

去津系

DEPARTMENT OF LAW

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Mr. John Lambourn,
Marine Department,
23/F, Harbour Building,
38 Pier Road, Central,
Hong Kong.

Dear John,

Thank you for asking me to be present at your meeting last Monday. Question time, in particular, was for me a very useful exercise and helped me to clarify my own thoughts as well as to understand, in perspective, the problems with which your Group is grappling. Thank you also for your letter.

As I mentioned at the meeting, the rights and freedoms of inhabitants can properly and effectively be protected by law only if -

- (a) these rights and freedoms are defined in a law which has an over-riding authority over other laws (such as, for example, a national constitution or basic law);
- (b) the two principal institutions of government, i.e. the legislature and the executive, are required, in the exercise of their respective powers and duties, to respect and to observe these rights and freedoms; and
- (c) the judiciary is vested with power, not only to interpret these rights and freedoms and to determine judicially their proper scope and extent, but also to declare invalid any legislative or executive action which is in conflict with such rights and freedoms.

In the context of the Hong Kong SAR, it appears to me that, this objective can best be achieved by including a statement of rights and freedoms (in other words, a bill of rights) in the Basic Law itself. Such a statement will, of necessity, be of some considerable length. For this purpose, three models are available:

- (1) the International Covenant on Civil and Political Rights;
- (2) the European Convention on Human Rights and Fundamental Freedoms;
- (3) the standard draft prepared by the UK Foreign and Commonwealth Office for inclusion in the constitutions of its present and former dependent territories.

Each of these is based on the Universal Declaration of Human Rights. The first two, (a) and (b), are almost identical.

The third, (c), is based largely on (b), but is more detailed because, in order to facilitate its application, it incorporates permissible restrictions already made under existing law in the respective territories.

However, if for any reason it is impractical to include such a statement in the Basic Law, the next best option appears to be to give, through the Basic Law, the force of law, within the Hong Kong SAR, to the relevant provisions of the International Covenant on Civil and Political Rights. A draft prepared by me to achieve that objective is annexed hereto marked "A". I have also included in this draft a reference to the relevant provisions of the International Covenant on Economic, Social and Cultural Rights which, according to the Joint Declaration, will also continue to apply to the Hong Kong SAR: (The other provisions of the two Covenants impose international obligations, such as regular reporting, and these will, presumably, be undertaken by the Government of the Peoples' Republic of China when it signs and ratifies the two Covenants and continues their applicability to the Hong Kong SAR, as promised in the Joint Declaration).

Since the Civil and Political Covenant already applies to Hong Kong, the UK Government has, since 1976, been obliged, in terms of Article 2 of that Covenant, to provide by law an effective judicial remedy to any person who believes that any of the rights and freedoms recognized in the Covenant has, in respect of him, been infringed. This obligation has not been fulfilled by the UK Government in respect of Hong Kong, although it has done so for both Gibraltar and Bermuda which are still colonial territories. It can yet be done (if perhaps the Legislative Council were to so request) by providing by Act of Parliament or Order in Council a Bill of Rights similar to that now in force in Gibraltar and Bermuda. Such a Bill of Rights will then be a constitutional document.

Alternatively, it is still open to Legco to make an Ordinance incorporating the provisions of the Covenant. Such an ordinance, not being a "higher law", will be limited in scope and applicability, but will be better than nothing at all. I have annexed, marked "B", a draft that may be used for this purpose.

If I can be of any further assistance, please do not hesitate to let me know.

With kind regards,

Sincerely,

Nihal.

Dr. Nihal Jayawickrama.