

Nihal Jayawickrama

The Judicial Application *of* Human Rights Law

**National, Regional and
International Jurisprudence**

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The birds that fly in the air and the wild animals that dwell in the jungles have the same rights as you, O great King, to live wherever they wish or to roam wherever they will. The land belongs to the people of the country and to all other beings that inhabit it, while you are only its guardian.

Arahat Mahinda, the son of Emperor Asoka of the Mauryan dynasty, to King Devanampiyatissa of Lanka, c. 250–210 bc, found on a rock inscription in Polonnaruwa, Sri Lanka.

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. Over 150 countries, spread over every continent, incorporated contemporary human rights standards into their legal systems. Over 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:

- (a) the *travaux préparatoires*, particularly in respect of the International Covenant on Civil and Political Rights;
- (b) the texts of international instruments dealing with specific rights and other standard setting resolutions of the United Nations General Assembly, specialized agencies and subsidiary institutions;
- (c) the 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;
- (d) the judgments and advisory opinions of the International Court of Justice and its predecessor, the Permanent Court of International Justice;
- (e) the decisions of the Human Rights Committee on individual communications received under the Optional Protocol, and of the Committee against Torture;
- (f) the judgments of the European Court of Human Rights and the reports and decisions of the European Commission of Human Rights;
- (g) the decisions and advisory opinions of the Inter-American Court of Human Rights and the reports of the Inter-American Commission of Human Rights;
- (h) the 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; and
- (i) the 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 afforded me by the University of Saskatchewan 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, Ms Finola O'Sullivan, Commissioning Editor (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

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