PROPOSALS TO IMPLEMENT ARTICLE 23 OF THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

NOTE FOR THE BAR COUNCIL OF ENGLAND AND WALES

1. I have been asked by the Bar Council of England and Wales to comment briefly on proposals to implement Article 23 of the Basic Law of the Hong Kong Special Administrative Region. Article 23 requires legislation prohibiting various activities including treason, secession, sedition and subversion. Although the proposals are the subject of consultation there is not yet available a draft bill setting out the details of the proposed legislation.

2. I have seen an Opinion by David Pannick QC dated 24 October 2002, which expresses the view that in principle the proposals "are consistent with human rights law." (para.2) Mr Pannick's Opinion addresses the question of proportionality at paras.8-9, in particular the principle that a fair balance has to be struck between the rights of the individual and the general interest of the community. His opinion is that the question of proportionality cannot usually be determined in the abstract and will have to be decided on the facts of a given case.

3. However, in human rights law, the question of proportionality (whether a restriction on a fundamental right is necessary in a democratic society) only arises after a logically prior question has been answered in the affirmative:

namely, whether the restriction is "prescribed by law". That very phrase is found in Article 39 of the Basic Law.

4. The concept of "law" in this context requires not only that the restriction should be founded in some source of law (often a piece of legislation) but also that the law itself must have the attributes of the rule of law. This entails in turn that it should be (1) accessible to those affected by it; (2) reasonably foreseeable, so that those affected by it may know how to conduct themselves so as to avoid breaking the law; and (3) that the law should not confer such broad discretion on the executive or administrative officials that in practice it could be applied in an arbitrary or discriminatory manner without effective judicial control. These principles are well-established in the jurisprudence of the European Court of Human Rights: see e.g. *Sunday Times v. United Kingdom* (1979) 2 EHRR 245, para.49; and *Hentrich v. France* (1994) 18 EHRR 440, paras.40-42.

5. Although Mr Pannick is right that, even after a law has been enacted, there remains valuable scope for the application of human rights standards, for example through the process of interpretation or by striking a fair balance on the facts of a given case, it is in my view more appropriate to assess the compatibility of proposed legislation before it is enacted. This is what the United Kingdom government is required to do in giving a statement of compatibility to Parliament under section 19 of the Human Rights Act 1998 in

relation to all bills which it introduces. It is also the central part of the work done by the Joint Committee on Human Rights, which scrutinises draft legislation and reports on its compatibility with human rights standards to the UK Parliament.

6. I would respectfully suggest that, before definitive views can be given as to the compatibility of the proposed legislation with human rights law, it would be better to wait to see a draft bill in detail. This would permit an assessment to be made in particular of the question whether the proposed measures are consistent with the requirements of "law" which I have mentioned above.

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23 December 2002