about how to do that.

**Your courts probably have
an established approach
that they use to think
about balancing rights**

WHAT IF REALITY IS NOTHING LIKE WHAT THE LAW SAYS IT SHOULD BE?

Good lawyers and activists know how to choose the right battles

Let's pretend that you read the last section and were so excited that you ran out and read up on the law. You might now be thinking that the reality in your country is nothing like what the law says it ought to be. The truth is, prison conditions in most countries violate human rights and dignity. Normally, countries either lack a good legal framework or have failed to implement their laws. Around the world, it is typical for the Department of Prisons to be amongst the least accountable government departments. Yet the Department of Prisons is one of the most important players in the TB response. This is why we need activists who think like lawyers and lawyers who think like activists.

Chances are that once you know what the law says, you will see violations of it everywhere you look. We have to be strategic about which issues we take on. Issues that need attention from activists vary from country to country, prison to prison, and even cell block to cell block. But some issues pop up almost everywhere.

Overcrowding is a big one. You could provide prisoners the best healthcare in the world, and it wouldn't make much of a difference if there's still extreme overcrowding. And extreme overcrowding is pretty much the norm in most countries. As said earlier, prisons are sites of rights violations without accountability the whole world over. Overcrowding is a major reason that prisons fuel the TB pandemic all around the world, and a big reason why activist-lawyers need to take overcrowding seriously.

Screening and testing are also big. Screening every prisoner when they come into the prison and regularly thereafter is critical, and basically free so long as you already have the staff, yet it's so rarely done!

Treatment and other health services are also key; healthcare services in prisons are rarely adequate.

Ventilation is a major issue and is often overlooked. Many countries will have law related to how much space each prisoner must have and how much exercise they must get but not how much ventilation they need. A clever activist might argue that the right to conditions of detention consistent with human dignity (lots of constitutions say something like that or something similar) requires proper ventilation standards.

An important issue that is often unpopular with prison officials is the right of detained people to organise into TB support groups as well as into groups that can hold the system to account.

THERE ARE LOTS OF WAYS TO USE THE LAW

When we talk about activists “using the law,” most people think about going to court—and that is indeed an important way activists can wield the law to claim rights. But we should also think about how the law can be built into all of our work.

Our arguments, for example, should account for and sometimes be based on what the law says or doesn't say. Often, activists want change in law and policy. We have to use the law to explain and argue for that change.

Here are a few specific ways to use the law. There are many, many more—once you see the law as being integrated into your work, you will see its uses everywhere.

Submissions on draft laws and policy

In most countries, the government will publish draft law and policy and give the public a period of time, often three months, in which to send comments on the draft to the government. This is a great opportunity to influence the law.

The trick is to make sure your submission is taken seriously.

Activists know how to do this—they contact key allies within the government, write letters to the Ministry or members of parliament responsible for the law and badger them for meetings to discuss the submission, draw public attention to the process through the media, form coalitions and have lots of organisations sign on to a single submission, and march to the office of the Minister to deliver the submission. And so on. The stuff activists do.

Government gets this type of feedback at different stages in the process of developing new law and policy. Sometimes there is a

legal requirement for “public participation” in the process, and the government has to give the public a chance to comment. Other times, the government just does it. Sometimes, the government doesn't announce the opportunity but will give an organisation an opportunity to be heard if asked.

Look out for policy proposals in the form of “green” or “white” papers. Normally a green paper is a concept note or early draft of a law or policy—it's a good time to get involved, because it's early in the process and you might be able to make big changes. White papers normally come after green papers and are a bit more refined—they typically come right before a first draft of the actual policy or law itself. Finally, look out for drafts of the law sent out for public comment. They are often published in the “Government Gazette” or another official government publication. The visual on pages 14 and 15 is an example of the Government Gazette in Namibia. Getting in and making inputs at any of these stages is an excellent way to win change.

A few of the many, many ways to use the law:

- 1. Influencing the law and policy through participation in the development process**
- 2. Advocacy for law and policy change**
- 3. Supporting organising and mobilisation**
- 4. Litigation**

Advocacy for change in law and policy

Almost all activists have as part of their agenda the goal to make some change in law or policy. You might stand a better chance of being listened to if you can put your arguments into legal terms alongside the other arguments you make. And you don't have to wait for the government to call for submissions or start a process of reforming the law on its own. Go to the minister or a sympathetic member of parliament and argue why the law needs to be changed—and use the skills and principles we've discussed to do it.

Supporting organising and mobilisation

The rights to assembly and protest are amongst the most important tools that we as activists have. But they're also amongst the rights that are most routinely violated. One reason for this is that organisers of protests normally have to deal with police, and the police

often try to stop protests before they start, even when the people obviously have the right to hold the protest. It's important to know the law related to the right to protest in order to handle police or other authorities who don't want activists to exercise it. Often, the most important law to know is the detailed procedural stuff about when and where you have to file things and other stuff like that. You're more likely to have success if you go into the process of engaging the police knowing the law and procedures.

Litigation and the threat of litigation

Even if you don't swing it, it's nice to have a big stick

Litigation is an important tool. It's not to be used lightly; but if we are serious about our cause, we know that we must take serious measures to achieve our goals. There's an interesting thing, though: The more you know the law, and the more credibility you have as an organisation that can litigate and use the law, the less you have to actually litigate. If your organization has a reputation as a legally savvy one that can go to court if needed, chances are you'll get a lot more done than otherwise and never even have to go to court. You don't always need to swing your big stick—it's often enough that people know you have it.

GATHERING EVIDENCE

Activists focused on TB in prisons are often concerned with whether the government is doing the right thing. They may also be concerned with the actions of private companies who provide services in prisons. Lawyers test whether the government is following the law by taking what the law says about the rights of people and obligations of government and placing them side by side with the reality on the ground to see where they match up and where they don't.

There are lots of ways to do this. This section covers a few of the ways we gather evidence.

ANNUAL REPORTS AND ANNUAL PLANS FROM THE DEPARTMENT OF PRISONS

In most countries, the Department of Prisons will publish two big documents each year. One is normally a plan for the upcoming year, often called something like the "Annual Performance Plan," and the other is a report, often called something like the "Annual Report." The first says what they plan to do and the second says what they did. The Annual Performance Plan will probably say things like how many prisoners they plan to treat for HIV and TB or how they plan to reduce overcrowding. The Annual Report should say how they did on fulfilling those plans.

Unfortunately, the reports don't always provide information in ways that help. They may make plans and then not report on them. Or they might change the way they report on them so that you can't compare the stuff they planned to do with the stuff they reported on. Sometimes it may feel like the Department does this on purpose. Or the information in the reports might not be trustworthy because the Department is not good at collecting information. Nonetheless, these types of reports are a good resource to check.

REPORTS FROM OVERSIGHT BODIES LIKE THE HUMAN RIGHTS COMMISSION OR PRISONS INSPECTORATE

We mentioned in the section about the basics of government that your country may have institutions meant to serve as additional checks and balances in the government. These institutions often have powers to monitor and report on conditions in prisons. Sometimes, they are legally obligated to do so on a regular basis; this is most often the case with the Prisons Inspectorate. These institutions are meant to be independent, though they aren't always as independent as they should be. In any event, these reports may provide valuable information. You might also consider filing a complaint with these institutions to make them investigate a certain issue. This is another way activists can use the law in their work.

REPORTS AND HEARINGS IN PARLIAMENT

In most countries, the legislative branch has the power and duty to provide oversight over how the executive is performing in its duty to enforce the law. One main way the executive branch reports to parliament is in written reports or written responses to specific questions. Another way is in hearings where officials, most often the minister of a government department, appear before parliament in person to answer questions from members of parliament. These written reports and transcripts from hearings are normally public. Typically, the law requires them to be public unless the hearing is closed for some specific reason; for example, because it involves classified information.

Members of parliament may ask officials for information that is otherwise not reported on. The officials take an oath and are bound by a legal duty to answer truthfully. It is a crime to lie to parliament in these circumstances.

If you cannot find these reports and transcripts online, you may be able to access them by calling someone in the legislative branch. There will probably be a clerk or staff member responsible for dealing with this stuff. Or, you may have contact with a member of parliament, and her office might provide the reports or transcripts.

Often, officials will report or appear at hearings on a regular basis that is scheduled in advance. If you're thinking like an activist-lawyer,

you may see an opportunity here. What if you have questions for the department to which they haven't or won't give you answers? You could consider working with a member of parliament to have her ask questions or request information using her legal power to have oversight over the executive branch. That way, the Department may be forced to respond! This is how activist-lawyers think and use the law in creative ways to advance their causes.

TAKING STATEMENTS

Activists know that we also have to go straight to the source, the people affected, to know what's really going on. This means talking to people who know what it's like in prisons. Activism around TB in prisons is especially difficult, because the people most directly affected are imprisoned—they're hard to reach unless you are also imprisoned.

Getting information out of prisons is hard, and sustaining a movement of prisoners is even harder. But activists find a way. Creative activists might find themselves working together with prison staff or their unions, an alliance that often feels odd at first but makes sense once one acknowledges that prison staff, too, are at high risk and have an interest in protecting themselves.

One of the most important skills an activist can have is taking statements. We use statements for all sorts of things. They may just help activists understand what is happening on the ground, or they may be used to inform advocacy materials or campaigns. A good story told well is the most powerful thing on earth.

One use of a statement is as evidence in court. A statement put before the court as evidence is called an affidavit, and the person who gives the statement is called a "deponent" or "affiant." One key feature of an affidavit is that it must be "given under oath." This means that the deponent must sign the statement in a certain way to confirm that it is true. There are rules about how this must be done, but almost everywhere, the deponent must sign the document in front of a person who is authorised to make sure that the deponent is the person she says she is. The deponent signs in front of that person to confirm the truth of what is said in the document.

WORKING WITH LAWYERS

Working with lawyers can be intimidating. Hopefully, you'll be able to link up with skilled, committed and ethical lawyers. Ideally, these will be what are sometimes called "movement lawyers"—lawyers who are committed to social justice, see their work as a piece of a broader vision, and believe that their role is to help you, the movement, use the law to further your goals. Regardless of the kind of lawyer you work with, some basic rules will apply. They will vary from country to country, but some things will remain the same.

THE SPLIT BAR

Some countries have what is called a "split bar," which means there are different types of lawyers, and each type can and cannot do certain things. Normally there is one group of lawyers, often called "barristers" or "advocates," who argue in court, and another type, often called "solicitors" or "attorneys," who meet with and advise clients. Barristers or advocates are normally the ones who wear robes and sometimes wigs, whereas solicitors or attorneys normally wear suits. In other countries, the bar is not split. There are just lawyers (who will also be called attorneys or counsel or advocates—I know, it's confusing) who do both parts, they deal with clients and argue in court. Here's a tip: Ask the lawyer you meet if there is a split bar in your country, and if so, ask her to explain the different roles. Understanding the different roles could be important for you. For now, though, it's enough to remember that there may be different types of lawyers in your country and you should ask your lawyer about it and what type they are.

Movement lawyers see their work as a piece of a broader vision, and believe that their role is to help you

YOU AND YOUR LAWYER

Putting aside the “split bar” issue, there are a few key features of your relationship with your attorney:

- Your lawyer represents you, and they have a legal obligation to be loyal to you and provide you with competent, zealous representation. They can and almost certainly will also represent other people, but they have to avoid “conflicts of interest.” This means they can’t represent other people whose interests are against your interests in the case. The clearest example of this would be that your lawyer couldn’t represent you as well as the person you are suing at the same time in the same case. It’s not always as simple as that, but you get the idea.
- Your lawyer has a duty to communicate with you in a timely manner and to keep you updated about any developments in her representation of you. If something happens in your case, your lawyer should tell you about it.
- Your lawyer operates “on instructions.” This means that you’re the boss and you instruct your attorney to do things on your behalf. Your lawyer gives you advice, and then you tell her what you want to do. If your lawyer suggests that you should do something, but you do not want to do that thing and instruct her that she should not take action on your behalf to do that thing, she can’t run off and do that thing on your behalf anyway. Your lawyer cannot settle or otherwise resolve a case, for example, without your approval. For the most part, your lawyer shouldn’t take any major action or make any major decisions about your case without direct and explicit instructions from you. Often, you and your lawyer will enter into a written agreement that explains the scope of her representation of you and your instructions to her. This might be called a “retainer agreement,” but it could be called something else. It probably doesn’t matter too much what it’s called, what it says is more important. It should define how your relationship with your lawyer will work.

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE

Generally, conversations in which you seek legal advice from your lawyer are confidential and protected by “attorney-client privilege.” Confidentiality means that she can’t tell anyone about what you talk about unless you give her permission to do so. Attorney-client privilege is similar but also means that she cannot be forced by the law to reveal what you spoke about.

So, imagine that you are being prosecuted for a crime. If you told your mechanic that you committed the crime, the prosecutor might be able to call the mechanic to the witness stand and ask about what you told them, and they might have to answer. The same is not true of your lawyer (whom you also told when you hired her to defend you). She cannot be forced to tell, because your discussion with her is protected by attorney-client privilege. However, there are some exceptions. And there are some specific things one can do that “break the privilege,” meaning that the protection goes away. You will need to ask your lawyer about the specifics. But we will talk about some of the basics, at a very general level, now.

If you tell your lawyer that you are going to commit a crime in the future, she may be permitted, and may even be legally required, to tell the authorities. Be careful to distinguish a few things here. First, you can generally tell your lawyer about crimes you committed in the past and she cannot legally tell anyone else so long as you told her about them in the context of seeking legal advice. She’s supposed to take that knowledge to the grave and never tell another soul unless you give her permission to tell someone or, sometimes, if she is working with someone else, like another lawyer, on your case and that person needs to know the information.

Future crimes are different, as a general matter if you tell your lawyer that you plan to commit a crime in the future, that information will probably not be protected by attorney-client privilege. Your lawyer also cannot advise you on how to commit a crime. Doing so would itself probably be a crime on her part.

But, your lawyer can advise you on whether something is illegal or legal and what the consequences of a certain illegal action might be. You can see how this could get tricky sometimes; in the context of civil disobedience, for example. It's therefore important to communicate with your lawyer about whether the information you want to tell her will be protected. And you need to establish this before you tell her the information, obviously.

For the most part, confidentiality only applies in the context of communication in which you are asking for legal advice. Otherwise, your lawyer is just the same as anyone else; she isn't under any legal obligation to keep quiet about what you've told her if you're just shooting the breeze and casually talking about your life.

Your lawyer should explain confidentiality and attorney-client privilege in detail, and you should ask her to do so if she does not. Ask questions if you have them—it is important to be clear on this subject.

PAYING YOUR LAWYER AND THE COST OF LITIGATION

Often, activists will link up with lawyers or legal organisations who have external funding to do this type of work and who will not charge their clients. That doesn't necessarily mean that there are not any costs involved, though.

You're an activist. Be one with your lawyer, too

Sometimes, a court will order the losing side in litigation to pay the legal expenses of the winning side. So, even if your lawyer is free, the other side may have a very expensive lawyer, and you could be stuck with the bill if you lose. Be sure to ask your lawyer about this possibility.

There may also be other costs involved. Courts often charge "filing fees" for submitting documents, for example. Or there could be costs associated with legal research if your lawyer needs to use a service that compiles and updates laws and cases. Ask your lawyer about these, too. Finally, there are things like printing or travelling and other things like that. Ask your lawyer how these will be covered.

You might not have access to free legal services. In that case, there are a few different ways your lawyer could ask to be paid. Lawyers often charge hourly rates. If they are part of a firm, the cost per hour could be different for different lawyers. More experienced lawyers charge more than less experienced ones. Your lawyer should explain this, and you should tell your lawyer what your budget is. Or, your lawyer might give you a flat rate. Finally, when there is money to be won in the litigation, your lawyer might take your case on “contingency.” This means they will take an agreed percentage of the winnings and, normally, that you don’t pay anything unless you win.

You are an activist fighting for justice. Be an activist in your relationship with your lawyer, too. Don’t be afraid to ask for a discount or to ask for clarity on any costs.

CONCLUSION

The law is a tool. Law can lock us up or set us free, make us sick or protect our health—it all depends on who uses it and how. Activists all over the world use it to fight prison conditions that take lives and fuel the TB crisis.

In Malawi, activists and detained people are litigating to stop the spread of drug-resistant TB in wildly overcrowded prisons. In Kenya, communities teamed up with sharp lawyers to stop the government from putting people in prison just because they couldn't take their TB medication. In Brazil, civil society organisations took to the Inter-American Court of Human Rights to challenge overcrowding in the Curado Prison Complex. In India, researchers and the judiciary joined hands to inspect prison conditions for compliance with the law. In South Africa, activists and lawyers helped take a case all the way to the Constitutional Court to ensure that people who get TB from unlawful prison conditions can hold the government to account. People are using the law to fight TB in prisons in China, Russia, Ukraine, Colombia, the United States, and more.

But the crisis continues—there is far more work ahead of us than behind. This guide is a resource, its purpose is to empower activists. Law can be a powerful tool for justice—if activists wield it well, we may yet turn prison systems around.

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