

Model legislation and regional integration: Theory and practice of model legislation pertaining to HIV in the SADC¹

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OPSOMMING

Modelwetgewing en streeksintegrasië: Teorie en praktyk van modelwetgewing oor MIV in die SADC

'n Proses om modelwetgewing oor MIV aan te neem is onlangs in die kader van die Parlementêre Forum van die Suider-Afrikaanse Ontwikkelingsgemeenskap (SAOG) geloods. Modelwetgewing word toenemend op die supra-nasionale vlak aangeneem om leemtes in nasionale regstelsels te vul. Modelwetgewing is nie bindend nie, maar dien as inspirasie en voorbeeld vir nasionale wetgewers. Nasionale wetgewers kan modelwetgewing onveranderd aanvaar of aanpas by plaaslike behoeftes en omstandighede. So 'n breë diskresie hou egter gevare in en kan die integriteit van die modelwetgewing aantas as nasionale wetgewing aangeneem word wat nie die gees en oogmerk van die modelwetgewing beliggaam nie. Modelwetgewing behoort daarom 'n bepaling te bevat wat die onbegrensde diskresie van nasionale wetgewers aan bande lê.

Wanneer modelwetgewing 'n gemeenskaplike benadering in meerdere state bevorder, kan groter regsharmonie in die hand gewerk word. 'n Gebrek aan konsensus, wat 'n gemeenskaplike benadering kortwiek, het in die SAOG-proses na vore gekom ten aansien van, onder andere, die kriminalisering van MIV-oordrag, die regulering van kommersiële sekswerk en die verspreiding van kondome aan gevangenes.

1 Introduction

It is generally recognised that the process of African integration and harmonisation of law in Africa will be gradual and protracted.² However,

¹ This contribution is based on a position paper on model HIV legislation in SADC, drafted by the AIDS and Human Rights Research Unit, a collaboration between the Centre for the Study of AIDS and the Centre for Human Rights, University of Pretoria, submitted to the Southern African Development Community Parliamentary Forum (SADC PF) and presented at a consultative workshop, 2007-11-10-14, in Dar es Salaam. The contributions of Patrick Eba, of the AIDS and Human Rights Research Unit, Alaric van der Berghe, an intern at the unit and Anna-marie Havenga, of the South African Law Reform Commission (SALRC), are acknowledged with great appreciation. The Model Law referred to in the paper, drafted by the unit, is mainly the handiwork of Eba. This contribution is a reworked version of a paper delivered at the conference of the Society of Law Teachers of Southern Africa, 2008-01-22.

² Under the Treaty establishing the African Economic Community (AEC or "Abuja" Treaty), of 1991, the process of regional integration was foreseen as an evolution

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continent-wide processes need to be preceded by, and should build on, the strengthening and consolidation of sub-regional regional economic communities (RECs), and the evolution of African Union (AU) law will emerge only if increased harmonisation of law at the sub-regional level has been attained.³ In this contribution, an ongoing attempt to arrive at model legislation dealing with HIV in Southern Africa is discussed as an example of harmonisation at the sub-regional level. Before dealing with this specific process, which is unfolding within the ambit of the SADC PF, some theoretical underpinnings pertaining to the nature and aim of model legislation are canvassed in some detail.

2 Background on Model Legislation

2.1 Definition

“Model legislation” may be defined as a detailed set of standards on a particular issue, which are offered for the consideration of, and adoption by, national legislators. As Rumphorst puts it: “[M]odel law is a model – no more but also no less”.⁴ Model legislation is often adopted at the supra-national level, as a “template” that could be used in various jurisdictions that face similar problems. Domestic legislatures may adopt the whole or parts of the model law, and may adapt the relevant provisions to suit local circumstances, if need be.

Model laws are often adopted when there are new societal challenges, affecting numerous countries, which have not yet been addressed by legislation in most of the affected countries. Model law has been developed successfully or is under consideration in various fields. Recent issues that have become the object of model legislation include the exploitation of children,⁵ safety in biotechnology,⁶ the proliferation of small arms,⁷ cross-border insolvency,⁸ transparency about revenue derived from oil and other minerals,⁹ money laundering¹⁰ and financing of terrorism.¹¹

over six stages, spanning 34 years (art 6(1)). The AU did not dispense with, but rather accelerated, this “roadmap” (par 2(a) of the AU’s Accra Declaration, 2008-07-03).

3 Under the AEC Treaty, the RECs are regarded as the building blocs of an eventual continent-wide economic community (AEC Treaty art 4(2)(l)).

4 Rumphorst *Model Public Service Broadcasting Law and Aspects of Regulating Commercial Broadcasting* (1999) 4.

5 International Centre for Missing and Exploited Children *Model Legislation: Child Pornography* (2006).

6 AU *Model Law on Safety in Biotechnology* (2003), in the process of being revised.

7 The Programme for Coordination and Assistance on Security and Development has identified the need for such legislation, particularly in West Africa.

8 The United Nations Commission on International Trade Law developed a Model Law on Cross-Border Insolvency.

9 Columbia University’s Model Law on Revenue Transparency led to the adoption by São Tomé e Príncipe of the Oil Revenue Management Law, issued in 2004-08.

10 A collaboration between the Global Programme against Money Laundering, the UN Office on Drugs and Crime (UNODC) and the IMF developed two model laws on anti-money laundering – one for common-law countries, and one for civil law countries.

2.2 Process of Elaboration and Adopting Model Legislation

One may identify five main phases through which the elaboration and adoption of model legislation proceeds.

First, somebody, or some body, needs to initiate the process. The initiative for model legislation may come from various sources. A state or an inter-governmental body, recognising a legal *lacuna*, may set the process in motion.¹² Often, the process is characterised by the collaboration of more than one institution. Such an initiative may be supported by an academic institution, as in the case of Columbia University's Model Law on Revenue Transparency, which supported efforts by the government of São Tomé e Príncipe.¹³ Non-governmental organisations, such as the Canadian HIV/AIDS Legal Network, may independently start the process, or work with governments. Funding agencies may be involved, as evinced in the funding by USAID of the Action for West Africa Region (AWARE) project on the West and Central African Model Law on HIV.¹⁴ Inter-governmental agencies may also develop model legislation. The UN Commission on International Trade Law, for example, developed a Model Law on Cross-Country Insolvency.

Once the idea of model legislation had been accepted, the next step usually is to conduct a survey of existing legislation, either in one particular state or in a number of states. Such a survey may have a descriptive element, charting the terrain and identifying the *lacunae*, but may also be evaluative, by assessing existing laws against the applicable international standards.

This phase is followed by a process of elaboration of detailed standards, by way of as inclusive a process as possible. This may often be a relatively protracted process, as it should ideally involve a wide array of role-players, including law-makers and civil society organisations, from participating countries.

Once a model law has been elaborated, the particular state or inter-governmental institution needs to take political ownership of the law. Such ownership could culminate in the acceptance, in principle, of the law, as an official text of an inter-governmental organisation or by an international experts' meeting.

Lastly, in respect of a model law adopted at the supra-national level, the text has to be domesticated. The ultimate aim of a model law remains its

11 As above, the laws also cover the countering of the financing of terrorism.

12 The AU, eg, developed the Model Law on Rights of Local Communities, Farmers, Breeders and Access (2000). The United Nations Commission on International Trade Law (UNCITRAL) developed a Model Law on International Commercial Arbitration (1985).

13 *Supra* n 9.

14 Adopted by, amongst other organisations, the Forum of African and Arab Parliamentarians for Population and Development and the Economic Community for West African States (ECOWAS) Parliament at a regional workshop to adopt a model law on STI/HIV/AIDS for West and Central Africa, N'Djamena, 2004-09-8-11. See UNDP *Compendium of Key Documents Relating to Human Rights and HIV in Eastern and Southern Africa* (2007) 279.

adoption by national legislatures. Commercial entities may also be involved in the process of domestication, such as the advocacy by Constella Futures Group, a US-based global “consulting firm” providing professional health services, to ensure domestic adoption of the West and Central African Model Law on HIV.¹⁵

2.3 Treaties, Declarations and Model Legislation Compared

Even if model laws are adopted by international organisations, they do not constitute treaties. While a treaty is open for ratification, model legislation is not. While treaty provisions become binding on a state upon ratification, the provisions of a model law are not binding under international law. Similar to model legislation, international declarations are not binding. Declarative standards guide states and are often vaguely formulated.

A model law has some of the characteristics of both treaties and declarations. As it stands, a model law is not binding. Similar to international declarations, its provisions serve as examples and inspiration to domestic law-makers. In some sense, then, treaties and model laws both require states to “domesticate” their provisions. However, model legislation is usually much more precise than both treaties and declarations, as it is framed in the legal language of law-makers rather than in the rhetorical terms of international law.

Both treaties and model laws need to be given effect in the domestic legal arena. Domestication of treaties may take one of two main forms – direct incorporation, when the whole of the treaty is adopted as a domestic law, or transformation, when parts of national law are amended to reflect the standards in the treaty.

On the one hand, either of these methods may culminate in the constitutionalisation of norms. This seems to be the way in which states’ obligations under human rights treaties are usually understood. When states report to human rights treaty bodies, for example, they mostly point to the correspondence between their bill of rights and the relevant treaty to justify their “domestication” of treaty provisions. However, as constitutional provisions, these norms remain quite vague and open-ended, often requiring further clarification of their scope and content by legislatures and courts.

On the other hand, domestication could be in the form of national legislation. Because international treaties are mostly framed in vague terms, they do not necessarily inspire detailed domestic legal reform. When they do, questions may arise about the conformity of national legislation with international norms, due to the imprecise obligations in these treaties. Accepting that local legal cultures and circumstances differ, some leeway must exist in the process of adapting a broader, internationally agreed consensus position to the narrower, and more immediate concerns of a particular country.

¹⁵ www.constellagroup.com/news/impact/2007/hiv_aids_model_law (accessed 2008-01-19).

Similar to treaties, model legislation could also be domesticated by way of direct incorporation or transformation. Being mostly more precise in its wording than international treaties and declarations, model legislation provides more exact contours to guide national legislatures. Still, the same questions arise about conformity with, and an acceptable degree of deviance from, internationally-agreed norms in respect of both treaties and model legislation. In answering the question how far a state may deviate from supra-national norms, the yardstick of international law, when dealing with reservations to treaties, is that a state must respect the “object and purpose” of treaties.¹⁶ The equilibrium between the adaptability of model legislation to local realities and the “minimum core” of protection should always be ensured. To accommodate local imperatives, model laws sometimes contain two or more options on a particular issue.

The emergence of model laws has not been unproblematic: It is one thing to agree that such a law should be adopted, but it is another to agree on its scope and content. Despite its many positive features, the West and Central African Model Law on HIV, for example, also contains provisions allowing for mandatory HIV testing “when a person is indicted for rape”, “when determining HIV status is necessary to solve a matrimonial conflict” and “when a pregnant woman undergoes a medical checkup”.¹⁷ The West and Central African HIV Model Law also contains a provision on criminalising “wilful” HIV transmission “through any means”, which could also include transmission from mother to child. The West African Model Law also places an unqualified duty on a person diagnosed with HIV to disclose his or her status to his or her “spouse or regular sexual partner”.¹⁸

Propelled by Constella Futures, which has “primary responsibility” to ensure the adoption of the model law,¹⁹ almost all countries in West Africa have adopted the West African Model Law, mostly without significant amendment. These countries are Benin, Burkina Faso, Cap Verde, Côte d’Ivoire, Guinea, Guinea-Bissau, Liberia, Mauritania, Mali, Niger, Senegal, Sierra Leone and Togo.²⁰ Following the provisions of the West and Central African Model Law on HIV, Guinea, for example, made HIV testing before marriage compulsory and Togo has made the periodic testing of sex workers mandatory.²¹ These are examples of open-ended provisions in the Model Law leading to restrictive national legislation. Overbroad provisions criminalising HIV transmission have also been adopted in all seven states. Constella’s advocacy drive is illustrated by the unfortunate heading on its

16 See eg art 19(c) of the 1969 Vienna Convention on the Law of Treaties.

17 West and Central African Model Law on HIV art 18.

18 *Ibid.*

19 www.constellagroup.com/news/impact/2007/hiv_aids_model_law (accessed 2008-01-19).

20 See eg Benin’s Law 2005-31 on prevention, care and control of HIV/AIDS, adopted on 2005-08-18 by the Benin National Assembly, less than 11 months after the N’Djamena meeting.

21 For a critical discussion of these laws, see Pearshouse “Legislation contagion: The spread of problematic new HIV laws in Western Africa” (2007) 12 *HIV/AIDS Policy and Law Review* 4 available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1275> (accessed 2008-04-15).

website describing this process in the following terms: “Seven down, eleven to go”.²² The impression is created of a process driven by funders and commercial entities, without sufficient regard to human rights perspectives.

The seemingly uncritical and wholesale absorption of the West and Central African Model Law on HIV is all the more problematic due to its widespread regional acceptance. Model legislation does not, in itself, meet the requirements of a formal source of international law as set out in the ICJ Statute.²³ It could best be described as “soft law”.²⁴ Yet, despite its lack of binding legal authority, a significant number of states in the region have given it binding force by enacting it in their domestic legal orders. Arguably, the West and Central African Model Law on HIV is evolving towards acquiring the status of regional customary international law. There may soon be sufficient state practice to justify such a conclusion. Evidence of *opinio iuris* may be derived from the assumption that national parliaments must have deliberated on its provisions before enacting its provisions into legislation. *Opinio iuris* may, however, be placed in question by the role of external pressure and a desire on the part of legislatures to be seen to do something, rather than to rationally appropriate the specific provisions of the Model Law.

In the light of widespread concerns about the West and Central African Model Law, particularly from human rights organisations, UNAIDS and other partners in April 2008 organised a workshop to discuss the Law and its adoption in the national legal systems of states in the region.²⁵ The workshop, which also involved AWARE-HIV/AIDS and parliamentarians from the region as participants, set in motion a reconsideration of the HIV laws adopted in the various countries, particularly in respect of their compliance with human rights principles.

2 4 Aim of Model Legislation

The aim of model legislation may be viewed as being four-fold.

2 4 1 *Model Legislation Serves as Guidance to National Legislators to Fill Legal Lacunae*

The goal of model legislation is to enable the relevant individual countries to consider adapting and adopting provisions of the model legislation.

22 www.constellagroup.com/news/impact/2007/hiv_aids_model_law (accessed 2008-01-19).

23 ICJ Statute art 38(1) lists the sources of international law as “conventions”, “custom”, “general principles of law”, “judicial decisions” and “teachings” of “publicists”.

24 Particularly in the field of human rights, “soft law” has played, and is increasingly playing, a significant role in the interpretation and application of international law. See eg Shelton “Compliance with international human rights soft law” in Weiss (ed) *International Compliance with Non-Binding Accords* (1997) 119.

25 “Atelier de Renforcement des Capacités sur les Droits Humains et le Genre dans les Cadres Légaux VIH” (Capacity-building workshop on human rights and gender in the context of HIV law), Dakar, Senegal 2008-04-16–18.

Model legislation is therefore aimed at assisting states – in particular policy-makers and legislative drafters – to address all of the relevant areas in need of legislative reform. At the same time, it should be stressed that a model law does not aim to usurp the authority of national legislatures or undermine the domestic sovereignty of states. Rather, model legislation builds on the collective experience of other legislatures and provides a pool of wisdom from which a particular legislature may select and adapt provisions to suit its own circumstances and needs.

2 4 2 Model Legislation Serves as a Yardstick to National Legislators for Reviewing Existing Legislation

The guidance of model legislation should also be normative, providing a yardstick against which to assess legislative responses.

2 4 3 Model Legislation Reinforces a Commonality of Approach and Legal Harmonisation

Model legislation may reinforce a common approach to a common regional problem. Increasing globalisation and the inherent transnational nature of issues such as terrorism, the regulation of the internet, child pornography and human trafficking affect countries collectively, rather than separately. Spreading easily across borders, HIV also falls into this category. A harmonised regional approach could also address issues such as minimising change in treatment options open to persons moving around in the region, and strengthening bargaining power to ensure more affordable medicines to people in the region.

When a model law is developed in a particular region, such as the SADC region, it often builds on existing best precedents and reinforces a commonality of approach. At the same time, the ideal is not uniformity for uniformity's sake. Country-specific differences still need to be accommodated. The aim of the model law should therefore not be to ensure uniformity of law, which would imply a rigid similarity between the legal regimes of participating states, but rather to ensure harmony in the fundamental approach of each state's legal system.

2 4 4 The Adoption of Model Legislation Underlines the Need for Appropriate Legislative Action and may Serve as a Stimulus for Debate and Advocacy

The adoption of a model law is further likely to highlight the importance of legislation at the national level, thereby stressing the urgency of legal reform as a crucial part of the response to a particularly pressing issue, such as HIV.

The process of adoption, both at the sub-regional and national levels, may, in itself, serve the important goals of informing and stimulating national debates. The process of adoption of the model law could serve as a lobbying tool and a vehicle to garner awareness about appropriate responses.

Once adopted, the model legislation may become a powerful tool to organisations of people living with HIV, human rights organisations and other civil society groups for advocacy targeted at legal and policy reform.

2 5 Format

An analysis of existing model laws adopted at the supra-national level reveals that two main approaches are used. Each one of these avenues displays advantages and disadvantages.

2 5 1 *Single, Comprehensive Law*

The first approach is the “single text” or “omnibus” approach, leading to the adoption of a single, comprehensive legislative instrument which integrates a wide range of related issues into one document.²⁶ This approach was followed for the Model Law on STI/HIV/AIDS for West and Central African States (West and Central African Model Law on HIV).²⁷ At the national level, such a single text usually inspires the adoption of similar single comprehensive codifications, as was the case in at least seven countries in West Africa that adopted the West and Central African Model Law on HIV, often without any amendment.

The advantage of the single text is that it establishes a single source, provides certainty and easy access to information for people, as most relevant HIV-related provisions can be found in a consolidated document. In addition, it ensures that most issues related to HIV and AIDS can be passed through a single Act of parliament, thus obviating unnecessary and costly delays.

However, this approach has its disadvantages. A single Act is unlikely ever to cover all relevant issues and might fail to include some important concerns. To the extent that a model law represents an attempt to be comprehensive, it may be too voluminous, far-reaching and complex. Arriving at a sufficient consensus on a broad spectrum of provisions may be very time-consuming. In addition, a specific HIV law could be perceived as reinforcing stigma against people living with HIV as it singles out the pandemic and the people infected or affected by HIV.

2 5 2 *Issue-specific and Focused Legislation*

The second approach is the “multiple texts approach”, in terms of which numerous model laws may be adopted, each dealing with an aspect related to HIV and AIDS.²⁸ A “model law” following this approach would address one or two issues, in particular, and would not aim to regulate the legal field comprehensively. The “Legislation for women’s rights in the context of the HIV/AIDS epidemic”,²⁹ developed under the auspices of the Canadian HIV/AIDS Legal Network, is an example of such an approach

26 This approach is akin to that of adopting a single comprehensive statute dealing with HIV and AIDS at the domestic level, such as the Kenyan HIV and AIDS Prevention and Control Act 14 of 2006.

27 See AWARE-HIV/AIDS Regional Workshop to Adopt a Model Law on STI/HIV/AIDS for West and Central Africa (2005).

28 This approach is akin to the approach at the domestic level of adapting existing legislation to incorporate concerns related to HIV and AIDS, as exemplified by the South African legislature’s adoption of the Criminal Law Amendment Act 105 of 1997, and the piecemeal inclusion of provisions dealing with HIV, for example in ss 6, 7 and 50(4) of the Employment Equity Act 55 of 1998.

29 On file with author.

being used. This draft legislation addresses four key areas, in four separate model laws, that are fundamental to the vulnerability of women to HIV, namely: Rape and sexual assault, domestic violence, property law and inheritance rights and family law (for example, marriage and divorce).

At the national level, these provisions usually lead to the amendment of existing laws or the adoption of new legislation.

The multiple laws approach has the advantage of covering a wide range of areas, while providing for more detailed provisions on particular pertinent issues, increasing the potential usefulness of the law.

However, the disadvantage of this approach may be the reduced visibility and accessibility of the legislative measures. Disparate provisions in various laws may also create confusion amongst the public, and may fail to inform those who need them most. In addition, there is the risk that the requirement to pass several new laws and amendments can lead to delays in parliament.

2 5 3 Format of National Legislative Response

It should be stressed, though, that the format of the Model Law does not conclusively determine the format of the national legislative response. National legislatures may select provisions from a single, comprehensive model law to amend specific legislation or to adopt new laws with a narrow focus. Similarly, national legislatures may combine provisions from various issue-specific model laws to adopt a comprehensive statute. In other words, the envisaged model legislation may be directly incorporated, when a state adopts the model law as a whole, as it is, or when it adopts selected provisions from the model law in parts of its legislation, as they are. A state may also “transform” the model law by adapting and adopting the model law as a whole, or by adapting and adopting selected provisions from the model law in parts of its legislation.

So far, within the domestic arena, most Southern African countries, such as Malawi³⁰ and South Africa,³¹ have adopted and adapted issue-specific laws. In East and West Africa, states have generally opted for comprehensive legislation on HIV.³²

3 SADC Model Law on HIV

In recent years, two processes for the adoption of model HIV legislation in the SADC have been launched: one by the Canadian HIV/AIDS Legal Network, proposing issue-specific legislation³³ and another by the AIDS

30 See Kainja *The HIV/AIDS Legislative Review Assessment Report* (2004).

31 *Supra* note 28.

32 See eg Benin's Law No 2005-31 relating to the Prevention, Care and Control of HIV/AIDS in the Republic of Benin (translated version in UNDP *Compendium of Key Documents Relating to Human Rights and HIV in Eastern and Southern Africa* (2008) 259–262.

33 See www.aidslaw.ca (accessed 2008-01-19).

and Human Rights Research Unit, working with the SADC PF, proposing a single, comprehensive model law. Under the umbrella of the Canadian project, a workshop was held in Johannesburg late last year, and a process of collaboration is ongoing. The Canadian Network's work in the SADC builds on issue-specific HIV legislation to address HIV/AIDS in prisons, and the "Legislating for Health and Human Rights: Model Law on Drug Use and HIV/AIDS", developed in the form of "eight modules" in 2006. The focus in this contribution is on the initiative of the unit, about which the author has more intimate knowledge.

3 1 Process

The SADC PF is considering the adoption of model legislation on HIV based on the recognition of the important role of the law in the context of HIV and AIDS. As the association of the national Parliaments of the SADC members states,³⁴ SADC PF aims to create capacities for intervention of national parliaments on issues relevant to the citizens of the SADC. SADC PF, through its HIV and AIDS Committee, has been playing an important role in assisting national parliaments in their response to HIV. In 2004, the SADC PF, with the National Democratic Institute (NDI), organised a survey of assessing the legislative efforts to address HIV in the SADC. After considering the result of this survey, the SADC PF recommended specific areas for legislative review and reform.³⁵ The report of this research was distributed at the seventeenth SADC-PF Plenary Assembly session in Tanzania. Amongst the suggestions for enhancing national responses to HIV/AIDS at the regional level was that "the SADC PF should propose model laws for consideration and adoption by member Parliaments". The unit's involvement in the initiative was informed by a number of systematic analyses of legal – including legislative – responses to HIV and AIDS in Southern Africa. An analysis of the situation of HIV, AIDS and human rights in Southern Africa was also undertaken by the Centre for the Study of AIDS (CSA) in 2002.³⁶

Legislative efforts in the region are further traced and collected in *Human Rights Protected? Nine Southern African Country Reports on HIV, AIDS and the Law*, published by the AIDS and Human Rights Research Unit, which sets out the position as at June 2007. This report should be read in conjunction with the AIDS and Rights Alliance of Southern Africa (ARASA) research report *HIV/AIDS and Human Rights in SADC: An Evaluation of the Steps taken by Countries within the SADC Region to Implement the International Guidelines on HIV/AIDS and Human Rights*, released at the end of 2006.³⁷

34 For more information on the SADC PF visit www.sadcpf.org.

35 See SADC PF "Findings of the SADC PF's survey of legislative efforts to combat HIV/AIDS in the SADC region" (2004) Paper presented at the IDASA/SADC PF regional leadership and policy dialogue, 2004-10-12, Pretoria. The NDI study is referred to here merely as a reference point in the SADC PF's engagement with the notion of model legislation, and not for the accuracy of the findings contained in the NDI study.

36 See www.csa.za.org.

37 See <http://www.arasa.info>.

It is certainly correct that numerous SADC member states have taken some steps to legislate in this area. Examples are numerous, and include countries like Angola, Botswana, Lesotho, Madagascar, Mauritius, SA and Zimbabwe. The major limitations of these efforts are the focus on the employment sphere and on steps to “criminalise” HIV transmission. For instance, the majority of legislative activity in relation to equality and non-discrimination has occurred in the area of labour law (employment).³⁸ Most of the legislation fails to address the root causes of HIV and does not address issues of property rights, inheritance and harmful cultural practices that make women and children more vulnerable to HIV.

The project on model legislation on HIV in Southern Africa is therefore an initiative and process of the SADC PF. The AIDS and the Human Rights Research Unit, in collaboration with other relevant organisations, institutions and individuals throughout the sub-region, including Law Reform Commissions, organisations of people living with HIV and human rights organisations, is providing technical advice in this process. In line with the SADC PF’s recommendation, a Position Paper and a tentative draft Model Law have been drafted, seeking to provide national legislators and policy makers in the SADC countries with model provisions addressing the gaps in their current legal and policy framework, if and to the extent that they exist.

Mandated by the SADC PF’s Regional Standing Committee on HIV/AIDS, the unit prepared an initial draft position paper and model law. These documents were discussed at a workshop in Pretoria, on 13 October 2007, involving important stakeholders. The revised paper and model law then served before a deliberative session for members of Parliament of the SADC PF’s Regional Standing Committee on HIV/AIDS, focused on model legislation for HIV and AIDS in the SADC region. The session was held from 10 to 14 November 2007 in Dar es Salaam, Tanzania. The aim of the deliberation was to consider the adoption of a model law on HIV and AIDS based on the recognition of the important role of the law in the context of HIV and AIDS. The deliberative session was attended by fifty participants, including members of parliament, legal experts, civil society, inter-governmental organisations and academics from twelve SADC member states: Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, SA, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

The meeting decided that there was a need for elaborating and adopting a model HIV law in the region and noted that “the initiative is long overdue given the social and development threats the region is facing as a

38 See eg Law no 8/04 on HIV and AIDS (2004) of Angola; Decree 43/03 Regulations on HIV/AIDS, Employment, and Professional Training (2003), also of Angola; the Labour (Amendment) Act 1 of 2004 in Mauritius; the Mozambican Law 5 of 2002, the Namibian Labour Act 15 of 2004 and South Africa’s Employment Equity Act 55 of 1998 (original or translated versions in UNDP *Compendium of Key Documents Relating to Human Rights and HIV in Eastern and Southern Africa* (2008)).

result of the HIV and AIDS pandemic".³⁹ The SADC meeting opted for a single, comprehensive model law. This choice was informed mainly by the detailed and specific wording which national legislatures may consider, and the realistic prospect of delays in adopting numerous separate statutes. Preference for this option reflects the weakness and protracted nature of national legislative processes in the region.

At the conclusion of the meeting, participants resolved that the SADC PF regional HIV/AIDS Standing Committee should consider and recommend the adoption of the Model Law to the Plenary Assembly of the SADC PF, its policy organ. Following this internal procedure, the attending members of Parliament suggested that "the next step will be to take the document to the national parliaments for discussion and domestication through appropriate procedures at national levels. Concurrent to this process, an advocacy strategy at both national and regional levels will be launched to popularise and garner support for the ownership of the model law".⁴⁰

At the time of writing, the position paper and model law are being revised, incorporating comments and suggestions made at the deliberative meeting.

3 2 Aim of the SADC Model Law on HIV

Southern Africa is the epicentre of the HIV pandemic.⁴¹ Of the fourteen member states of SADC, nine have an adult prevalence rate higher than ten percent,⁴² six states, higher than twenty percent⁴³ and one, Swaziland, higher than thirty percent. In 2005, Southern Africa was home to 14,8 million of the 38,6 million people living with HIV in the world.⁴⁴

These HIV prevalence estimates conceal the much more appalling reality of the pandemic's impact on the human, social, economic and development structures of most Southern African states. More than twenty years of AIDS in the sub-region have contributed to reduce life expectancy,⁴⁵ orphaned millions,⁴⁶ affected food security, economic growth and

39 SADC PF Communiqué: *The Model Legislative Deliberative Session for Members of Parliament and Legal Drafters on model Legislation for HIV and AIDS in the SADC Region* 2007-11-10-14, Dar es Salaam, Tanzania.

40 *Ibid.*

41 UNAIDS *Facing the Future Together: Report of the Secretary-General's Task Force on Women, Girls and HIV and AIDS in Southern Africa* (2004) 8.

42 Malawi, Mozambique, Zambia, Lesotho, SA, Zimbabwe, Botswana, Swaziland, Namibia. See UNAIDS *Report on the Global AIDS Epidemic: A UNAIDS 10th Anniversary Special Edition* (2006) 506-507.

43 Lesotho, Zimbabwe, SA, Namibia, Botswana, Swaziland. See UNAIDS *idem* 506-507.

44 See UNAIDS *idem* 505.

45 The comparison of life expectancy in several Southern African countries between 1970-1975 and 2000-2005 unveils shocking trends. In SA, life expectancy dropped from 53,7 years in 1970-1975 to 47,7 years in 2000-2005. Over the same period, life expectancy dropped from 47,3 to 34,4 in Swaziland, from 56,0 to 33,1 in Zimbabwe, from 56,1 to 39,7 in Botswana, from 49,5 to 35,1 in Lesotho and from 49,7 to 32,4 in Zambia. See UNDP *Human Development Report 2004: Cultural Liberty in Today's Diverse World* (2004) 170-171.

46 There are about 6,38 million children between 0 and 17 years who have lost one or both parents to AIDS in Southern Africa. See UNAIDS *supra* 509.

compromised hard-gained improvement in social and development structures.⁴⁷

While many Southern African states have put policies in place dealing with HIV and AIDS, fewer have adopted legislation in this area. As a consequence, the implementation of standards has largely been left to the discretion of governments.

In spite of legal reforms and new legislation on HIV adopted or being considered for adoption in several Southern African countries, they have often fallen short of comprehensively integrating human rights standards, ensuring the protection of vulnerable groups and translating sound medical and public health considerations into binding documents. For instance, of the fourteen SADC member states, at least eight criminalise commercial sex work or activities related to it,⁴⁸ eleven criminalise male-to-male sex⁴⁹ and, in most of them, the situation of women and girls is one of inequality and serves to fuel the epidemic.⁵⁰

Model HIV legislation in the SADC should therefore pay specific attention to these often forgotten or neglected issues and groups and integrate them into the legal response to HIV. The model legislation should uphold human rights standards as provided in international human rights conventions, accepted by SADC member states and to which they are party, relevant to HIV and AIDS, such as the International Covenant on Civil and Political Rights (1966), the Convention on the Rights of the Child (1989), the Convention on the Elimination of All Forms of Discrimination Against Women (1974), the African Charter on Human and Peoples' Rights (1981), the Abuja Declaration and Plan of Action on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (2001), the Maputo Declaration on HIV/AIDS, Tuberculosis, Malaria and Other Related Infectious Diseases (2003), the SADC Protocol on Health (1999), the SADC Code on HIV/AIDS and Employment (1997), the SADC Declaration on Gender and Development (1997) and the Addendum to the Declaration on Gender and Development by the SADC (1998), the Maseru Declaration on the Fight against HIV/AIDS in the SADC Region (2003), the International Guidelines on HIV/AIDS and Human Rights, the UNGASS Declaration of Commitment on HIV/AIDS (2001) and the Millennium Development Goals (2000).

47 For an analysis of the impact of HIV and AIDS on development in Southern Africa, see O'Grady "The impoverishing pandemic: The impact of the HIV and AIDS crisis in Southern Africa on development" 2004 5 *Development Update* 17-43.

48 These countries are Botswana, Malawi, Mozambique, Namibia, SA, Zambia, Zimbabwe and Swaziland. See Centre for Human Rights and Centre for the Study of AIDS *HIV/AIDS and Human Rights in SADC* (2004).

49 Ottosson *Legal Survey on the Countries in the World having Legal Prohibitions on Sexual Activities between Consenting Adults in Private* (2006) available at www.ilga.org/statehomophobia/LGBcriminallaws-Daniel_Ottoson.pdf (accessed 2007-10-02). This study reveals that all Southern African countries except SA, Madagascar and the DRC criminalise male-to-male sex.

50 See UNAIDS *supra*. The report explores the situation of women and girls in the context of the AIDS pandemic in Southern Africa and reveals high levels of violence against women and girls as well as the adverse effects of law and harmful cultural practices on the realisation of their human rights.

As a sub-regional document adopted through a process involving a wide range of relevant stakeholders in Southern Africa, providing higher human rights standards and informed by sound scientific evidence about HIV and AIDS, the model legislation is aimed at becoming a yardstick against which national HIV-related legislation could be evaluated. For legislators and policy makers, the model law could be an inspirational framework that should inform reform of legislation and the adoption of new legislation on HIV. Where relevant, the model legislation can, following necessary adaptation to the local context, be passed in full or in part into legislation.

The Model Law will also enable a more harmonised approach that will facilitate closer sub-regional integration. As free movement of persons, services and goods across borders in the SADC becomes a reality, the need for legal harmonisation grows. This process may be eased by the fact that the legal systems of most states in the region stem from the common-law tradition.

3.3 Content of the SADC Model Law on HIV

Acceptance of the need for model legislation does not resolve debates about the approach to the subject matter and the content of the law. As a broad starting point, a human rights based approach has been suggested. Very soon after the HIV epidemic emerged, individual states, the UN (in particular the WHO/UNDP partnership on AIDS) and academics framed the epidemic as a human rights and development issue.⁵¹ In more recent times, to some degree since the advent of ARVs in 1996, the biomedical and public health approaches have been in ascendancy, with some of their proponents advocating that there should be a “return” to “public health principles” in the response to HIV, sometimes in explicit contrast to “human rights approaches”, and sometimes in opposition to what is seen as failed multi-sectoralism.⁵²

However, the human rights based approach is still at the core of most successful proven strategies to address the epidemic. Failing and failed attempts are often the result of an inadequate implementation of human rights based strategies, such as voluntary counselling and testing, education and access to treatment. Frustration with the implementation of human rights based strategies should not lead to discarding the human rights approach. In fact, the potential of the human rights based approach has not been fully utilised or explored. In any event, all the states in the SADC are party to numerous international human rights instruments and have domestic systems of human rights protection in place.

The SADC Draft Model law sets out its objectives, amongst others, that it aims to provide a legal framework including options while maintaining the

51 See eg the First International Consultation on HIV/AIDS and Human Rights, 1989, and the early interventions of Mann, the First Director of WHO's Global Programme on AIDS.

52 See eg De Kock *et al* “Shadow on the continent: Public health and HIV/AIDS in Africa in the 21st Century” 2002 *The Lancet* 67–72.

need to observe the object and purpose of the SADC Model Law. It further deals with prevention, highlighting the importance of education, for example about “harmful cultural practices”. The SADC Model Law further covers testing, the rights of those infected and affected, including women, prisoners and trial participants, and the role of people with HIV and their organisations. During the Dar es Salaam consultative workshop, issues that should possibly be included in model legislation on HIV and AIDS in the SADC, but which are to a greater or lesser extent controversial in nature, have emerged. These issues include the availability of condoms in prisons, male circumcision, HIV testing, age of consent to testing, regulation of commercial sex work, traditional medicine, gender inequality, as well as HIV and AIDS and criminal law.⁵³ The obligation of states to “fulfil”, for example by ensuring affordable medicines or condoms, also proved to be very controversial, as some states do not provide for justiciable socio-economic rights in their Constitutions.

4 Conclusion

The process has, so far, highlighted a number of issues that are relevant not only to the SADC PF attempt, but also to other instances of harmonising law.

A lack of inclusion and participation of ordinary Africans has so far impeded the AU’s efforts towards regional integration. The acceptance and legitimacy of integration depends on involvement from a broad range of actors, and should not depend on the dictates of politicians or bureaucrats in Addis Ababa. The process of elaboration of supra-national standards should be as inclusive and consultative as possible, involving not only parliamentarians, but also legal drafters, members of law reform commissions, civil society, academics and inter-governmental institutions. To ensure the success of model legislation, there should be buy-in of role players of the eventual target, the national level of participating member states.

Participants in the drafting process may be at different levels of awareness and insight of the issues involved. Experts that are detached from the process, such as relevant experts from inter-governmental agencies, could be involved to provide background information and to assist in resolving deadlocks.

A balance needs to be maintained between under- and over-inclusiveness of model legislation. Steering a course between a maximalist and minimalist approach, the model law should not be too lengthy or elaborate, nor should it be too brief. Much thought and planning has to go into the basic structure of the law. The initial question to be answered is: What is included and what is left out? A balance also has to be found between upholding the underlying ethos of the law and allowing for state-specific variance. Attempts to erode the content of the model law should be curtailed. Different to most other model laws, the proposed model law

53 SADC Communiqué *supra*.

takes a position on the degree of variance allowed from its own provisions by stipulating that national legislation has to embody the “object and purpose” of the model law. The question remains: Who will act as arbiter of an acceptable degree of deviance? It is suggested that this issue should also be resolved in the model legislation itself.

The enactment and adoption of national law is not an unqualified good in itself. The process of adoption may unleash forces that undermine the ethos or objectives that initially inspired the process. Domestication may be slow or may see the watering down of the model law’s provisions. The model law should therefore be as exact and detailed as possible, leaving little room for states to proclaim adherence to the model law while deviating from its ethos.

Adoption of the model law is not, as such, an end point, but should be followed by domestication. Domestication must be supported by other efforts to ensure effective implementation of the model law. Civil society organisations and the media have an important role to play in making this happen.

The SADC HIV Model Law project is premised on the underlying assumption that law has a distinct role to play in addressing the HIV epidemic. Conceptually and practically, a clear distinction is drawn between policy and legislation. There is no shortage of policies and strategic plans in the region. The Model Law on HIV in the SADC aims to reinforce the importance of legislation as a clear anchor for government accountability and certainty about individual rights and entitlements.

However, this premise may be called into question. The extent to which legislation has permeated many countries in the SADC has been very limited. Domestication is obviously not enough to convert the model law into reality. The impediments of lack of knowledge and awareness, exorbitant cost, delay and inaccessible legal services should also be addressed. Rectifying these defects is a huge undertaking. The adoption of a national HIV law should therefore be followed by regional and domestic advocacy and awareness-raising, and serious attempts to address the underlying dysfunctionality and inaccessibility of our legal systems.