

## THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW

Since the proclamation of the Universal Declaration of Human Rights, over 165 countries have incorporated human rights standards into their legal systems; the resulting jurisprudence from diverse cultural traditions brings new dimensions to concepts first articulated in 1948. In this revised second edition, Nihal Jayawickrama draws on extensive sources to encapsulate the judicial interpretation of human rights law in one comprehensive volume. Jayawickrama covers the case law of the superior courts of 103 countries in America, Europe, Africa, Asia, the Caribbean and the Pacific, as well as jurisprudence of human rights monitoring bodies. He analyses the judicial application of human rights law to demonstrate empirically the universality of contemporary human rights norms. This definitive compendium is essential for legal practitioners and government and non-governmental officials, as well as academics and students of both constitutional law and the international law of human rights.

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THE JUDICIAL  
APPLICATION OF HUMAN  
RIGHTS LAW

National, Regional and International  
Jurisprudence  
*Second Edition*

NIHAL JAYAWICKRAMA



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In memory of  
Sarojini  
friend, companion and critic

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## PREFACE TO THE SECOND EDITION

It is nearly fifteen years since the first edition of this book was published. Although the language of the principal human rights instruments have remained the same, their judicial interpretation has significantly extended the frontiers of human dignity and freedom. As Justice Sachs observed in the Constitutional Court of South Africa, ‘as the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning’. This has been particularly evident in the development of the law in respect of the right to life, freedom from torture, freedom of expression, freedom from discrimination, the right to privacy and the right to family life.

In this edition, the emphasis is on jurisprudence. Accordingly, in the introductory section, the chapter dealing with the international protection of human rights has been replaced with one on the right to a remedy. In the section on substantive rights, many of the chapters have been extensively revised and re-written, drawing not only on the increasing volume of jurisprudence from international and regional human rights tribunals, but also on the judgments of superior courts of over a hundred states, from the Pacific to the Caribbean, through Asia, Africa, Europe and the Americas. In this enormous volume of case law, one striking feature is the recognition of the universality of human rights – the common thread that binds them together.

The re-writing of this book was interrupted, intermittently, during almost two years due to the illness of my wife, Sarojini. She insisted, before she passed away, that I should complete it. I am extremely grateful for the patience and kindness extended to me during that difficult period by Finola O’Sullivan, the Executive Publisher of Law, and the encouragement that I since received from my two daughters, Nishana and Sharanya, which helped me bring my task to an end.

## PREFACE

From 1978, I was associated with Professor Paul Sieghart, then chairman of Justice, the United Kingdom section of the International Commission of Jurists, and Professor James Fawcett, then president of the European Commission of Human Rights, in a research project on the international law of human rights. My research on the jurisprudence of the Strasbourg institutions and of national courts was incorporated in Paul Sieghart's pioneering work, *The International Law of Human Rights*, which was published in 1983. The cut-off date for the law examined in that book was 31 December 1981.

In the next two decades, the international human rights regime strengthened considerably. More than 150 countries, spread over every continent, incorporated contemporary human rights standards into their legal systems. More than 100 countries ratified the Optional Protocol to the International Covenant on Civil and Political Rights, thereby enabling their inhabitants to access the Human Rights Committee. Meanwhile, nearly all the countries of South and Central America, Africa and Europe subscribed to regional human rights instruments with their own monitoring or enforcement mechanisms. The resulting jurisprudence, rich in content and varied in flavour, from diverse cultural traditions, has added a new dimension to the concepts first articulated in the Universal Declaration of Human Rights. This book seeks to incorporate that jurisprudence and, in that sense, complement the late Paul Sieghart's invaluable work.

I have not set out to produce a scholarly work on human rights or on international law. There are already several analyses of the theoretical foundations and the politics of human rights, commentaries on the different human rights instruments, academic studies of selected rights, and surveys of selected case law of the Strasbourg institutions and of the Human Rights Committee. What is lacking is a volume that assembles all

the available jurisprudence on human rights from international, regional and national sources, a book that presents the content of human rights law as interpreted by the courts. That is the need I have set out to meet.

In identifying the substantive content of the rights recognized in the International Bill of Human Rights, i.e. the Universal Declaration and the two covenants, I have drawn on the following sources:

1. *Travaux préparatoires*, particularly in respect of the International Covenant on Civil and Political Rights
2. Texts of international instruments dealing with specific rights and other standard setting resolutions of the United Nations General Assembly, specialized agencies and subsidiary institutions
3. General comments of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, and the conclusions of the Committee of Experts under the European Social Charter
4. Judgments and advisory opinions of the International Court of Justice and its predecessor, the Permanent Court of International Justice
5. Decisions of the Human Rights Committee on individual communications received under the Optional Protocol, and of the Committee against Torture
6. Judgments of the European Court of Human Rights and the reports and decisions of the European Commission of Human Rights
7. Decisions and advisory opinions of the Inter-American Court of Human Rights and the reports of the Inter-American Commission of Human Rights
8. Judgments of superior courts in national jurisdictions interpreting and applying domestic Bills of Rights, wherever the specific rights and freedoms have been formulated in terms identical or similar to those enunciated in the two international human rights covenants
9. Works of jurists

The depth of discussion of a particular right is dependent on the availability of case law. Accordingly, the chapters on economic, social and cultural rights are necessarily brief, while some on civil and political rights may appear inordinately long. Since I have been able to work only in the English language, references to national jurisprudence from the European continent are often based on published summaries. The cut-off date for the law incorporated in this book is, to the extent practicable, 31 December 2001.

Any work of this kind involves considerable research. Much of the early work was done in the libraries of the United Nations in New York and Geneva, and of the Institute of Advanced Legal Studies in London. I am grateful to the former United Nations Centre for Human Rights in Geneva, the General Secretariat of the Organization of American States in Washington, DC, and the Secretariat of the Council of Europe in Strasbourg for sending me regularly a wealth of information contained in their publications, documents and reports. Many friends, including my former colleagues in Hong Kong, have either sent me, or directed me to, material which I was unaware of or had overlooked, or provided me access to their personal collections.

Writing a book of this nature is difficult to combine with regular teaching at a university, as I soon discovered after I commenced preliminary work on it while teaching constitutional, administrative and human rights law at the University of Hong Kong. I am most grateful, therefore, for the opportunity the University of Saskatchewan afforded me in 1992–3, to spend an academic year in Saskatoon, in the exhilarating climate of the Canadian prairies. It was during that year, when I had the privilege of occupying the Ariel F. Sallows Chair of Human Rights, that I began writing this book. I could not have found a more conducive or stimulating environment, made even more agreeable by the warmth and kindness with which Dean Peter MacKinnon, QC, and his colleagues received my family and me. After leaving both Hong Kong and academia in 1997, progress on this book was interrupted for a while as I commuted between London and Berlin (and a few other places as well), learning and exploring the new, but not entirely unrelated, area of corruption in public life and, more especially, in the judiciary.

This book would not, of course, have assumed the shape and form in which it appears today but for the help and co-operation which was always forthcoming from Professor James Crawford, Whewell Professor of International Law at the University of Cambridge, and Ms Finola O'Sullivan, Executive Publisher of Law, and Dr Jennie Rubio, Law Development Editor, at Cambridge University Press. I am grateful for their recognition of the need for a definitive text on this subject and their belief in my capacity to produce and deliver within the time constraints that regulate most things in life. An effort spread over a decade would not have been possible without the continuing tolerance and understanding of my family. Indeed, it was their profound interest and encouragement that

enabled this work to reach fruition. My deepest debt, therefore, is owed to my wife, Sarojini, and to our two daughters, Nishana and Sharanya, all of whom, I am sure, looked forward on each New Year's Day to life finally returning to normal in our home, wherever it might have been located.

The language of the chapters on the substantive rights that follow is rarely mine. The real authors are the lawyers and judges, the men and women of many cultures who, individually and collectively, enhanced the value of human life and extended the frontiers of human dignity by their courageous, imaginative and innovative approach to the interpretation and application of international and regional human rights instruments and national constitutions. I have attempted to assemble in a single volume as much of the material as I have been able to gather, in the hope that their endeavours will help and inspire others not only to follow but even to improve upon their achievements. Thereby, the evolving body of international human rights law will, in fact, become the universally accepted common standard by which the conduct of governments, public officials, private bodies and individuals is measured. If I have expressed a preference for a particular view, criticized a decision or projected a dissent, I have done so because of my own perception that in the protection of human rights, it is not possible to compromise; there can be no halfway houses, no wayside halting places. Human rights are not only fundamental; they are also inherent and inalienable.

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