Legislative epidemics: the role of model law in the transnational trend to criminalise HIV transmission

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ABSTRACT

HIV-related state laws are being created transnationally through the use of omnibus model laws. In 2004, the US Agency for International Development (USAID) funded the creation of one such guidance text known as the USAID/Action for West Africa Region Model Law, or N’Djamena Model Law, which led to the rapid spread of HIV/AIDS laws, including the criminalisation of HIV transmission, across much of West and Central Africa (2005–2010). In this article, I explicate how an epidemic of highly problematic legislation spread across the region as a result of a text-mediated work process enabled through model laws. I theorise the textual genre of model laws arguing that these texts are best understood as ‘preoperative documents’ which, when activated, can lead to swift legislative reform in and beyond the field of HIV/AIDS governance. The legislative process being investigated was made visible through participant observation, archival research, textual analysis and informant interviews with national and international stakeholders (n=32). This involved ethnographic research in Canada, the USA, Switzerland, Austria, South Africa and Senegal (2010–2011). The untold policy processes and narratives explored in this article make evident how the work of contesting problematic HIV/AIDS model laws and newly drafted state laws involves both creating new texts and contesting the legitimacy and efficacy of others.

By way of introduction, I provide an overview of the US Agency for International Development/Action for West Africa Region (USAID/AWARE) Model Law, also known as the N’Djamena Model Law. After illustrating the success of this text in reforming HIV-related laws in the region, I demonstrate the obstacles of contesting this problematic HIV/AIDS model law. I argue that this intervention work challenges the transnational textual processes that aided the rapid and unreflective criminalisation of contagion. These legislative interventions have involved both the creation of new guidance texts that oppose the overly broad use of criminal law governance strategies and the contestation of the legitimacy and efficacy of HIV-related model laws and state laws.

RESEARCH METHOD

This research is informed by the critical sociological tradition of institutional ethnography. In this article, I expand upon the largely state-based body of research in this field, and position my research as a transnational institutional ethnography (TIE). By examining institutional complexes beyond individual states, this mode of ethnographic inquiry allows for a mapping of transnational networks of text-mediated social relations and work process including, but not limited to, the production of texts at United Nations and international development agencies. This TIE involved participant observation, archival research, textual analysis and semistructured informant interviews with national and international stakeholders in Canada, the USA, Switzerland, Austria, South Africa and Senegal (2010–2011). Ethnographic attention to the role of texts in coordinating work processes beyond the level of individual states is central to advancing a sociological understanding of HIV/AIDS governance and the coordinating potential of model law. The Human Research Ethics Board (HREB) at The University of Victoria, Canada, granted ethics approval for this research. All informants gave voluntary, informed consent prior to conducting interviews.

What are model laws?

A model law (as an ideal type) is a draft text that serves in the creation of national or provincial laws. Model laws may facilitate the harmonisation of laws across a region, standardising laws in macroregional contexts. Model laws, or model legislation, are written in the language of law and outline...
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detailed provisions and legal standards on an issue. As such, these texts may function as a template or guidance document to be adapted by domestic legislators. Viljoen argues that ‘[m]odel 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’ (p.384). Viewed in this way, model laws are a specific textual genre.

Draft legislative language is provided in model laws, and in some cases ‘best practices’ of laws and regulations from other (comparable) countries are discussed. Model laws have been developed or are being considered in various fields within and beyond global public health: drug use in prison (eg, The Canadian HIV/AIDS Legal Network’s (CHALN) Legislating for Health and Human Rights: Model Law on Drug Use and HIV/AIDS); public broadcasting (eg, Article 19’s Model Public Service Broadcasting Law); international commercial arbitration (eg, United Nations Commission on International Trade Law’s Model Law on Cross-Border Insolvency); and money laundering and the financing of terrorism (eg, Global Programme against Money Laundering’s Model legislation on laundering, confiscation and international cooperation in relation to the proceeds of crime). While most discussions of model law focus on macro-regional or transnational legislative reform processes, it is important to recognise the role and rule of different kinds of model laws and codes at the national level, such as the influential role of The Model Penal Code across the USA—a text originally drafted by the American Law Institute (ALI) between 1952 and 1962.

As Smith reminds us, an ‘[e]xploration into the ruling relations, into institutional complexes, from the standpoint of lived actuality, opens up into a world that is organised in language and is based in texts of various technological orders’ (p.68). Central to this analysis is a discussion of the relationship between model laws, state laws and the language of law. On this point, it is worth looking to the work of Gibbons who explains that

…because written texts retain their form and wording—at a later date it is their meaning that may become open to doubt. Once something is written down, its form becomes accessible afterwards. This means that a particular wording can be reproduced exactly upon demand, in particular writing facilitates the retention of successful wordings (p.23).

However, as this research makes explicit, just as ‘successful wordings’ can be retained and reproduced, so too can problematic or ‘unsuccessful wordings’ be disseminated over time and transnational space.

Further, model laws can be understood as what I call ‘pre-operative documents,’ by which I mean they are the documents which may lead to the creation of the documents that create legal frameworks and establish legal relations. Model laws, however, do not have legal powers independently of this activation process. This framing expands upon Tiersma’s textual typology by arguing that ‘operative documents’—eg, texts which establish legal frameworks and giving rise to legal relations, such as legislation, pleadings and petitions, contracts—are shaped in time and space through text-mediated work processes including the activation of ‘preoperative documents’ such as model laws (figure 1). Smith’s text-work-text imagery helps to make this textual relationship clear through the use of a simplified conceptual figure.

A NOT-SO-MODEL LAW IN FOCUS
What is the USAID/AWARE Model Law?

Focusing on the model law at the centre of this inquiry, the USAID/AWARE Model Law (2004) is an omnibus HIV-related model law created to reform laws across countries in West and Central Africa. The Model Law argues that ‘the peculiar nature of the AIDS epidemic, its multidimensional nature, spread rate and the extent of the damage it causes, warrants an equally specific intervention’ (p.9). From 8 Sept to 11 Sept 2004, Family Health International (FHI) and Action for West Africa Region-HIV/AIDS (ARE) held a regional workshop in N’Djamena, Chad, to adopt a Model Law on STIs and HIV/AIDS for West and Central Africa. More than 40 participants from the 18 countries in the region were part of the USAID-funded initiative. One UNAIDS staff member in West Africa who has been involved in this legislative issue for the last five years put it this way:

…heads of state made a kind of commitment and the parliamentarians also wanted to be part of the movement—part of the response to HIV. The only way they had […] [was to be part of] the law—the legal initiatives. So, they decided to meet in N’Djamena to develop this law. It was supported by USAID… (UNAIDS, Dakar, Senegal).

As this UNAIDS staff member states, many parliamentarians, among other policy actors, wanted to be ‘part of the movement’ to transform the legislative landscape in the region. When describing the HIV legislative terrain in West Africa, a number of informants used varied metaphors with seemingly contradictory ecosystems to describe the terrain that ranged from a ‘policy desert’ to ‘a forest in need of development’. While none of the 18 countries in the region had HIV omnibus legislation in 2004 (figure 2), by 2010 end, 13 of 18 targeted countries have passed HIV-specific laws based on the guidance text (figure 3).

A number of key resources focusing on the criminalisation of HIV transmission acknowledge the widespread influence of the USAID/AWARE Model Law throughout sub-Saharan Africa informing HIV-related laws that have passed or are being considered in Burundi, Djibouti, Kenya, Mauritius, Mozambique and Tanzania.

The Model Law on STI/HIV/AIDS for West and Central Africa contains thirty-seven articles which are connected by their focus on the prevention, care and treatment of HIV/AIDS in West and Central Africa. It is this broad focus that gives this model law its omnibus character: a kind of text that seems to call out to would-be users to legislate it all and legislate it quickly. The main components of the model legislative language provided in

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The 18 countries in the West and Central Africa Region are: Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Côte d’Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

The workshop was organised in collaboration with the Forum of African and Arab Parliamentarians for Population and Development (FAAPPD), the West Africa regional program (WARP)/USAID, the West Africa Health Organization (WAHO), the Centre d’Etudes et de Recherche sur la Population pour le Développement (CERPOD), the Economic Community Of West African States Parliament (ECOWAS) and the Legal Network of Chad Parliamentarians for Population and Development. The workshop also involved members of the national networks of parliamentarians for Population and Development, national HIV/AIDS control programs in the region, United Nations (UN) agencies, the Sahelien network of parliamentarians, and the executive secretary of the Economic Community of West African States (ECOWAS).
the text are definitions contained in Article 1, and the fields of proposed legislation contained in Articles 2–37 which are organised into seven chapters. The text is available online and in hard copy, produced in French and English, and contains no direct references to research evidence or other relevant case law. This last textual feature makes the Model Law stand in contract to other HIV-related model laws, such as those produced by the CHALN (eg, Respect, Protect, Fulfill: Legislative for Women’s Rights in the Context of HIV), that are grounded in human rights and provide detailed references and case law examples for would-be users.\textsuperscript{12} While this CHALN Model Law example is a substantive 2-volume text and demands that readers review detailed commentary, multiple versions of draft articles, and provides extensive references for review, the USAID-funded model law is a comparably short document that requires much less work on the part of the reader—an aspect of the text that may have enabled its rapid and problematic translation into state law across much of West and Central Africa.

The USAID/AWARE Model Law contains a preamble justification section that discusses the sub-Saharan Africa region as the most affected by HIV/AIDS globally—citing three million new infections in 2003 alone with the total number of infections at twenty-five million.\textsuperscript{15} This justification section discusses some aspects of the gendered nature of the epidemic—eg, the increasing rates of HIV among women globally; evidence which demonstrates that more than 60\% of persons living with HIV/AIDS in sub-Saharan Africa are women between 15 and 49 years old—and the need to protect the human rights of people living with HIV/AIDS (p.10).\textsuperscript{15} Additionally, the justification section positions the USAID/AWARE Model Law as a ‘best practice’ text which is focused on women’s rights and human rights, and is in keeping with international calls for legislative reform including those of the General Assembly of the United Nations on HIV/AIDS and declarations by the African Heads of State.\textsuperscript{12} This framing of the Model Law can also be seen within the body of the text, as the first section of the document provides a ‘fill in the blank’ section: ‘Law # of ….. 2004 on HIV/AIDS prevention and control’ followed by a preamble of the relevant conventions, charters and declarations in this field (p.11).\textsuperscript{15}
Finally, this section of the text also notes the ‘flexible’ nature of this guidance document as a key feature: pointing to the need to adapt and domesticate the Model Law to fit local specificities of the legal environment and social, political and cultural contexts of each country. While the importance of being able to adapt the draft text is noted, unlike other model laws such as the CHALN example noted above, no significant assistance is provided in the USAID-funded text with respects to the ‘how to’ of domestication (eg, commentary on the significance of each article, and the relationship across articles; drafts of different articles that may be considered depending on the cultural contexts of each country).

Article 1 of the text defines the terms used within the law stating, ‘[i]n accordance with this law, the terms and expressions used in the first article of this convention shall be understood as follows, unless otherwise defined by the context’ (p.11). This statement is followed by twenty-two definitions of terms used in the document. For example, concepts such as ‘Willful Transmission’, ‘HIV Risk Behaviour’ and ‘Medical Confidentiality’ are operationalised. Articles 2–37 in the Model

Figure 3  HIV/AIDS legal landscape in West and Central African countries after the uptake of the USAID/AWARE Model Law.

Figure 4  USAID/AWARE Model Law excerpt (Articles 35 and 36) (USAID/AWARE-HIV/AIDS, p.11).
Law provide draft legislative language in eight broad fields, each organised as a chapter containing multiple articles: (1) Education and Information; (2) Safe Practices and Procedures; (3) Traditional Medicine; (4) Voluntary Counselling and Testing; (5) Health and Counselling Services; (6) Confidentiality; (7) Discriminatory Acts; and, (8) Willful Transmission of HIV. These diverse domains make clear the omnibus character of this Model Law beyond criminal law governance provisions.

For the purposes of illustration I will focus upon the last article of Chapter 7 (Discrimination Acts), Article 35, and the first article of Chapter 8 (Willful Transmission of HIV), Article 36. The excerpt from the USAID/AWARE Model Law below (figure 4) illustrates how draft text is provided for legislators to copy, paste and adapt as needed. Article 35 makes visible how users of this text are asked to ‘fill in the blank’ (or, more specifically, the x’s) regarding prison sentencing: ‘ranging from xxxx to xxxx’. Article 36 is worth underscoring given the centrality of the criminalisation of HIV transmission to much of the debate around this omnibus standardising initiative. What is also important to recognise here is the way in which articles in the Model Law reference one another (Article 36 referencing Article 35) helping to position this as a comprehensive package of laws that work together to address issues of HIV prevention, treatment and care.

It is important to also consider the broad definition of willful transmission provided in the USAID/AWARE Model Law. ‘Willful transmission’ is defined as ‘transmission of HIV through any means by a person with full knowledge of his/her HIV/AIDS status to another person’ (p.15).12 Human rights lawyers have drawn attention to the ways in which the USAID/AWARE Model Law as an omnibus package, and subsequent state laws it has inspired across West and Central Africa, are highly problematic including, albeit certainly not limited to, this specific definitional issue.22–27 While the Model Law and new state laws include some ‘progressive language to prohibit discrimination against PLHIV [Persons living with HIV]’, Pearhouse notes that many forms of discrimination are left without legal redress due to gaps in the drafting of the model law (p.5).27 As such, the document is highly problematic as a whole due to specific articles it contains (eg, Articles 1 and 36 that criminalise HIV transmission and do not restrict it to cases where transmission is done with the ‘deliberate purpose of transmitting HIV’) (p.20)24 and what it ignores (eg, attention to women’s rights and other key populations such as sexual minorities).24 These concerns will be further explicated in the sections that follow.

Conflicting claims about the work that needs to be done

Supranational agencies do not necessarily have a monolithic agenda. A subset of the transnational actors described above were involved in specific work activities to address provisions they deemed problematic within the USAID/AWARE Model Law. When discussing their work as ‘technical (legal) advisers,’ informants primarily drew upon their experiences working at consultations held in West Africa in 2007 and 2008: the Consultative Meeting on The HIV Legal Frameworks Addressing Human Rights and Gender (Dakar, 24–25 July 2007) and the Capacity Building Workshop on Human Rights and Gender in HIV Legal Frameworks (Dakar, 16–18 April 2008). This constellation of non-state actors also described their role in writing pieces of legal analysis which responded to the USAID/AWARE Model Law and have helped to solidify their thinking in this legislative field.24,28

Among some of the early meetings to discuss how to respond to the USAID-funded Model Law, the former Director of Research and Policy at the CHALN met with a UNAIDS lawyer and devised a strategy to ‘work out what could be done... because obviously it was a very sensitive period of time’ (Former Director of Research and Policy, CHALN, Canada). The recognition of country sensitivity to outside criticisms was discussed by CHALN and UNAIDS stakeholders:

...[in] these countries [West Africa], you know the atmosphere was not conducive to outside criticisms to the model legislation. There was already a certain sense of momentum behind the effort...and it’s obviously a very difficult environment to go in and say to legislators who have recently passed law that has been sold to them as model and progressive law, that actually there are some really serious problems about the law that has just been passed, or has just been drafted and about to be passed. Obviously, at a number of different levels that is a sort of very difficult message to deliver and I think that both UNAIDS and the Legal Network [CHALN] at that stage were determined that it was something that had to be taken on (Former Director of Research and Policy, CHALN, Canada).

Staying within a legal paradigm of practice, one of the strategies devised by UNAIDS and CHALN lawyers and staff was to develop alternative language to the USAID/AWARE Model Law.24 This is not a full alternative HIV-model law per se, but rather a critical text that makes explicit the problems with the USAID/AWARE Model Law and provides alternative draft articles. To understand the alternative language proposed by UNAIDS stakeholders it is necessary to review some of the basic arguments and provisions presented in this alternative language text while highlighting the focused example of provisions dealing with the transmission and/or exposure of HIV. Reviewing the UNAIDS text makes explicit some of the specific ways in which (model) laws are ‘coded in language’.2 While the UNAIDS text alone has not led to the creation of an alternative model law endorsed by stakeholders in the region, it does reveal the key kinds of legislative claims making human rights lawyers engaged in while participating in meetings in 2007 and 2008.

The UNAIDS recommendations for alternative language in response to the USAID/AWARE Model Law involves a discussion of subject matter that is: (1) in the model law and deemed to be problematically worded or conceived with attention to: Education on HIV/AIDS in learning institutions, Article 2 of USAID/AWARE Model Law; HIV testing issues, Articles 17, 18 and 24; partner notification, Article 26; prohibition of discrimination and vilification, chapter VIII; criminalisation of HIV transmission, Articles 1 and 36, and prisons, Article 8 and (2) issues that are omitted, ignored or rendered invisible in the model law: attention to women’s rights and discussion of other vulnerable groups such as gay, bisexual and other men who have sex with men (MSM) and persons who inject drugs. This is a response text organised around unsuccessful wordings—including a critique of the definition of ‘willful transmission’ described above—and problematic omissions. The UNAIDS alternative language document also notes key measures to prevent HIV infection and to support the human rights of those living with HIV.24

Just as many informants discussed the importance of listening to the voices of those infected with and affected by HIV, the alternative language text references the right of people living with HIV to be engaged in a discussion of alternative language due to the insight and experiences they can provide: such involvement ‘in the process of consultation in law reform is also a specific expression of the right to ‘take part in the conduct of public affairs’ (p.4). The document notes the need to follow the Greater Involvement of People Living with HIV/AIDS (GIPA) principle—which was recognised formally by many
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Table 1 Conflicting claims over the USAID/AWARE Model Law

<table>
<thead>
<tr>
<th>Claim</th>
<th>Overarching regional claim (eg, AWARE, parliamentarians)</th>
<th>Overarching outside claim (eg, UNAIDS, CHALN, ARASA)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>This is a good Model Law and its use needs to be further supported.</td>
<td>The highly problematic nature of this Model Law must be addressed to prevent the use of the imprecise, dangerous language in this text and to minimise the harm already caused.</td>
</tr>
<tr>
<td>2.</td>
<td>This is a community-created Model Law developed through a regional partnership.</td>
<td>This is a USAID-funded Model Law that should not be viewed as a ‘model’ at all.</td>
</tr>
<tr>
<td>3.</td>
<td>The Model Law is ‘mostly good’.</td>
<td>The Model Law is flawed and emphasising potentially positive provisions risks obfuscating the highly dangerous nature of this text.</td>
</tr>
<tr>
<td>4.</td>
<td>We have sovereignty to make the laws we want and need not listen to ‘outside’ actors.</td>
<td>We respect your sovereignty, but it is important that you respect human rights principles including those articulated in declarations to which you are committed.</td>
</tr>
</tbody>
</table>

governments at the 1994 Paris AIDS Summit. While GIPA is frequently referenced as a ‘best practice’ in HIV/AIDS policy processes, it is worth critically interrogating what such forms of meaningful involvement can and do look like in highly technical legislative reform processes.²

Finally, the UNAIDS text takes a clear stance against the broad criminalisation of HIV transmission and underscores the need to focus on human rights. In doing so, it directs policy actors to review other human rights focused texts that can give guidance on appropriate legislative responses to HIV, including UNAIDS/OHCHR’s International Guidelines on HIV/AIDS and Human Rights²⁹ and UNAIDS/UNDP/IPU’s Taking Action Against HIV: A handbook for parliamentarians.³⁰ The UNAIDS/UNDP/IPU handbook echoes many of the arguments made in the alternative model law language document. For example, the text invokes the genre of good or best practice, and provides a checklist for parliamentarians to use when considering the issue of criminalising HIV transmission or exposure.

Facing resistance: the challenges of legislative intervention

One of the first messages that UNAIDS and CHALN staff worked to articulate at the Model Law consultations in 2007 and 2008 was that countries did not need to pass HIV omnibus laws in order to address HIV/AIDS effectively; legal reform was not a sufficient solution to the HIV epidemic, and it was not always necessary to engage in sweeping legal reform processes as part of a comprehensive national response. In short, they argued that it is important to recognise that a broad onslaught of rapid legislative reform may not be an effective approach to address this global health epidemic. The argument that in the ‘fight against HIV’ sweeping (omnibus) legislative reform may not be necessary ‘was a totally new, fresh perspective at those meetings. There was a pre-established notion that in the fight against HIV […] a country must pass a law, and a country that does not pass a law is deficient. That was absolutely the starting premise of, I think, that entire [USAID/AWARE] project’ (Former Director of Research and Policy, CHALN, Canada).

To explain this point further, UNAIDS and CHALN presenters noted that many countries have undertaken law reform studies or processes and decided not to create broad, omnibus legislation. One UNAIDS staff member explained the difficulty of facing resistance and informing stakeholders about the problematic nature of the USAID/AWARE Model Law at the first meeting in 2007:

This is the first conversation which really showed that the parliamentarians felt [resistance to reforming the USAID/AWARE Model law] because they thought [we] were against them, were criticizing them, their work...now you can tell them that it was not that good—it was difficult. It was really kind of...I can’t say a fight but we [met] a lot of resistance at the beginning (UNAIDS West Africa Staff, Dakar, Senegal).

This informant also articulated the challenge of organising the consultations among various clusters across the legislative lifecycle: countries which had already passed HIV-related laws, countries considering passage of state laws, those that had rejected passing laws, and those not currently considering the passage of HIV-related laws. One challenge of organising possible sites and opportunities for intervention in this field is the shifting targets across this region—with countries in various, continually changing, stages of legislative development, revision and rejection.

While lawyers from UNAIDS, and NGOs including CHALN and AIDS and Rights Alliance for Southern Africa (ARASA) sought to problematise this preoperative model text, others were concerned with the focusing upon the work needed to further promote the use of this document (AWARE; FAAPPD; West African parliamentarians). As such, as part of their overarching claims making work, UNAIDS, CHALN and ARASA lawyers aimed to problematise the content and processes related to USAID/AWARE Model Law, questioning the extent to which HIV-related law reform was necessary. Many legislators with whom UNAIDS and CHALN actors were engaged believed the USAID/AWARE Model Law was a good model: it was something to be proud of and a necessary step to address the HIV epidemic in this region. For example, one USAID/AWARE consultant noted quite simply that the AWARE team had done a ‘very good job’ in passing so many laws; this was ‘a very big achievement’ (Policy Advisor/Consultant USAID/AWARE, West Africa).

As should already be clear, the USAID/AWARE Model Law has been subject to multiple conflicting claims regarding its merit, development process, and potential to have a positive public health and human rights impact in the everyday world. Table 1 provides an overview of some of the overarching tensions in the work of regional actors at these workshops (eg, AWARE, parliamentarians) and ‘outside’ actors (eg, UNAIDS, CHALN, ARASA). For example, it held for many regional actors that the Model Law would be transferred into concrete ‘action at the ground level’ and successfully implemented; that these laws would be transferred to courts and the courts would, for instance, take the criminal law provisions and sort of, so-to-speak ‘get the baddies.’ This premise—that the USAID/AWARE model law was a progressive piece of legislative

²This is the perception of many informants. Here, the Former Director of Research and Policy, CHALN, is quoted articulating the general view he understood of many parliamentarians in the region and some AWARE staff. A number of AWARE-HIV/AIDS and FAAPPD informants articulated a similar position consistent with the Former Director of Research and Policy’s assessment.
reform that would lead to important changes ‘on the ground’—led legislators to ask for help in the work of continuing to promote the USAID/AREW Are Model Law.

Clearly, state and non-state actors were reading the USAID/AREW Are Model Law differently, maintaining conflicting perspectives about the work that needed to be done in and beyond these meetings. As such, it is not difficult to understand why many described the consultations as ‘tense’, ‘difficult’ and ‘frustrating’. The former Director of Research and Policy, CHALN, who gave presentations at the 2007 meeting in Dakar, explained this clash of ideas, operating premises and questions looked like:

So, when we [CHALN and UNAIDS] were coming in with presentations [that were quite critical of the national laws and the Model Law], the legislators were saying ‘no, no, no you haven’t understood the process...we are at a stage that we have completed the law enactment and what we want now is help from UNAIDS and your organization as well if you like to disseminate these laws (CHALN, Canada).

Adding to the difficulty described above, a senior human rights lawyer at UNAIDS who provided technical legal guidance at the 2008 consultation, also described the discursive challenges of this work. The idea of ‘outsiders’ critiquing their law was a key tension for many parliamentarians:

...the parliamentarians did not like anyone casting any aspersions on their law. They didn’t like people from outside doing that. You know, there was a lot of real serious back and forth and people getting on the defensive, you know. So, it was a very difficult meeting (Senior Human Rights and Law Adviser, UNAIDS, Geneva, Switzerland).

Informants made it explicit, that both these consultations and related work activities involved a series of challenges. Focusing on linguistic tensions, including but not limited to those related to technical legal language, reveals the important rhetorical strategies advanced and barriers encountered by lawyers and policy advisors during these consultations. Finally, another lawyer involved in contesting the text provides an important summary of challenges faced by technical legal advisors who worked to contest the problematic nature of the ‘from the American people’ Model Law:

...it was an incredibly difficult meeting because here were these West African parliamentarians and policy makers saying, ‘you know four years ago we were told that this is what we needed to do and we thought that we were doing the right thing and now you guys come here and tell us that this is a load of crap and that we need to change all these laws’. The sentiment amongst the parliamentarians was...what the hell were you guys talking about? Four years ago we bent over backwards to pass these laws because we were told this was the right thing, and now you are turning around and telling us this is nonsense and we actually need to change the law. I mean how stupid are we going to look going back to our parties and saying, excuse me, that law we passed four years ago, it’s actually a load of rubbish and we need to change it? (Director, AIDS & Rights Alliance for Southern Africa, Namibia)

It is worth reiterating, as the lawyer articulates above, that many stakeholders involved in the passage of the USAID/AREW Are Model Law in West Africa, including parliamentarians, apparently believed that they were responding to national and international calls to promulgate such omnibus legislation. This belief was part of the myriad of discursive conflicts and difficulties in processes of consultancy and reform. As another UNAIDS lawyer stated:

...clearly the bottom line is that parliamentarians were called to support the HIV response very strongly. Every time UNAIDS people and other people were talking about HIV to parliamentarians they say, ‘you have to do something, you have to help us with dissemination, you have to take leadership.’ Then they look at, ‘what can we do really?’ This is what parliamentarians do, is to adopt laws. ‘So we’re going to do that’ (Human Rights Advisor, UNAIDS, Switzerland).

Many informants articulated that there is simply ‘no excuse’ to pass such obviously flawed legislation, and that parliamentarians should have known better. However, rather than focus on the failure of individual legislators and policy drafters, others focused on the systemic problem of granting agencies, such as USAID, who funded the rapid creation and promotion the Model Law without adequate capacity building and consultation in the region. It is important to contextualise the disagreement and somewhat contentious exchanges that occurred at these reform-oriented consultations in 2007 and 2008 and the various textually mediated activities described including the development of alternative model law language written by UNAIDS and the CHALN.

CONCLUSION

The law, like HIV, is a profoundly social phenomenon: both may cross state boundaries and have differential impacts on the lives of everyday publics. The law, like the everyday world, is problematic. Legislating the social dimensions of HIV prevention and treatment demands a consideration of complex, stigma-laden legal issues including, but not limited to, sex work, injection drug use, homosexuality, gender-based violence, discrimination and obligations to disclosure of one’s HIV status. HIV-related laws deal with the intimate and the international—serving to regulate everything from the passage of bodily fluids between persons to the mobilities of persons across state borders. What has received little attention, however, is the text-mediated processes by which some HIV-related laws are becoming aligned or harmonised transnationally through the interventions of non-state actors who have funded, drafted and promulgated omnibus HIV model laws. I argue that to more robustly understand the processes of legislative alignment that have criminalised particular contagions, the ruling relations of model laws must be considered. In this paper, I begin to addresses the gap in this field by considering the ways in which the content of USAID/ARE Model Laws and state laws are problematic, and also the transnational work processes of creating and challenging omnibus HIV model laws more broadly.

Nancy Fraser argues ‘overcoming injustice means dismantling institutionalised obstacles that prevent some people from participating on par with others, as full partners in social interaction’. We must recognise why model legislation is an attractive option for some stakeholders, as well as the institutionalised obstacles of language and particular forms of legislative knowledge as highly significant barriers to the meaningful participation of publics in model law creation and reform processes. Rather than simply celebrate the work of international human rights lawyers, such as those working for UNAIDS and CHALN—kinds of lawyers without borders akin to the much...
celebrated Médecins Sans Frontièrè—it is important to critically interrogate the who and how of challenging legislation which is constituted as problematic: who should do this work and how should they go about the work of problematising legislation, working with stakeholders and drafting alternative language for model laws and state laws? Just as processes of transitional legislative reform are problematic, must we not constitute international challenges to region and country legislation as similarly problematic, or is this simply a necessary human rights intervention? These questions of sovereignty, and the ethics of transnational legislative intervention demand sustained attention for those concerned with matters of macroregional legislative reform through the use of omnibus model laws.

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