

*Abul Hasnat Monjurul Kabir*

## **PROTECTION AND PROMOTION OF HUMAN RIGHTS AND THEIR ENFORCEMENT MECHANISMS IN SOUTH ASIA**

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### **Introduction**

There has been a quest for effective realization and enforcement of human rights in different societies from the dawn of human civilization. However, the concept of human rights was for long solely viewed as a matter entirely within the domestic jurisdiction of the states to grant or deny to their citizens and, as such, was not subject to interference from any outside pressure. In course of time, as a result of the work of international, regional, governmental and non-governmental organizations around the globe, human rights transcend national boundaries and jurisdictions and thereby, go beyond the limits of municipal public law, falling a matter of international concern to be promoted and protected within the framework of international law. It should be mentioned here that the protection of human rights of the people is much more difficult than either defining them or adopting declarations, bills and covenants concerning human rights. The major problem is that neither the United

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**Abul Hasnat Monjurul Kabir**, a graduate student at the Department of Law, University of Dhaka, is in charge of the 'Law & Our Rights' page of the *Daily Star*, Bangladesh. This article is a revised version of a paper presented in the Fifth SAARC LAW Conference held in 27- 29 December 1996 in Dhaka.

Nations nor any other organization in the world has the power to force nations to honour all the rights of their citizens. The implementation of international human rights standard depends for the most part on the voluntary consent of the nations and their true willingness to implement such standard in their respective jurisdiction and arena. But in absence of national institutions, regional initiatives and any effective international mechanism either to protect or to implement them, those standards and rights could be limited to rights in paper only.

Since we live in a system of nation states, ultimate answers shall, therefore lie in building national institutions for implementation and protection of human rights through various mechanisms. This will need continuous re-enforcement both in accepting the norms as well as in developing enforcement for substance and development of these norms in national, regional and international arena. Indeed human rights are now on the national, regional and international agenda of action. We have the European Community, the African Community, the American Community and above all, the international community, ideologically accepting values and principles emanating from the United Nations. We have thus some foundational and structural beginnings already before us. But their finer formulation and regional adaptation through appropriate mechanisms is a task daunting but necessary. South Asia must devise a blue print for ensuring human rights with a touch of relativity and appropriateness but without deviating from those political, social, cultural and economic essentials. Human rights activists, socially sensitized jurists and the legal and judicial professionals as well as non-governmental organizations have summons from the dear, desperate humanity of our century to explore and concretize ways and means of making human rights a living reality of the homosapiens in the SAARC region.

In this paper some of the formal mechanisms under a fresh dynamic approach and the informal trend testifying reality of

human rights enforcement mechanism are discussed in depth in the South Asian perspective. The objective of this paper is to highlight some means of enforcing human rights at the respective national levels so that commitments of the states of this region to various international bodies, conventions covenants etc. for protecting and enforcing human rights can not remain as a mere piece of paper in the absence or silence of instrumental structures or mechanisms.

### **The Genesis of Human Rights**

*"Come, you whom my Father has blessed, take for your heritage the kingdom prepared for you since the foundation of the world. For I was hungry and you gave me food; I was thirsty and you gave me drink; I was a stranger and you made me welcome; naked and you clothed me, sick and you visited me, in prison and you came to see me.*

*Lord, when did we see you hungry and feed you; or thirsty and give you drink? when did we see you a stranger and make you welcome; naked and clothe you; sick or in prison and go to see you?*

*I tell you solemnly, in so far as you did this to one of the least of these brothers of mine, you did it to me"*

**Mathew 25: 34-40**

The expression 'human rights' had its origin in international law, appertaining to the development of the status of an individual in the international legal system, which was originally confined to the relation between sovereign states, who were regarded as the only persons in international law. For all practical purposes, the genesis of this international aspect of human rights is not older than the Second World War, though the concept of an individual having certain inalienable rights as against a sovereign state had its origin in the dim past, in the some what nebulous doctrine of natural law and natural rights.<sup>1</sup>

1. D. D. Basu, *Human Rights in Constitutional Law*, New Delhi, Prentice Hall of India Private Limited, 1994, p.1.

Human rights were typically called the rights of man or as stated earlier, natural rights. Thomas Paine may have been the first to use the term human rights, in his English translation of the French Declaration of the Rights of Man adopted by the National Assembly of France in 1789 which prefaced the Constitution of 1791. Later, in accordance with the suggestion of Eleanor Roosevelt, the term human rights has been used in English text of the Universal Declaration adopted by the General Assembly of the United Nations on 10 December 1948.<sup>2</sup>

In fact human rights are those minimal rights which every individual must have against the state or other public authority by virtue of his being a 'member of the human family', irrespective of any other consideration. Human rights are the ultimate legitimate basis for a universal human community. They "represent minimal moral standards for human society"<sup>3</sup>. The possession of human rights is the principal means for maintaining a notion of human dignity. "Human rights are concerned with the dignity of the individual ..... the level of self-esteem that secures personal identity and promotes human community."<sup>4</sup> Since human rights inhere universally in all human beings and the principal means for preserving a notion of human dignity they, unlike other 'possessions' can not normally be traded off. "Universal inherence" and "inalienability" are the two principal features which distinguish human rights from other rights.<sup>5</sup> In defining what we mean by human rights, we may emphasize on three most funda-

2. Alan, S. Rosenbaum, "Philosophy of Human Rights", *International Perspective*, 1980, p. 9.
3. Morris B. Abram, "Freedom of Thought, Conscience and Religion," *Journal of the International Commission of Jurists*, Vol. 8. No. 1 1967, p. 40.
4. Abdul Aziz Said, "Pursuing Human Dignity," *Human Rights and World Order*, 1978, p. 1.
5. M. Ershadul Bari, "The Rule of Law and Human Rights", *Law and International Affairs* (Journal of the Bangladesh Institute of International Affairs), Vol. 13. No. 1 & 2, 1990, p. 61.

mental categories of human rights: Firstly, the rights to be free from governmental violation of the integrity of the person such as torture, cruel, inhuman or degrading treatment or punishment, arbitrary arrest or imprisonment, denial of fair public trial. Secondly, the right to the fulfillment of such basic needs as food, work, shelter, health-care and education. Thirdly, the right to enjoy civil and political liberties, freedom of thought, of religion, of assembly, of speech, of the press and freedom of movement both within and outside one's own country<sup>6</sup>.

### **Protection & Promotion of Human Rights: The Global Response**

*"The participating states emphasize that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern as respect for those rights and freedoms constitute one of the foundations of the international order. They categorically and irrevocably declare that the commitments under taken in the field of the Human Dimension of the CSCE are matters of direct and legitimate concern to all participating states and do not belong exclusively to the internal matters of the state concerned".* **The Declaration of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 3 October, 1991.**

The quest for human rights and human dignity is a phenomenon of contemporary life of universal dimensions and immense significance. The concept of human rights is a concept of world order. It is a determination for so structuring the world that every individual human worth is realized, and every individual's human dignity is protected. And this concept and trend is nothing new. From Humuravi to the Tablets of the Asoka

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6. Abdur Rahman Chowdhury, *Democracy, Rule of Law and Human Rights*: Kamini Kumar Dutta Memorial Law Lecture, University of Dhaka, Dhaka, Bangladesh, 1993, p. 35.

Pillars, from the Ten Commandments to the Speech at the last pilgrimage (The last Hajj), from the sayings of Manu to the Magna Carta to the French Declaration of 1789, in many ways depicted principles of a continuous thread of Humanitarian Law and Edicts. This continuity is synonymous with the development of human civilization in its totality<sup>7</sup>.

Historically, concern for the protection of human rights found expression almost exclusively at the national or domestic level in accordance with the varying notions of changing times. Even in the national sphere prevailing power structures in many countries resisted acceptance, beyond the purely metaphysical or philosophical, of the very notion of human rights, the dignity of human person and the humanity of man. Violations occurred and were wide ranging. As a result, great popular upheaval took place and gave birth to charters in some states e.g, Magna Carta, the French Declaration of the Rights of Man and of the Citizen etc. These instruments were by modern standards, undeniably limited in content and focus and were not perceived and being of universal application though they undoubtedly inspired and influenced reform in many countries in the field of human rights.

After the First World War, however the beginning of universality, though still restricted in content and scope, began to emerge. This was, in great measure, due to the founding of the League of Nations and the imposition of certain safeguards in peace treaties in the treatment of minorities. But it was not until the aftermath of the Second World War that the international community became dramatically convinced of the real and pressing need to protect and promote human rights. the promotion and protection of human rights were seen as an integral and essential element for the preservation of world peace

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7. Lutfur Rahman, "Why Human Rights", *Continuing Legal Education Programme Bulletin* (CLEP Bulletin- Special H. R. T. P. Edition), Vol. 3, No. 2, April 1996, p. 42.

and co-operation, not only within the confines of particular states but universally. To achieve this end the need was also felt to create the necessary mechanisms to deal with the highly complex questions that would inevitably arise in the systematic quest for generally acceptable norms and their implementation within all national jurisdictions. The creation of United Nations system after the Second World War provided a permanent structure for systematic work in the fulfillment of its mandate.

Following the horrors of the Second World War which humanity had inflicted upon itself and possibly, as well, the need felt to extend to everyone the benefits of the protection given to minorities in terms of those provisions of peace treaties which had been imposed on certain states in the inter-war period, the promotion and protection of human rights were seen as an inseparable part of the principal objectives which states set for themselves [Article (3) and (4) and 55 of the UN Charter]. To achieve this end, they pledged themselves "To take joint and separate action in cooperation with the organization" for the achievement of that objective (Article 56 of the Charter). Further within the system, each functional machinery was specifically assigned particular tasks (ECOSOC and its subordinate bodies, specially the Commission on Human Rights and its expert Sub-Commission) to assist the General Assembly in its quasi-legislative functions in the human rights field (adoption conventions, some eventually with independent treaty supervisory bodies like the Human Rights Committee, adoption of resolutions or declarations of general application). In addition, there was the general mandate of the General Assembly to ensure that the pledges of Article 56 were fulfilled by states in which the situation of human rights became a matter of concern to the international community<sup>8</sup>.

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8. Rajsoomer Lellah, "International Human Rights Norms", *Developing Human Rights Jurisprudence* (The Domestic Application of International Human Rights Norms), Human Rights Unit, Commonwealth Secretariat, 1988, p. 3.

### **The South Asian Context**

South Asia is the land of one fifth of the mankind, an agglomeration of diverse nationalities, ethnic communities and cultures, which inherited a common legacy from the centuries-old pre-colonial and colonial period<sup>9</sup>. In term of human development index, the countries of South Asia occupy almost the same position. Wide-spread illiteracy, low position of women, child malnutrition, low wages, poor health services, heavy incidence of external debt, unfinished agrarian reforms, fallout of structural adjustment programme at the behest of the Fund-Bank, high military spending, discrimination against the indigenous peoples and the minorities, communal tension, migration all these are but some of the problems facing South Asian region as a whole.

There are remarkable differences also. Differences in size of territory, population and natural resources endowment are high. Ethnically, countries are diverse from each other. Development of civic politics and of popular movement for democracy and justice also varies from country to country. Yet there are numerous elements of unity in diversity. And often similarities, override the dissimilarities and differences.

Democratic institutions with acceptable level of accountability and transparency are very weak in the region and are still confined within the narrow limits of franchise. The vast majority of the population are treated as mere objects by the state and by its so-called local and global guardians. The states as they exist today, are hegemonic to their peoples. Due to their divisive policies and coercive activities, South Asia has become a hot-bed of communal and ethnic violence, trafficking of women and children, wasteful arms race and state terrorism. The people at the grassroots are increasingly being marginalized by the states and its dominant classes.

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9. Mohiuddin Ahmed, *Emerging South Asian Perspective*, Dhaka, Bangladesh, Nabodhara, 1996. p. 48.



Human rights record in the region is poor in any acceptable standard, states are at loggerheads which obstruct free flow of the people and information. Rights are being curtailed and the militarism is rationalized on the false premise of "national security". Violence of the dominant groups patronized by the state functionaries is unleashed to weaker groups in terms of language, religion, ethnicity and sex. The situation of women in all countries is precarious. During the British reign, Indian sub-continent encountered the horrific and draconian experience of several repressive laws such as Indian Safety Act. The British Raj promulgated those legislations in order to suppress nationalist movements and political dissent against colonialism. After independence in 1947, this subcontinent also witnessed a similar kind of narrowing of democratic practices. Various kinds of legislations which are anti-people in nature were promulgated in the narrow interest of the government and the ruling class. This unfortunate trend is still continuing. And numerous people became victims of human rights violations under the repressive laws e.g., Armed Forces (Special Powers) Act 1958, the Terrorist and Disruptive Activities (Prevention) Act 1985 (now annulled) etc. of India; the Public Security Ordinance 1947, the Prevention of Terrorism (Temporary Provisions) Act 1979 etc. of Sri Lanka; the Special Powers Act 1974 of Bangladesh; Maintenance of Public Order Ordinance, prevention of Anti-National Activities 1974 etc. of Pakistan are some instances of repressive laws.

In most of the South Asian countries big projects like dams, roads and structures funded by World Bank, IMF, ADB have already started to backfire against the people of the South Asian region. The states are failing to protect the rivers and the habitat and also have denied the customary rights of the people over the natural resources and almost destroyed their livelihood patterns and thereby making them displace.

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10. Adilur Rahman Khan & Zaved Hasan Mahmood, "National Security Laws in South Asia & Violation of Human Rights". (Mimeo)

As earlier mentioned, since women are most vulnerable, mostly uneducated and economically disadvantaged, the targets of the fascist and fanatic shadus, Mullahs and priests are generally women and pro-women activists in the region. Because of their anti-development fascist and fanatic philosophical position they tend to prevent grass-root level development programmes, such as primary education, health-care, family planning, women's literacy programme and confront with the workers of the village level development organizations. Frequently they issue '*fatwa*' (so called religious sermons) against women's natural rights.

The partition of the sub-continent in 1947, Bangladesh's Liberation War of 1971, Tamil people's movement in Sri Lanka, continuing ethnic strife in Karachi and ethnic issues in Bhutan have made millions of refugees in this South Asian region throughout the decades. Displacement by so-called development activities has also been instrumental in making many more people internally displaced and refugees in their own home country.

In South Asia, courts are regarded as the principal and in some cases sole means of enforcement of human rights. But they have already been overburdened with its original jurisdictional functions and duties. Protection, promotion and enforcement of human rights are a huge task and no single formal system of justice like the courts can cope with the situation. This is not the question of emotion or less reliance on the courts but this is a reality. Today across the world, the importance of facilitating access of the disadvantaged to legal and administrative bodies and the value of informal and inexpensive means of redress have been highly emphasized. Even the formal and rigid justice delivery system e.g., the judiciary is trying to assume a new activist role through its dynamic activism which in past could never have been imagined. The object of this paper is as already mentioned, to highlight the present scenario of South Asia regarding the pro-

tection and promotion of human rights and their enforcement mechanism.

### **Judicial Activism: A New Dimension in Human Rights Enforcement Mechanism**

*"Judicial Activism is like a sharp-edged tool which has to be used as a scalpel by a skillful surgeon to cure the malady not as a Rampuri knife which can kill".* **J. S. Verma, Indian Supreme Court Judge in the Jain Hawala case, India Today, March 15, 1996.**

Judiciaries in South Asia is trying to adopt an activist, goal oriented approach in the matter of interpretation of fundamental rights. The judiciary has expanded the interpretation of fundamental rights and in the process rewritten some parts of the Constitution through a variety of techniques of judicial activism. The Supreme Court in India has undergone a radical change in the last few years and it is now increasingly being identified by justices as well as by people as "The last resort for the purpose of the bewildered". The transition from traditional captive agency with a low social visibility into a liberated agency with huge socio-political feasibility is an interesting development in the career of the Indian appellate judiciary. The Supreme Court of India has through judicial activism found a new historical basis for the legitimization of judicial power and acquired a new credibility with the people. This development has been the result of intense social activism on the part of some of the justices of the supreme court of India.<sup>11</sup>

In highly evolved legal systems, such as in the U.S., the judiciary drew succour from as well as assimilated public opinion and stated it as a legal principle even if it meant renegeing on

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11. P. N. Bhagwati, "Fundamental Rights in their Economic, Social and Cultural Context", *Developing human Rights Jurisprudence*, Human Rights Unit, Commonwealth Secretariat, 1988, p. 63.

earlier pronouncements. For example, as public sentiment changed in the 1950s, an activist Supreme Court was a formidable moving spirit behind the Civil Rights Movement where nearly a century earlier it had given racial bias a clear sanction under the law. In the US a good or bad judgment becomes the subject of constant debates in society law schools. In the words of the eminent Harvard law professor Paul Freund, the role of the Supreme Court is "Ultimately that of a moral teacher".

In most of the South Asian countries necessary institutional crutches or balances are missing. And the only real checks are public opinion and the press. If the courts fail in their duty or display gross malafides in upsetting constitutional norms, there is one reason why public opinion and the press will not sway towards Parliament and the Executive.

The Hawala Scandal is by no means any definitive indicator of who is corrupt and who is not. It is in essence a historic symbol of an institutional overhaul that was long overdue. A churning of the democratic process in which the thrust of enlightened public opinion spiced with a dose of political opportunism and activism of the Supreme Court have converged to restore a modicum of moral authority to a system. One that has been rapidly deteriorating into a brazen display of naked political power without accountability to real sovereigns of land- the people. For the Supreme Court of India to be virtually dictating terms to the Central Bureau of Intelligence (CBI) in the Hawala case- in other words, telling the executive to do its job-is a reflection of a systematic breakdown of the other branches of the Government. The Supreme Court has chosen to play is no accident. Its emergence as the grand arbiter for the sake of enforcing human rights and human dignity and welfare of the vast majority of people notwithstanding the fact that the judiciary is itself burdened with some of the same problems that afflict other limbs of the Government is a matter of constitutional dialectic.

All people need something to guide them. In their personal lives they may look to religion and religious books. In civil society, the constitution has a life of its own but it speaks only through institutions. And when one institution breaks down, another becomes more powerful - if parliament fails, the bureaucracy becomes more powerful, if the executive is weak, parliament assumes a stronger role. If both lose their credibility by abdicating their responsibilities then the courts begin concerning themselves not only with policies but also examining their wisdom and need.

What the Supreme Court of India is doing for the protection and promotion of human rights and the establishment of the organic accountability of the government for the first time is not without international precedent. In 1993, Italian judges became public heroes following the arrest of more than 1000 people, including cabinet ministers in a kickback scandal involving organized crime. Similarly heads rolled in France, Germany, Spain and in 1996, two former South Korean Presidents were given death sentence for assuming state power without any legal claim and basis and for other serious charges. In many of these countries people's movement backed the judiciary when it took the executive to task.

The judiciary in India has sincerely tried to give effect to the human rights norms embodied in the International Covenant on Civil and Political Rights (I. C. C. P. R) and the International Covenant on Economic, Social and Cultural Rights (I. C. E. S. C. R) have been incorporated into the domestic law by a process of judicial process of judicial interpretation. The entire law of bail was "humanized" by a judicial interpretation of Article 21 of the Constitution of India and the Supreme Court of India hold that a new insight should inform the judicial approach in the matter of

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12. Inderjit Bodhwar, "Swing of the Pendulum" *India Today*, 15 March, 1996, p. 108.

pre-trial release. If the Court is satisfied after taking into account the information placed before it that the accused has roots in the community and is not likely to abscond, it need not insist on a monetary fund and may safely release the accused on a personal bond. The human rights norm set out in the international instruments was thus translated into national practice.

India's "judicial" experiment with democracy has much to commend it. It invites access to the courts as interrogators of power and dispensers of substantive social and economic justice. It creates new ways of eliciting information and provides the possibilities of comprehensive remedies. Like all social experiments, it needs the discipline of integrity, due process and courage. The end result may not be cataclysmic in civil and political society or, by itself effect distributive justice. But it will create a responsive administration and mitigate harshness, arbitrariness and pain. Courts of justice are not in the words of an insightful Indian Supreme Court judge for powerful people with quibbling minds and long purses. It is an invitation for the disadvantaged and disempowered to redeem their faith in constitutional democracy, necessary if the constitution is to be ascribed a meaning consistent with justice.<sup>13</sup>

Through dynamic judicial activism which definitely includes extremely beneficial and co-operative attitude towards public interest litigation, the judiciary of India sets a milestone, opens a new horizon in the South Asian region. In fact what public interest litigation in India has done is to introduce a new concept of trusteeship of the public interest. Hitherto the common law reposed the protection of the public interest in the Attorney-General who alone could represent public causes in court. Restrictive rules of standing restrained ordinary citizens from voicing their public concerns and challenging the abuse of power

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13. "Put Our World to Rights", A Report By A Non-governmental Advisory Group, Commonwealth Human Rights Initiative, August 1991, p. 207.

and authority through the courts. No doubt, groups of citizens could get together as a class and pursue their collective rights. But the new public interest litigation procedure converts every citizen in India into a "Private Attorney-General". It links democracy to justice and seeks to make power subject to accountability. Though what the judiciary of India is doing (as already mentioned) in all these cases is not without international precedent - in South Asia, India alone leads and dominates in those respects.

Under the auspices of the new Constitution of Nepal (1990) the judiciary of Nepal starts its rescheduled new democratic journey which was earlier subservient to the monarchy. The activist role of judiciary of its neighbour (India) can not influence Nepal's justice delivery system so far. Due to prolonged and complex Tamil crisis, the judiciary of Sri Lanka has to function for long under emergency period which sometimes does not even enable it (the judiciary) to establish the very fundamental rights of the people let alone its being active and sensible to various issues of public interest.

The new-born democratic system influenced by feudal lords, military clique and strong religious and ethnic groups has not yet fulfilled the basic preconditions of an independent and enlightened judiciary in Pakistan. Moreover, the responsibility of applying Sharia Law also creates obstacles and credibility crisis for the judiciary of Pakistan. As such application raises serious questions in the public and treated in many cases as arbitrary and contrary to the notion of democracy and human rights by various citizens' groups.

Unlike Nepal, Sri Lanka and Pakistan, the judiciary of Bangladesh attained some remarkable progress though at slow pace towards judicial activism and in shaping public interest litigation particularly in environmental matters. The judiciary, especially the highest judiciary of the country that is the Supreme

Court has not been reactionary to appreciate to emerging need to conserve environment and human health besides playing a crucial role of protector or defender of conventional human rights.

The role of law and lawyers remains significant in protecting human rights since law is the mechanism for social engineering. The law, lawyers and judiciary have to earn the glory of being vanguard of human being as the part of the nature in performing duties to future generation and to non-human lives and entities too.

### **The Office of Ombudsman: An Effective Safeguard of Human Rights**

*"The mere existence of their offices means little. the men in the office are what counts. whoever holds responsibility for dealing with citizen's complaints must measure up to a very big job because most assuredly the job of attacking administrative imperfections will not execute itself".* **Walter Gelhorn, Ombudsman and others, Page No. 43.**

In South Asia, maladministration, inefficiency, arrogance and abuse of power are built into the system of administration. The term maladministration covers a multitude of administrative sins, sins of commission and omissions. It is usually accompanied by the celebrated crossman catalogue of bias, neglect, inattention, delay, incompetence, ineptitude, perversity, arbitrariness and so on. The question of maladministration is crucial because neither Courts nor Tribunals can offer a remedy when private citizens complain that public administration although they have acted within the law, have failed to observe the proper standards of administrative conduct. These faults are treated as maladministration. Good governance, one of the major prerequisites of democracy, rule of law and human rights can not be established or in some cases, restored in presence of rampant



maladministration<sup>14</sup>. Therefore an urgent problem of the day is to evolve an adequate and effective mechanism to contain these dangers by controlling the administration in exercising its powers safeguarding individual rights and creating procedures for redress of individual grievances against the administration<sup>15</sup>. The prevailing administrative processes and mechanisms of control over administrative malpractices is not so effective and the circumstances call for an additional, more informal and a new technique like the officer of an external agency falling outside the administrative hierarchy, is absolutely necessary to detect and check administrative lapses and faults and to supervise the administration so that the rights of the individuals are not unduly jeopardized. And the office of ombudsman can be such an external, independent and effective agency to check the administrative excesses, red-tapism, arbitrariness, bias, corruption etc, which in many ways undermine human dignity and human rights.

The modern concept of ombudsman was first conceived in Sweden. The Swedish word 'Ombuds' means spokesman or representative. The office of Ombudsman was created first in 1809 when Sweden adopted a new constitution. The office was introduced to provide the RIKSDAG (Parliament) with a means to supervise the compliance with laws and ordinances by all judges, civil servants and military officers. Protecting the rights of individuals in their contacts with authorities is fundamental to the process of law in Sweden. The Swedish Ombudsman system is a guarantee against oppressive measures and misgovernance specially in the public administration and judiciary.

The Ombudsman as an independent arm of the legislature, assists it (legislature) in its function of maintaining the activities of

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14. Abul Hasnat Monjurul Kabir, "Ombudsman for Bangladesh: Problems & Prospects" Keynote Paper of the Seminar on *Ombudsman for Bangladesh* Organized by Law Review, 4 October, 1996, p. 1.
  15. Chandra Bansi Singh V Bihar. AIR 1987, SC. 1767.

government agencies and officials. The basic purpose of this system is to protect the human rights of the citizens. It is an answer to those who say citizens can not fight bureaucracy and red-tape.

The existing mechanisms for adjusting grievances in modern states are inadequate. In law courts litigations are expensive, tension-creating and protracted. Administrative Courts follow Court-like procedures. Executive complaint handling agencies lack the essential characteristics of independence. The Ombudsman provides the citizen with an expert and impartial agent who acts informally, without delay, without requirement of counsel and recommends corrective action. Thus the Ombudsman is known as "Citizen's defender", "Complaint commissioner" or as "Independent critic of the administration". According to Geard E. Laiden, the device is : "the institutional public conscience, the essence of what government ought to do".

So far there are 46 countries who have Parliamentary Ombudsman which also include our neighboring South Asian Countries like India, Pakistan, and Sri Lanka. In India they are known as Provincial Ombudsman (Lokayukta) as the idea of establishing Ombudsman at the central level has proved abortive so far for various reasons. In that they have Ombudsmen, most of them are justices of the High Court. In Pakistan, it has one Federal Ombudsman, a retired justice and a regional Ombudsman for each province. Recently, the Federal Ombudsman is empowered to prosecute all but the President by a Presidential Ordinance<sup>16</sup>.

Part 12 of the new Constitution (1990) of Nepal established a Commission for the Investigation of Abuse of Authority (CIAA) which conducts or causes inquiries into and investigates the improper conduct or corruption by a person holding any public

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16. The *Daily Star* 15 November 1996.

office. If the Commission finds that a public servant has misused his authority by improper conduct, it may admonish him, or forward a recommendation to the concerned authority in writing for taking departmental or any other necessary action. If such person has committed an act which is defined by law as corrupt, it may bring or cause to be brought an action against such person or any other person involved therein in a competent Court.<sup>17</sup> In fact, the Commission for the Investigation of Abuse of Authority (CIAA) functions as an office of Ombudsman in Nepal.

In Sri Lanka, it has one Ombudsman known as Parliamentary Commissioner for Administration. The Parliamentary Commissioner for Administration Act was passed in 1981 in the parliament of Sri Lanka. This Act has undergone a major amendment in 1994. Even an infringement of a fundamental rights or other injustice by a public officer, or officer of a public corporation, local authority or other like institution can be thoroughly investigated followed by proper action by the Parliamentary Commissioner for Administration in Sri Lanka<sup>18</sup>.

Article 77 of the Constitution of Bangladesh provides that parliament may by law establish the office of Ombudsman. Once established, the Ombudsman shall have the power to investigate any action taken by a Ministry, a public officer or a statutory authority and such other powers and functions as may be prescribed by Parliament. The Ombudsman shall prepare an annual report concerning the discharge of his functions and such report shall be laid before Parliament.

Being convinced by the fact that an institution like the Ombudsman would be essential for safeguarding the interests and rights of the public in Bangladesh from maladministration or

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17. Article 97-98 Part -12 of *The Constitution of the Kingdom of Nepal* (1990).

18. Section 10 (Part III) of *The Parliamentary Commissioner for Administration Act* (Act no 17, of 1981) of Sri Lanka.

administrative excesses, our Constitution makers have made such provision for it in our Constitution (Constitution of Bangladesh). But up to 1980, no definite attempt was made to establish the office of Ombudsman. In 1980, The *Jatiya Sangshad* (National Parliament) passed the necessary Act providing for the establishment of the office of Ombudsman<sup>19</sup>. But unfortunately the Act has not yet been brought into force and the office of Ombudsman has not been established though more than 17 years had passed since the passing of the Ombudsman Act.

Protecting the rights of individuals in their contacts with authorities is fundamental to the process of governance in all civilized countries. The Ombudsman system is definitely a unique guarantee against oppressive measures and misgovernance in the public administration. The existence of the Ombudsman institution in the South Asian countries will ensure the attainment of quick remedy and justice for the millions of destitutes- the real sovereign of the South Asian democracies.

The office of the Ombudsman can make an important contribution to the protection of human rights in the South Asian region. Being freely accessible and unencumbered with any rigid formalism or procedural constraints, it can provide people from every strata of society with a remedy against government officials which would otherwise not be available. In addition, the independent investigative power permits the taking of immediate action in defence of human rights.

Ombudsman of any country or system generally submits an annual report depicting his discharges of duties to the Head of the State. Annual reports to be given by the Ombudsman indicate that many complainants do receive a speedy and satisfactory determination of their cases. Indeed having the right to complain

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19. *The Ombudsman Act*, 1980 (Act No XV of 1980) Bangladesh Gazette, 9 April, 1980.

and to receive an explanation for a decision is in itself important. In addition the very presence of the institution may act as an incentive for government officials to perform their duties conscientiously.

The real success of the institution, no doubt depends, to a very large extent upon the support it receives from government. With increased international interest in the development of governmental accountability, the office of the Ombudsman may yet play a key role in the protection of human rights<sup>20</sup>.

The office of Ombudsman is just one more weapon in the stock of armory to control the arbitrary bureaucratic and administrative action. It will not be the panacea for all the ills that one finds in the society and such an expectation will be totally misplaced today but it can, if established thoughtfully, provide a relatively efficient form of remedy to the general public in certain circumstances in contrast to law courts which could either too expensive or time consuming or both. The office of Ombudsman is considered by many - to be an essential component of the national integrity of the respective countries of South Asia.

### **Activist Power: The Alternative Forum**

*"Though non government organizations or NGOs have long been around, they now are emerging as a bold new force for change. pressure groups are keeping governments on edge from Taipei to New Delhi. Whats more, they are being accepted-grudgingly perhaps as essential for the regions development".*

**Susan Berfield, Activist Power Hits Asia, Asiaweek, December 6, 1996, Page No 20.**

Life is suffering, the Buddha said, enunciating the first of his four Noble truths<sup>21</sup>. In South Asia it is a reality that troubles us

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20. "Put Our World to Rights", a Report by A Non-governmental Advisory Group, Commonwealth Human Rights Initiative, August, 1991, p. 202.

21. Raj Chengappa, "Angels of Change" *India Today*, 15 January, 1996, p. 79.

whichever street we live on, wherever we go. Homeless children imploring motorists at traffic lights for a few penny even as their tender lungs breathe in noxious fumes. The sick dying for want of medical care. The poor are deprived of their legal and fundamental rights as they can not seek justice from the judiciary due to huge expenses and for want of legal aid, the helpless people specially the destitute women are generally harassed by the law enforcing agencies. The opposition groups or activists of the government or party in power are often treated cruelly, ruthlessly. For millions in this region, the flame of hope is but a flicker.

As citizens of this country, there is much that each of us can do to prevent that flame from being snuffed out. Or to help it burn more brightly. Yet those of us who are better off appear paralyzed by the enormity of the problems confronting the region. We inure ourselves to the surrounding misery. It does twinge our conscience occasionally. But we soothe it by writing a cheque to a local charity or throwing a few coins into battered tiffin carriers. Usually we do nothing more. Let someone else pick the dying off the roads. Let orphans fend for themselves. Let the Government look after the poor helpless people. After all are we not paying our taxes?.

Even if we did want to do something we ask ourselves where do I begin: can I really be of much help? In his poem '*Road Not Taken*' Robert Frost hints at the answer:

*"Two roads diverged in a wood, and  
I took the one less travelled by  
And that has made all the difference".*

Since the end of the Second World War and most especially since the end of the 1970s, there has been explosive emergence of local, national and international voluntary organizations working for the promotion and protection of human rights on every continent and almost every country in the world. Hundreds of

such organizations now exist in the South Asian region. In fact things are changing dramatically. Various Non-governmental Organizations (NGOs) and groups of activists are now emerging as a bold new social force for change. Many of the groups are increasingly keeping South Asian governments on edge. Their goals are often lofty. They want to reduce poverty, improve women's status and empower them, safeguard the environment, protect workers from abuse and consumers from fraud, expose corruption, bolster human rights and defend democracy. They work in Asia's villages and slums, they offer credit, vaccines, job training and legal aid. In some countries these NGOs provide services that governments do not. They wield banners when necessary and wheedle officials when possible. Atrocities caused by the law enforcing agencies, death in police custody, rape committed by law enforcers etc. sort of brutal violation of human rights now can not pass on without NGOs' timely intervention.

These NGOs, in all their diversity comprise a human rights movement that has taken us from a world in which governments are free to treat their citizens as brutally, callously or arbitrarily as they pleased to one in which political authorities are now accountable to internationally defined standard of human rights. NGOs have been the dynamo that has driven the struggle for self determination, the struggle for democratic pluralism, and the struggle for a more just economic order.

NGOs in the human rights arena perform a wide variety of functions. These will vary with the differing political, social, economic and cultural situations in which NGOs find themselves. The issues that absorb human rights NGOs in the developed western democracies and the strategies and tactics they will employ, will be very different from the issues of NGOs in situation of intense political repression, or of NGOs in Third World countries facing such multiple crises as famine, ecological degradation, foreign debt, ethnic violence, lawlessness and corruption.

In a report by a Non-governmental Advisory Group (Put Our World to Rights) published by the Commonwealth Human Rights Initiative, the functions of the NGOs regarding the protection promotion and enforcement of human rights are summarized under the following nine heads:

1. Information Gathering, Evaluation and Dissemination (of Information).
2. Advocacy to Stop Abuses and Secure Redress.
3. Legal Aid, Scientific Expertise and Humanitarian Assistance.
4. Lobbying National and International Authorities.
5. Legislation to Incorporate or Develop Human Rights Standards.
6. Education, Conscientization or Empowerment.
7. Building Solidarity Among the Different Sections and Classes.
8. Delivery of Various Social and Technical Services.
9. Keeping Open the Political System.

Sadly, there is still a tendency on the part of the governments of the South Asian countries to regard human rights NGOs with suspicion, to equate their criticism with treason or subversion. Thus, human rights defenders in the forefront of the struggle are very much at risk in many areas of the world. The United Nations Commission on Human Rights has established a Working Group on Defenders with a view to drafting a declaration for the better protection of human rights organizations and advocates.

Human Rights NGOs are now also playing crucial role in shaping and flourishing the concept of public interest law. Besides activism, they go to court and take help of the formal justice



system. No doubt the whole South Asia will be seeing more NGOs in the near future because they do make a difference and for that millions of Asians are thankful<sup>22</sup>.

Along with the genuine Human Rights agencies, official or non-governmental, the Human Rights movement in South Asia is slowly advancing in the right direction. One should not forget that the road towards reaching the destination of Human Rights is very long, full of detours and patholes. Yet humanity has to reach the destination. One great stumbling block on this road is poverty and tendency and temptation to exploit poverty is rampant all over the world. Human rights has no meaning to persons with empty stomachs, with no shelter on their head, and nothing, practically nothing, to cover their shame.

The NGOs and activists took the path that many of us hesitate to take for want of time or caring. The road to change, as they found out is strewn with thorns. It is long and winding one, always uphill. But their journey has already made a remarkable difference to the lives of the people they wanted to help.

### **Human Rights Commission: A New Agenda For Action?**

*"It is a source of encouragement that in the human rights programme of the United Nations in recent years, attention has been given not only to dealing with violations, but to providing assistance to governments, at their request, in strengthening their laws and institutions for restoring respect for human rights, as well as providing assistance to victims of violations of human rights"*  
**Javier Perez de Cuellar, Former UN Secretary General, noted in his address of February 15, 1983 to the UN Commission on Human Rights.**

Frequent and serious violations of human rights across the South Asian region suggest that there should be suitable machi-

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22. Susan Berfield, "Activist Power Hits Asia" *Asiaweek*, 6 December, 1996, p. 24.

nery and structure to ensure effectiveness of human rights both domestically and internationally. Human rights need protection by national institution which, in turn, can only grow and sustain in atmosphere where fundamental democratic norms are respected. Observance of minimum standard is thus part and parcel of the institutions which can protect and implement them. One can not have right without institution nor can have institution without right. They are both inseparably meshed into one another both stemming from and feeding to each other at the same time.<sup>23</sup>

The states concerned are principally entrusted with ensuring human rights to people by the international community. However, if the state concerned fails to ensure protection to the people or if it violates the fundamental principles of the Charter of the United Nations and when the states are far from being protectors of individual's fundamental rights and become tormentors, the issue of international action becomes imperative. We are at the fine edge of the 21st century and the authoritarian regimes can not be allowed to advance the concept of sovereignty for undermining the rights guaranteed under the Constitution and by the instruments of the United Nations<sup>24</sup>. Effective mechanisms nationally and regionally are to be evolved and flourished for the sake of protecting, promoting and enforcing human rights specially at the administrative and judicial levels. The possibility of setting up regional court of human rights as has been done in Europe may be debated. A brief look at the European system can be of great help in this regard.

A prominent regional achievement is the European Convention for the Protection of Human Rights and Fundamental

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23. M. Amir-ul-Islam, "Problems of Enforcement of Human Rights in the Developing Countries", *CLEP Bulletin*, Vol-3, No. 2, (Special H.R. T. P. Edition), April 1996, P.19.

24. K. M. Sobhan, "Human Rights: Bangladesh Perspective", *Journal of International Affairs, Bangladesh Institute of Law and International Affairs* (B. I. L. I. A), Vol. 2, No. 1 & 2, January-June, 1995, P. 6.

Freedoms. The European convention established a Commission and a Court for handling both state and individual complaints. In some instances individuals are able to assert their human rights in courts or other appropriate forums. For example, the European Convention on Human Rights and the Optional protocol to the Covenant on civil and Political Rights establish specific procedures for the bringing of complaints by private individuals where the nation concerned has agreed to such a procedure. In the law of human rights, it has long been apparent that the mere creation of international standards may be meaningless if it is unaccompanied by appropriate institutional enforcement mechanisms at the transnational level. The European Commission and the Court of Human Rights of the Council of Europe, are generally considered to be the most effective existing enforcement institutions, inspite of their limited geographical scope.

The European Convention on Human Rights represents more than a common standard of achievement. It imposes upon the contracting state parties a certain body of legal principles which they are obliged to conform to. In specific cases compliance with this law is ensured by the integral part of the domestic law of many of the contracting state parties. The Conventions' provisions are deemed to maintain great validity whether or not prior legislation on the subject exists at the domestic level. The basic function of this machinery consists primarily of examining and determining whether domestic law as it stands complies with the provisions of the Convention. Although constructed upon tenets of traditional treaty law, the Convention Law transcends the traditional boundaries drawn between international and domestic law.<sup>25</sup>

Not only from the above consideration of the European system but also from international as well as national experiences,

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25. Muhammad Haleem, "The Domestic Application of International Human Rights Norms". *Developing Human Rights Jurisprudence*, Human Rights Unit, Commonwealth Secretariat, 1988, p. 99.

it seems that considerable progress in securing human rights can be made through the establishment of specialized bodies vested with general or specific responsibilities for enforcing them. The American Human Rights Commission has helped to educate the public in the importance of human rights and exposed systematic violations of them in a number of countries. New Zealand has achieved great success in promoting better racial understanding and relations through the office of the Race Relations Conciliator. India has a commission to watch over the progress in the amelioration of the conditions of members of economically disadvantaged communities. In the UK commissions on Racial and Sexual Equality have played important roles in education, research and enforcement of legislation in these areas.

In the third report (Rights do Matter), the Commonwealth Human Rights Initiative recommends "Traditional approaches to secure human rights through judicial enforcement are inadequate. Human rights commissions and economic and social commissions should be set up to make state and non-state entities aware of their responsibilities in the sphere of economic, social and cultural level rights" In South Asian countries setting up of Human Rights Commission dominates the agenda for action to enforce human rights. In 1994, India passed the Protection of Human Rights Act 1994 for better protection of human rights. Recently Sri Lanka has also passed an Act providing for setting up of a Human Rights Commission. But the Commission is yet to be established. In Bangladesh the present government is planning to set up a Human Rights Commission within a short span of time.

In South Asia the experience of India regarding National Commission of Human Rights can be examined as a brief case study. It was in the wake of criticism of India for suppression of human rights that the President of India promulgated an Ordinance on September 28, 1993 with a view to providing for the setting up of National Human Rights Commission, Human Rights

Commissions in states, and Human Rights Courts “for better protection of Human Rights and for matters connected therewith or incidental thereto.” Later on Parliament embodied the provision of the Ordinance into the Protection of Human Rights Act, 1993 (Act No. 10 of 1994). The Indian National Human Rights Commission does not render decision the way a court of law does. Nor can its recommendations be enforced like judgments of the Courts. Yet, that does not render the Commission impotent. So far its recommendations have been respected. Much more is the impact that its recommendations are having on the violators of human rights, and the wide publicity are having towards protection of human rights are itself a gain. Its actions, movement and recommendations having a tremendous impact politically and socially. The role played by the commission in the campaign against TADA is worth mentioning. The Union Government had decided to extend the controversial Act, a temporary legislation, beyond 23 May, 1995 when it was due to expire. But the positive stand taken by the Commission made it difficult and the Act lapsed. Even a substitute legislation could not be cleared for the Government by Parliament.

The basic objective of a Commission is to promote respect for and observance of human rights in the administration of the province or the state. This objective may relate either to particular instruments, domestic or international, or to human rights more generally. There are about five principal methods by which the Commission can discharge this objective. These are educational standard setting, review of legislation and administrative practices for compatibility with human rights provisions, dispute settlement and litigation.

The educational programme has been one of the most important tasks of existing Commissions. Material for education in human rights covering both the content of the rights and the procedure for complaints and enforcement have been prepared

for and used, including pamphlets, audio and video. A commission may also conduct and publish research on human rights in particular the problems in their realization which may require special legislation. A Commission may be required to report to the government any legislation which it comes across in its work and which it considers is incompatible with the provision for human rights. It may also make suggestions for its repeal or reform.

By far the greatest amount of the time of a Commission is taken up by its consideration of complaints made to it by individuals associations or NGOs of violations of human rights. Such a Commission provides a more accessible, informal and cheaper alternative to litigation between the parties, consistent with the observance of human rights provisions. Experience in some instances has been that these efforts are generally successful, but if not, the law may provide for the commission to issue binding directions. If this is the case, the law will also provide for a party dissatisfied with a direction to have it reviewed by the Courts-the ultimate authority.

Sometimes a Commission may be able to proceed to litigation, in support of a party. It would usually do so, to assist a party without adequate resources of its own, if the issue raised a question of great importance which had a general application. In this way the Commission can help in the clarification as well as the enforcement of the law. The Commission may also help in the clarification and enforcement of human rights law by establishing codes of conduct to guide various parties (e.g. employers, professionals, trade unions etc.)

It could be given a general responsibility to oversee the implementation of the provisions of a bill of rights and other specialized human rights type of legislation. It might discharge that responsibility in part by submitting an annual report to the legislature on the state of human rights with its own recommendations for more effective implementation. The National Human

Rights Commission of India is playing a constructive role in this regard. The effectiveness of a commission depends on the process of appointment of the executives of the commission, its strong and independent footing determined by the statutory Act, the willingness of the government and definitely on the role of the Commission people. Its finances should be provided directly by parliament. It should also be able to report directly to parliament and any administrative ministry or agency it thinks appropriate. The possibility of setting up a regional commission on Human Rights or even Court of human rights as has been done in Europe may be debated, but the issue of establishing Human Rights Commission at national level for rest of the South Asian countries has already gained due currency. India and Sri Lanka have already made much advanced in this regard. The possibility of a Regional Commission for the SAARC countries discharging its duties and obligations, though depends to a large extent on the situation and the composition of members from countries, to oversee the human rights position in the member states and inquire into violations and make necessary recommendations to the concerned states may be another effective mechanism to provide guarantee for the observance of human rights in the region.

### **Concluding Remarks**

Apart from the universal declarations and covenants, some regions in the world have their own conventions on human rights. There is an African Charter (The Bangul Charter) adopted by the Organizations of African Unity (OAU); there is the American Convention on Human Rights adopted by the Organizations of American States (OAS), and there is the European Convention on Human Rights from the Council of Europe. The Arab World has made a draft charter on Human and People's Rights but for the Asian countries no convention on human rights has been made.<sup>26</sup>

26. "The Right to Debate", *Conference Report on Human Rights and Development in Africa, Asia and Central America*, The Danish Centre For Human Rights, 1993, p. 47.

However, the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948 serves as the basic principles for the Asian countries as for other UN members. The same counts for the two covenants based on the Universal Declaration, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as far as the Asian Countries have ratified the covenants. But the reality testifies that some of the most innovative attempts of the world to protect and promote human rights have occurred at regional level. Indeed it appears that regional arrangements have most rapidly advanced the commitment of nations to human rights. Can South Asia remain indifferent to this popular and effective trend? Even if it is not possible to achieve Asian Convention for the protection, promotion of human rights because of so many divergences among the Asian nations, at least an attempt should be seriously made to attain a South Asian Convention on Human Rights. The Convention can establish a commission and a court for handling both state and individual Complaints for the protection and to some extent enforcement of human rights and fundamental freedom. The mere creation of international standards may be meaningless if it is not accompanied by appropriate and adequate institutional enforcement mechanism at the transitional and national level.

Making a South Asian Convention on Human Rights, setting up a South Asian Human Rights Commission in addition to Commissions at national level and a Human Rights Court will, no doubt, go a long way to improve the condition of human rights record of South Asia. Besides, establishing an office of Ombudsman (like Sri Lanka), setting up Human Rights Commission (like India), following the trend of judicial activism (like India) at national level in other South Asian countries will also generate a significant change in the protection, promotion and enforcement of human rights. The role of NGOs in this



regard is tremendous. Across the region they are not only able to keep the governments on edge but also successful in creating some alternative mechanisms for protection and enforcement of human rights.

The problem of human rights springs from the duplicity of man. Justice is promised though only law prevails. Human Rights are talked from house tops yet prisons of all nations are full. Torture is condemned as inhuman and uncivilized yet the police posts all over the world resound to the cry of the tortured. While on the one hand human rights are proclaimed to be inviolable, on the other, human beings seeking such rights are tortured, maimed, disemboweled, killed and even burnt alive. Prisons all over the world, ring with the cries of their unfortunate victims.

So even some success in the regional and national level through the ways discussed in this paper will make this world, region a better place to live in. But achievement of any little success demands over concerted initiative. In the words of Vedic Rishis:

*"Sa hridayam samnasya avidwesham krinomi wah  
Ma bhrata bhrataram dwishna ma swasautwasa  
Sanayayanach swrata bhutwa wacham wadat bhadraya  
Samani prya sah wanna bhagah  
Samani yoktre sah wo yunigmi"*

**(Atharva 3.3)**

(I shall make you one at heart and free from animosity. Brothers and brothers, sisters and sisters, should not hate each other. All go in together to achieve any object. This I tell you in a friendly manner. Your food and enjoyment be equal. I unite you in commonly accepted bond).

If mankind is to survive love must replace hatred, the plough take precedence over armament and deeds take the place of words. The time is *now*.