

Declaration & Synopsis

SAARCLAW Seminar

24th–25th August, 2012 – Thimphu, Bhutan

SECURING ACCESS TO JUSTICE IN THE ENFORCEMENT OF
HUMAN RIGHTS



SAARCLAW

(IN COLLABORATION WITH UNAIDS, UNDP & SAIEVAC)

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SAARCLAW DECLARATION

Dated 25th August 2012 – Thimphu



WE THE MEMBERS of the South Asian Association for Regional Cooperation in Law (**SAARCLAW**)

SOLEMNLY REAFFIRMING our abiding friendship, unity and integrity and strong solidarity and cooperation;

REALIZING that we are united in our common social, economic, political, legal and cultural goals;

COMMITTED to join hands to overcome and resolve these problems together;

CONSCIOUS that good governance is the fountainhead of the emerging new social, economic, political and legal order;

RECOGNISING that human rights are the core components of democracy and good governance and are necessary ingredients for social and economic development and fostering peace and progress in the region;

AFFIRMING our faith in the role of the judiciaries in protecting and enforcing the rights of the people in ensuing social justice and our deep commitment to the vital necessity for Judicial Independence including but not limited to Judicial Appointments and Accountability of the Judiciary;

ACKNOWLEDGING the need of introducing for the needy pro-bono and free legal aid regime amongst the legal profession in the region;

NOTING with deep concern that the rights of key HIV affected women and girls are often violated, yet few have recourse to justice, either because there are no national laws (constitutional and legislative protections) or accessible mechanisms for them to claim their rights or to seek protection from human rights violations; or even where they exist, key HIV affected women are unaware of their legal rights and lack means to realize them;

INSPIRED by the numerous movements in the region for creating awareness, public opinion and developing collective commitment towards our common goals and problems and inspiring more active and meaningful initiatives through effective participation and empowerment of the people;

CONFIDENT that the collective voice and collective conscience of the **SAARCLAW** seminar in Thimpu, **SECURING ACCESS TO JUSTICE IN THE ENFORCEMENT OF HUMAN RIGHTS**, shall be duly heard, considered, taken into account and acted upon by the Governments of all Member States;

**NOW THEREFORE SAARCLAW HEREBY
UNDERTAKES THROUGH THE THIMPHU
DECLARATION:**

I. To facilitate courts to take suo-moto action so that free legal aid will be implemented. Fundamental rights relating to access to justice should be implemented even without a professional legal assistance.

II. To encourage senior members of the legal profession throughout the region to devote a specified amount of time each year for pro bono work and to legal aid cases, thereby using their expertise and standing with the judges to help gain redress for the poorest and most vulnerable.

III. To begin Legal aid clinics at law universities wherein senior law students mandatorily address legal aid cases thus assisting the poor and vulnerable and creating a cadre of young lawyers grounded in professional ethics and civic responsibility.

IV. To facilitate collaboration between the Bar Councils of each country and government institutions.

V. To provide effective support to civil society organisations to conduct outreach campaigns, which inform people about their legal rights and legal aid mechanisms that are available to them.


VI. To progressively work towards creating mechanisms that act as effective Alternative Dispute Resolution systems in the region.

VII. To commit to creating an enabling legal environment for the promotion and protection of women's full enjoyment of all human rights, and to actively support the development, dissemination and enforcement of legal protections for key HIV affected women and girls in countries in the SAARC region, including protection from violations of their rights at healthcare and other institutional settings.

SAARCLAW Seminar Synopsis

(Securing Access To Justice In The Enforcement Of Human Rights)

The SAARCLAW seminar, recently held in Thimpu was inaugurated by the **Hon'ble Chief Justice Sonam Tobgye, the President of SAARCLAW**. The event opened with a welcome address by the **Hon'ble Justice Tshering Wangchuk** followed by an address by the **Secretary General of SAARCLAW, Mr. Hemant K Batra** and then the presidential address by the president of SAARCLAW.



"Barriers include, intimidating court procedures and inadequate legal aid services"

Session 1: Identifying Pathways And Barriers For Disadvantaged People To Access Justice, And Enforce Rule Of Law.

The first working session saw the delegates grappling with issues relating to pathways and barriers for disadvantaged people to access justice. Delegates agreed that a critical gap exists between what is written on paper and the reality for many on the ground. **Mr Yadnan Rossy (Bangladesh)** spoke about specific systemic barriers relating to access to justice in the formal legal system of Bangladesh. These included extreme delays in provision of justice; lack of provision of adequate, timely, non-discriminatory, just and deterrent remedies; gender bias and other barriers in the law and legal systems; lack of adequate information and knowledge about rights; outdated laws and outdated language; politicization of the legal sector; lack of well trained and properly incentivised lawyers, judges and court staff; Ineffective law enforcement authorities and lack of independence

of the judiciary. He suggested that effective reforms leading to access to justice require an integrated approach which prioritises protection of rights, especially those of the poor and disadvantaged. Strengthening capacities to seek remedies through formal and informal mechanisms is critical. In addition he suggested that institutional capacities needed to be strengthened in terms of providing remedies and improving systems related to adjudication, due process, and enforcement mechanisms such as police and prisons.

The issue is not simply whether protective laws exist, but rather how they are enforced. In this regard the **Hon'ble Justice Khandu (Bhutan)** presented an overview of specifically vulnerable populations in Bhutan and explained how, despite Constitutional guarantees of equal treatment before the law, many groups of people still find it very hard to access justice.

He explained how barriers include few legal firms, intimidating court procedures and inadequate legal aid services. In addition lack of infrastructure such as roads linking up remote areas means that people may need to walk for days to reach courts. There is also a high level of illiteracy amongst the rural population and people are generally unaware of their legal rights.




Dr Ranbir Singh (India) addressed the issue of the courts in India and spoke about how the Supreme Court has ruled that the idea of the right to justice includes the right to access to courts of law. As he explained, "the right under Article 32 to petition the Supreme Court for enforcement and protection of fundamental rights is itself a fundamental right." The right to legal aid in India is also entrenched for a wide variety of people with special needs including children, women, persons in custody and labourers. He

explained that every High Court and Supreme Court in India has its own legal services committee tasked with providing effective and quality legal aid. However, there is still a massive dearth of services compared to the numbers requiring legal aid. Dr Singh also spoke of solutions to the problems including the role of technology and the instrumental role that could be played by law schools in India in terms of law students taking up legal aid cases.

The **Hon'ble Justice Kalyan Shrestha (Nepal)** spoke about how important it is to consider that even where legal aid exists it may not be reaching the people who really need it. He suggested that although the SAARC region harbours a vast percentage of the world's poor, we seldom talk about the rights of the under privileged. We need to talk about the quality and quantity of legal

aid services and look at models like the US one where 'code of conduct' type provisions apply to legal aid centres.



"The media can play a huge role in securing access to justice and bringing down barriers."

Mr Mehmood Mandwivalla (Pakistan) spoke about how

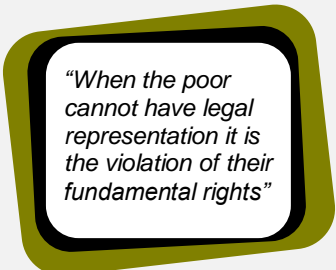
corruption within the judiciary or cases wherein the judiciary themselves are obstacles to justice is the most problematic situation. Unchecked judicial powers, he suggested could be likened to judicial terrorism and must be distinguished from judicial activism. He suggested that the media can play a huge role in securing access to justice and bringing down barriers.

During the discussion session one participant asked **Justice Kalyan Shrestha** how far the guidelines of the Supreme Court of Nepal are effective in protecting the victim of rape when there is no proper legislation. To this issue, Justice Kalyan answered that the guidelines of the Supreme Court are the interim measures before the appropriate legislation is passed. Another participant

raised an issue of judicial activism vs judicial terrorism in States. The speaker stressed that we should speak about judicial dynamism, which could be important in facilitating access to justice but caution must be used in terms of the doctrine of separation of powers. Judicial dynamism includes persuading the government to draft and pass appropriate legislation in areas where it is missing. Many participants highlighted that one basic barrier of access to justice is the attitude of the judiciary itself.

One of the participants suggested that a more proactive media could help address these issues.

Session 2: Specific Justice Needs Of Under-Privileged People: Legal Service And Legal Aid Interventions




“When the poor cannot have legal representation it is the violation of their fundamental rights”

During this session, **Mr. Tariful Islam (Bangladesh)** described the situation in Bangladesh, where, they have been working during four decades of independence on eradication of poverty and access to justice for people in need. The history of legal aid (free advice at the expense of the state) is as old as that of law. The Constitution of Bangladesh envisages the right to equal access to law, therefore, when the poor cannot have legal representation it is the violation of their fundamental rights.

In practical terms he suggested that legal aid should include all incidental costs and that there should be awareness, monitoring and follow up making legal aid providers accountable.

Judge Jangchub Norbu (Bhutan) suggested, in his speech, that the question we should ask ourselves is to what extent does legal aid meet the ends of access to justice? Principles enshrined in the Constitution such as equality before law, the right to legal counsel and the right to a fair trial cannot be enjoyed without the provision of legal aid by the state. 23.5% of Bhutanese people are poor and therefore legal aid is relevant in terms of what courts can do




“If the state fails to act, the judiciary should step in”

to help the under privileged such as waiving court fees for poor people. At the same time, if the state fails to act, the judiciary should step in, activating Constitutional provisions and various relevant laws. He suggested that translating the letter of the law would involve the Government taking various measures such as formally

establishing a legal aid centre, allocating sufficient resources for the centre and encouraging lawyers and legal firms to provide pro bono legal services to those in need.

In the same session, **Ms Yashita Munjal (India)** spoke about specific needs of victims of domestic violence in India. She outlined the fairly comprehensive legal framework protecting women in India as well as the available legal aid services for women. However, she pointed out that research has demonstrated that abused women who seek formal legal help are generally more vulnerable to heightened abuse from partners and/or families. Therefore, she suggested that other than lifting the financial burden from women, a holistic approach looking at housing and awareness raising is also very important. Another suggestion aimed at improving women’s access to justice in these cases was the setting up of a domestic violence court, acting as a specific forum with an integrated approach to the issues and streamlined procedures.

Mr Ali Zafar (Pakistan) delivered the final presentation of this session. He spoke about how legal aid should actually be called “legal duty.” Millions of people require legal aid but are denied



“Legal aid should actually be called legal duty”

justice by the system due to lack of money. He made the pertinent point that perhaps it was time to stop speaking about the government’s failure to successfully deliver legal aid to the needy and start looking within the legal profession. He said that if Pakistan as a nation cannot

provide capacity to people to come to court, then the society is inherently unjust. However, it is also incumbent upon those in the legal profession to do their part to change things. In this context he suggested that if prominent lawyers were to commit a certain amount of time each year to legal aid cases, this would go a long way to alleviating the problem.

During the discussion session one participant asked how awareness could be raised amongst the general population on issues of access to justice. Dr Singh answered that the National Law School on Delhi does this in three ways, namely by discussing legal issues on TV channels; awareness raising within communities; and a legal helpline.

The other issue raised was that of alternate dispute resolution mechanisms and a point was made that this can work but can also be abused. For instance in Pakistan there have been cases which have been presented before local community level councils resulting in extremely harsh penalties which violate human rights norms. In Bhutan ADR is linked with the judicial process and local government bodies deal with it.

Session 3: Poverty, Patriarchy and Women's Vulnerability to HIV/AIDS and HIV/AIDS and Enabling Legal Environment for Poor, Vulnerable and the Marginalised

"Reducing the vulnerability of women to HIV/AIDS requires a holistic approach towards prevention and care"

This session was a joint one addressing women's vulnerability as well as the issue of promoting an enabling legal environment for poor and marginalized people.

Sharmin Akhter (Bangladesh) spoke about intersecting inequalities that women face in Bangladesh, leading to their increased vulnerability to HIV and AIDS. In a patriarchal society where women's access to critical assets such as education, land, labour and capital and financial services like loans are limited, women are disempowered and more vulnerable to destitution and disease. She suggested that reducing the vulnerability of women to HIV/AIDS requires a holistic approach towards prevention and care. The most important element of this would be raising public awareness to change discriminatory social attitudes and providing access to information for women. This would lead to women becoming more self confident and participating more in decision making related to her own health and family.

Kaniz Fatema (Bangladesh) spoke about specific groups in Bangladesh who are most vulnerable to HIV and AIDS due to societal discrimination and institutionalized inequality. These include, injecting drug users, men who have sex with men, women, sex workers and migrants. She spoke about how discrimination is rife within economic and healthcare institutions

and also about laws which entrench discrimination such as Section 377 of the Penal Code which criminalises homosexuality.

She also put forward certain recommendations including:

“Tackling poverty must be specifically addressed at the planning stage of a programme”

- Tackling poverty must be specifically addressed at the planning stage of a programme and be continually monitored.
- Government should play a more

facilitative role in developing the capabilities of NGOs since they have been found to be more effective in service delivery in Bangladesh.

- NGOs should be encouraged to use a human rights framework to guide their programmes and devise measurable indicators so that progress against goals can be assessed.
- Advocacy efforts to address legal barriers against sex work and MSM must continue.
- Community-based organizations need to be strengthened to articulate their own agenda based on constructions of socially-devalued identities and categories, motivations for high-risk behavior, influences on access to healthcare and social stresses.
- Linkages among activists and groups, such as Parliamentarians for Global Action and Support Social Group on Prevention of HIV/AIDS and Human Trafficking, should be strengthened.

Brianna Harrisson from **UNAIDS** and **Nashida Sattar** from **UNDP** presented data on violations of women’s rights in healthcare settings. They explained that the fundamental rights of HIV affected women and girls- including women and girls living with HIV, female drug users and female sex workers, - are often violated at institutional settings including at health care settings. Evidence shows that many women and girls affected and impacted by HIV find that their right to the highest attainable standard of health, the right to found a family and the right to be

free from discrimination on the grounds of sex or HIV status are regularly violated. Examples include forced and coerced sterilization, forced or coerced abortions, denial of access to sexual and reproductive health services, and being subjected to violence, abuse and discrimination in healthcare settings.

“Around 5-9% of people living with HIV were coerced by a healthcare professional”

They quoted the Asia Pacific Regional Analysis of data from the People Living with HIV Stigma Index, which showed that around 5-9% of people living with HIV were coerced by a healthcare professional into being sterilized (9% Bangladesh, 9% Sri

Lanka and 5% Pakistan). The same report also showed that between 33% to 44% of people living with HIV had been advised by health care professionals not to have children after being diagnosed with HIV (44% Sri Lanka, 35% Bangladesh and 33% Pakistan).

As they pointed out, such advice is contrary to the human right to the highest attainable standard of physical and mental health, and the right to decide freely the number, spacing and timing of children, and to have the information and means to do so. It is also a clear demonstration of discrimination on the grounds of HIV status, which is a violation of human rights.

This session also enabled participants to hear from **Sapana Pradhan Malla (Nepal)**, former Member of Parliament in Nepal, on the continuing challenges within the country to ensure rights for women and marginalized populations.

Ayesha Mago (SAARCLAW) spoke on behalf of SAARCLAW about a collaborative project that had been carried out by SAARCLAW and TSF South Asia, funded by UNDP. This project which dealt with ‘Scanning of Laws that Impede Effective HIV and AIDS Responses In India’, involved four regional consultations

wherein key stakeholders including local government functionaries, NGOs, CBOS, PLHIV and key marginalized groups such as sex workers, transgender people, men who have sex with men and drug users were invited. She explained that the feedback and experiences of these stakeholders was recorded and incorporated into the final report.

The report provided a comprehensive overview of the laws impeding an effective HIV and AIDS response, reflecting the situation on the ground, the latest court judgments, the realities of affected communities and the views of key stakeholders working in the field in India.

Finally, **Sana Ifthikar** spoke about her work regionally with SAARCLAW and the International Development Law Organisation and the research she has carried out on positive laws that can be used to protect MSM and transgender communities in Pakistan.

Special Session : South Asia Initiative to



End Violence Against Children


Dr Rinchen Chopel, Director General of the South Asia Initiative to End Violence Against Children (SAIEVAC) spoke

about the work that SAIEVAC does, the Regional Initiative on Ending Corporal Punishment and the possibilities of collaboration with SAARCLAW and the countries of the region.

He explained that SAIEVAC'S central vision is that all children, girls and boys, throughout South Asia should enjoy their right to

an environment free from all forms of violence, abuse, exploitation, neglect and discrimination.

SAIEVAC'S Key focus areas are to:



*“Institutionalize
meaningful
participation of
children”*

- Promote better understanding and monitoring of child protection Issues
 - Support legal reform and develop national plans and policies
 - Build capacity and awareness of children, government representatives and civil society organizations
- Institutionalize meaningful participation of children

Since SAIEVAC aims to promote and reinforce regional cooperation and integrated national strategies toward their broader goal of ending violence against children in South Asia, they are hoping that collaboration with SAARCLAW will be a positive step in this direction. Dr Chopel ended his presentation by stating that they hoped that the meeting in Thimpu would lead to the following results:

- A framework of Cooperation or MoU with SAARCLAW
- Legal Review and Reform with the aim to identify gaps and challenges and opportunities for harmonization
- SAARCLAW – SAIEVAC Seminar on existing legal framework for Child Rights and Child Protection
- In the long term efficient human resource development



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