

# *Regulation of Foreign Lawyers in Hong Kong*<sup>\*1</sup>

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## I INTRODUCTION

Despite Hong Kong's status as a centre of international business and trade, current policies on the qualification of foreign lawyers and the licensing of foreign law firms make it one of the most restrictive jurisdictions. Liberalisation of rules on international practice has been under consideration for several years, and now — spurred by the possibility of agreement on the General Agreement on Trade in Services ('GATS') as well as past controversies over the role of foreign lawyers — a new system may well be adopted.

In 1990, the Law Society of Hong Kong<sup>2</sup> established two committees to develop schemes for the regulation of foreign law firms and the qualification of foreign lawyers. Preliminary results of the discussions were presented to the Law Society Council in July 1991, and the revised and final versions of both reports were approved by the Council in October 1991.<sup>3</sup> Since the Governor has approved the proposals in principle, legislation is expected to be introduced to the Legislative Council some time in 1992, and the new schemes might be implemented by late 1993.<sup>4</sup>

The purpose of this article is to comment on the Law Society's proposed schemes for the admission and regulation of foreign lawyers. Since the legislation has yet to be enacted and the schemes have so far been published

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<sup>2</sup> The rules discussed in this article relate only to the admission and practice of solicitors, not to barristers.

<sup>3</sup> Law Society of Hong Kong, 'Scheme for Admission of Non-Hong Kong Qualified Lawyers — Final Report,' Oct 1991 (the 'Admission Scheme'). Law Society of Hong Kong, 'Outline Proposals for the Regulation of Foreign Lawyers and Foreign Law Firms — Final Report,' Oct 1991 (the 'Foreign Law Firms Proposal' or 'FLF Proposal').

<sup>4</sup> According to reports in the South China Morning Post ('SCMP'), Feb 1, 1992; The Standard ('HKS'), Feb 1, 1992; The New Gazette, June 1992, p 6.

in outline form only, these comments are necessarily preliminary. But given the importance of the issue, even a preliminary analysis may raise fundamental questions about the proposals. To what extent would these proposals really liberalise the foreign lawyers' regime in Hong Kong? How do they address Hong Kong's unique situation: its 1997 reversion to the People's Republic of China (the 'PRC'), the importance of maintaining its status as an international centre, and the need for localisation despite possible increased emigration by local lawyers?

## II THE 'FOREIGN LAWYERS CONTROVERSY'

The current Law Society proposals must be viewed against the background of the system in operation as well as previous efforts to internationalise the legal profession in Hong Kong. Foreign law firms have been permitted to open offices in Hong Kong since 1972 and there are now some thirty foreign firms in Hong Kong (not counting English firms), but they operate subject to strict limitations. In 1986, a special committee headed by the then Chief Justice was appointed to review the whole area of admission to practise in Hong Kong. The committee's January 1988 report was a severe disappointment to many foreign lawyers, who argued that the conclusions were ill-considered and based at least in part on erroneous assumptions about practice in other jurisdictions, where Hong Kong lawyers were subject to no such restrictions.

Seven American firms then petitioned the Governor, asking for a simplified admission procedure for American (and other foreign) lawyers and the right to employ or take locally qualified solicitors as partners. The Hong Kong government rejected the first request but agreed to the second, and in August 1988 announced that it was drafting legislation to introduce a formal regulatory scheme for foreign lawyers and law firms. The scheme was intended to formalise the admission of foreign firms through the courts, enable the Law Society to discipline foreign lawyers through clearly laid down powers, and permit foreign law firms to hire Hong Kong lawyers to practise Hong Kong law.<sup>5</sup>

The Law Society did not object to the first two aspects of the proposed legislation, but vehemently opposed any action that might have allowed foreign law firms to bring in local solicitors. Its members launched an all-out media and lobbying campaign in an effort to block any such changes. In the months that followed, Law Society representatives missed few

<sup>5</sup> *Government's Proposal on Foreign Law Firms*, Jan 1989.

opportunities to raise the issue, predicting dire consequences for the profession, the legal system and the public if their campaign failed.<sup>6</sup>

According to the Law Society, the government's proposal would inevitably have resulted in the practice of Hong Kong law by unqualified persons, since in their view it would be the foreign firm and not simply the locally qualified individual engaging in practice. Moreover, the society argued, foreign firms would be tempted to hire a token local solicitor as a cover for foreign lawyers themselves to engage in Hong Kong practice, with no effective outside supervision possible. As a result, the profession's legal and ethical standards would be lowered and the interests of the public would suffer accordingly. In its campaign, the Law Society emphasised the differences between the Hong Kong and other legal professions; society representatives argued that foreigners could make no genuine contribution or lasting commitment to Hong Kong and that allowing the changes would lead to a flood of foreign lawyers, which would drive out local lawyers and undermine the profession.

Representatives of the American firms argued that foreign firms allowed in Hong Kong were reputable and were already bound by local legal ethics, that differences between the two professions were exaggerated and that English lawyers were also 'foreigners.' They noted that lawyers from other jurisdictions had long served as government lawyers, as judges and magistrates, and as law teachers in Hong Kong. They also pointed to the widespread belief, supported by surveys, that many senior members of the legal profession, like other professionals, had no intention of remaining in the territory after 1997. Despite the Law Society's reliance on principle, many also believed that the main, though unstated, reason for its relentless opposition to the foreign law firms was economic, fearing that allowing American firms to expand their practice would jeopardise a golden rice-bowl (the monopoly over conveyancing, for example, which has proved extremely lucrative in Hong Kong's booming property market).

Nevertheless, the controversy raised sensitive issues at a time of widespread concern, especially in the legal profession, over Hong Kong's post-1997 future. The Law Society played on those fears, arguing that opening the door, however slightly, to Americans would lead to wider entry for PRC lawyers. In the end, the Hong Kong government was forced to withdraw the proposal and in July 1990 announced it would not proceed with plans to allow foreign law firms to employ local solicitors. The dispute left bad feelings on both sides. Hong Kong lawyers felt that undue pressure had been placed on them by the US lawyers (and their government) in the

<sup>6</sup> See, for example, the pamphlets produced by the Law Society in Jan 1989, *Hong Kong's Legal System Endangered!*, and speeches published in the Law Society Gazette, Oct 1988.

name of international trade and commerce. But the tactics employed against the foreign lawyers were highly questionable, and many lawyers resented the continued admission of Hong Kong solicitors in foreign jurisdictions while they blocked admission here.<sup>7</sup>

### III ADMISSION OF FOREIGN LAWYERS

#### *Current rules*

Hong Kong now maintains a highly restrictive system of admission for foreign lawyers: only those foreign lawyers who have been admitted in the United Kingdom, or in certain limited cases have served as government legal officers or teachers in the Postgraduate Certificate of Laws course in Hong Kong, can be admitted without undergoing professional training and articles.<sup>8</sup> Those applying for admission from England must have resided in Hong Kong for at least three months immediately before admission. Others face longer residence requirements; if they are not Commonwealth citizens then they must have been ordinarily resident in Hong Kong for not less than seven years.<sup>9</sup> Under the current rules, therefore, it is very difficult (or effectively impossible) for many foreign lawyers to qualify in Hong Kong.<sup>10</sup>

#### *Proposed Admission Scheme*

The Admission Scheme would for the first time provide a general scheme governing the admission of foreign lawyers. The proposal would require, first, the possession of a law degree equivalent to a Hong Kong LLB (deemed equivalent for specified common law countries);<sup>11</sup> secondly,

<sup>7</sup> According to one report, 'Last year [1989] 333 Hongkong lawyers were accepted to practise in the Australian Capital Territory alone ...' SCMP, Sept 27, 1990. Hong Kong solicitors were also being admitted to practise in New York; before 1986, it was even possible for them to be admitted on motion, without taking the bar examination.

<sup>8</sup> *Legal Practitioners Ordinance* (cap 159, LHK 1989 ed), ss 4(1)(a)(ii), 3(1AB) and 3(1AD). In other cases, it would be necessary to complete the one-year postgraduate law course and two years of apprenticeship in Hong Kong. 'Foreign lawyers' means lawyers who have studied or qualified outside Hong Kong, which could of course include Hong Kong Chinese who studied law in the United States.

<sup>9</sup> *Legal Practitioners Ordinance*, s 3(1AA) and (1).

<sup>10</sup> Compare the rules for the admission of foreign-trained lawyers to the State of New York, for example. Foreign lawyers from common law jurisdictions are eligible to take the bar examination on a showing that their legal education was the substantial equivalent of an approved law school in the United States. See 22 NYCRR 520.5. The bar examination is given twice each year and no limit is placed on the numbers taking it. There is no residency or citizenship requirement for admission, nor is there any required period of apprenticeship or conditional practice for the newly admitted foreign lawyer.

<sup>11</sup> Plus two years of articles or the equivalent practice experience, unless an exemption is granted; this is apparently treated as part of the educational requirements for lawyers, although many jurisdictions do not require such an apprenticeship.

satisfactory completion of all or part of a transfer test or exemptions from the papers, plus a test in 'common law principles' for civil lawyers; and thirdly, a certificate of good standing from the lawyer's home jurisdiction. A residency requirement (of unspecified duration) would be imposed on solicitors who qualified through the transfer test. Completion of a period of conditional practice as provided by the *Legal Practitioners Ordinance* would also be required before the newly admitted lawyer could become a sole practitioner or a partner.

The proposal distinguishes between common and civil law lawyers, and between those with more than five years of practice and those with less. Only those trained in civil law with less than five years of practice experience would be required to complete further study and a period of articles. But a civil lawyer with five or more years of experience would be placed on a very similar footing to US lawyers. Depending on the exemptions granted from the transfer test, the only difference in their treatment might be the requirement of an oral test in 'common law principles' for civil lawyers.<sup>12</sup>

The Admission Scheme is straightforward and on the whole reasonable, and it would clearly broaden the avenues for admission of foreign-trained lawyers. Unlike the English Qualified Lawyers Transfer Test (open only to Commonwealth and EC lawyers), the scheme would be potentially available to any lawyer with recognised legal training and two years of practice experience. Nevertheless, the proposal in its present form raises certain questions. Does it provide a rational and fair plan for the admission of *all* foreign lawyers? Does it require sufficient knowledge of the special aspects of Hong Kong law?

#### *Transfer test subjects*

Under the Admission Scheme, a transfer test would be given in five areas: conveyancing; civil and criminal procedure; commercial and company law; accounts; and professional conduct. In subject matter it would therefore resemble the English Qualified Lawyers Transfer Test and

<sup>12</sup> The New York rules draw a greater distinction between civil and common law training. Lawyers trained outside common law jurisdictions would ordinarily be required to complete a period of training in the United States before being eligible to sit the New York State bar examination, for example. 22 NYCRR 520.5.

like it would also emphasise commercial and procedural law.<sup>13</sup> To many practising lawyers, these are doubtless the most significant areas of law, but are they the most likely to differ from jurisdiction to jurisdiction? Hong Kong corporate and commercial law, for example, would probably be the closest to other common law jurisdictions, as well as the easiest area for experienced lawyers to learn in practice.

Hong Kong is a special jurisdiction, and any transfer test ought to recognise that. The areas that make Hong Kong unique, or where one could find the most variance from other jurisdictions, are probably public law areas — yet there would be no requirement to pass tests in constitutional law (including *Bill of Rights*<sup>14</sup> and, in future, *Basic Law*<sup>15</sup> topics). Practitioners in this jurisdiction ought to have some understanding of these fundamental areas of law, but these are precisely the areas of law that outsiders would know least about. Focusing the test on these areas also tends to obscure the substantial and growing differences in the English and Hong Kong systems.

#### *Treatment of English lawyers*

The proposed Admission Scheme leaves untouched the privileged position of UK-trained lawyers, who would continue to be admitted in Hong Kong without examination. Although technically subject to the scheme, English lawyers who had passed their qualifying examinations and served their apprenticeships would automatically be granted exemptions for all subjects on the transfer test; effectively, therefore, the scheme would not apply to them at all.

This approach may be understandable for historical and other reasons: Hong Kong is still a British colony and many Hong Kong lawyers studied and qualified in England; until some twenty years ago there were no

<sup>13</sup> The written portion of which is given under three heads: Property (including conveyancing), Litigation (including civil and criminal proceedings) and Professional Conduct and Accounts. Qualified Lawyers Transfer Test Rules, 1991. The oral test consists of an examination covering principles of common law (contract, tort and criminal law or business organisations). Most European (ie civil law) lawyers are required to take all heads of the examination, but most lawyers from common law countries receive exemptions from all but the Professional Conduct and Accounts test; Hong Kong lawyers are exempt from all parts of the test.

<sup>14</sup> *Bill of Rights Ordinance* (cap 383, LHK 1991 ed).

<sup>15</sup> *The Basic Law of the Hong Kong Special Administrative Region of the PRC*, adopted by the National People's Congress on Apr 4, 1990, effective as of July 1, 1997.

opportunities to study law in Hong Kong. Moreover, Hong Kong solicitors are exempt from taking the English transfer test; although reciprocity is not a feature of the Hong Kong admissions scheme, the Admission Scheme committee may have felt that restricting similar entry to English lawyers would have been difficult or awkward at this stage.

Granting these automatic exemptions seems to assume that English and Hong Kong law are so similar, or the professions so nearly alike, that no transfer test need be taken. Viewed from the point of private law only, the differences between Hong Kong and English law may seem small, but this is misleading; in many key areas (including conveyancing), Hong Kong's law is very different. Moreover, the English and Hong Kong professions themselves are growing apart, and have done so for some years, even before the enactment of the English *Courts and Legal Services Act 1990*. Of course, nothing requires the Hong Kong profession to follow the English example — but then the two professions can no longer be treated as interchangeable.

Solicitors from other common law countries (such as Canada and Australia) do not receive automatic exemptions from all parts of the transfer test. But it is difficult to justify the different treatment accorded them, especially when the proposed scheme preserves the favourable (and anomalous) treatment for lawyers from Scotland. Indeed, one might argue that in some respects English lawyers are poorly prepared, compared to Australians and Canadians, to make the transition to practise in Hong Kong, since they come from a unitary system with no written constitution or bill of rights. The position of American lawyers (who receive no automatic exemptions under the Admission Scheme) is more problematic, although the differences tend to loom larger on the English side of the Atlantic than on the American. US-trained lawyers would also have some advantages: they are used to written constitutions and multi-jurisdictional practice; they would also be unlikely to assume that even commercial laws are the same in all jurisdictions.

For these reasons, it would arguably have been better to recommend that all applicants take tests in certain basic areas (not necessarily limited to commercial law), with a clear system of exemptions based on experience or demonstrated similarity of the law in the home jurisdiction. If the scheme is intended to be 'objective, nondiscriminatory and competency-based' (in the words of one circular), then it cannot perpetuate favourable treatment for UK lawyers. Of course, the drafting committee made clear that the scheme is intended to be transitional, but the proposed system of exemptions makes the plan seem backward- rather than forward-looking. Such favouritism has no real basis except history and the colonial tie.

*Conditional practice requirement*

The Admission Scheme would require all foreign-trained lawyers to fulfil a period of conditional practice in Hong Kong before they could become partners or sole practitioners. The term would be the same as for all newly admitted solicitors under the *Legal Practitioners Ordinance*, subject to any waiver granted under that ordinance. The required term is now two years (although an increase to three years has been discussed),<sup>16</sup> and ordinarily it cannot be reduced to less than one year on account of previous experience. The primary reason for the conditional practice requirement (and the possible increased length) is said to be that solicitors need experience before they are allowed into a position where they would be managing a law office and supervising employees, including other solicitors.

Should all foreign lawyers be subject to the same requirement? In the Law Society's view, generally yes, since 'some experience of practice in Hong Kong seems essential if that person is to be able properly to supervise the practice of Hong Kong law.'<sup>17</sup> But perhaps not all foreign lawyers should be placed in the same category as newly admitted local solicitors, particularly those who have already practised for years on their own account or as partners. In such cases, a short term spent in a local firm might still be instructive, but it might be argued that anything longer would be unduly restrictive. How reasonable this requirement is will therefore depend on how flexibly it is applied. The Law Society has indicated some willingness to abridge the required period, but this would be discretionary. A better alternative might be to set a maximum (of perhaps three to six months) for those with five or more years of experience.

Whatever its justification, a conditional practice requirement would in practice probably affect some lawyers more than others. It might, for example, be difficult for non-UK lawyers or those without any association with a local firm to find a placement to fulfil the requirement. Assuming they could find one, they would still be forced to leave their own firms for the term of conditional practice. At the same time, however, English lawyers could fulfil the requirement by working in their own firms, which would presumably be treated as Hong Kong firms for this purpose;<sup>18</sup> even time spent there before qualifying would count towards the requirement.

<sup>16</sup> For example, in the Law Society's Circular 194/90, dated Oct 8, 1990.

<sup>17</sup> 'Hong Kong Law Society Opposes Mergers and Full Partnerships,' LAWASIA, Sept 1991, p 8.

<sup>18</sup> The term 'Hong Kong firm' is not defined in this report, but presumably any firm that is currently considered local (including an English firm) would still qualify.

## IV REGULATION OF FOREIGN LAW FIRMS

*Current practice*

Unlike the rules for admission to practise, the current system of approval and regulation of foreign law firms in Hong Kong is an informal one. Foreign law firms (not including English firms) wishing to open an office in Hong Kong must apply to the Law Society for approval. Only after approval is granted by the Law Society and following consultation with the Law Society does the Hong Kong Immigration Department issue visas for the proposed partners and associates for the foreign firm. New employees are also granted visas subject to further consultation and approval by the Law Society.

The conditions for approval have no formal legislative basis, but are contained in the Law Society's 'Foreign Law Firms Establishing Themselves in Hong Kong — Guidelines to Applicants,' published in 1976. Requirements include showing that the firm is well established in its country of origin, that all partners of the firm consent to the establishment of the office and the provision of detailed background on the 'resident partner.' Most important, the firm and its attorneys must sign an undertaking containing the restrictions to which the law firm will be subject.

Although they vary from firm to firm, depending on the individual negotiations and the date they were signed, these undertakings have become increasingly restrictive over the years. In addition to undertakings relating to financial responsibility and the provision of legal services, firms must also undertake not to advise on Hong Kong law (including on matters falling outside the solicitors' monopoly), not to employ or admit as partners locally qualified solicitors, and not to advise on laws of countries other than the ones in which the resident partners were qualified.

The current foreign law firm scheme has been criticised on many grounds, and not solely by the foreign law firms themselves. The scheme's most obvious defect is the complete absence of any legislative basis, with the result that its dual consultation process is held together by 'strings and mirrors.'<sup>19</sup> The Law Society has essentially drafted its own rules, without public knowledge or approval, and it enforces them through an informal arrangement with the Immigration Department. The rules and policies adopted by the Law Society have also come under attack on specific grounds. Foreign lawyers have argued for years that the rules are unduly restrictive and fail to reflect the way large international firms operate, that they operate unfairly when Hong Kong lawyers may so easily be admitted

<sup>19</sup> Editorial, (1982) 12 HKLJ 257.

to other jurisdictions or practise there, and that they run counter to the growing movement to liberalise international practice rules and encourage international partnerships.

### *Proposed scheme of regulation*

This is the issue that touched off the 1988–89 controversy and many lawyers, both local and foreign, would still consider this the more important of the two schemes.<sup>20</sup> Not all foreign lawyers will wish to or find it practical to be admitted locally, so greater attention will probably be focused on this plan. The FLF Proposal outlines three changes or additions to the current situation: it would provide a formal basis for the regulation of foreign law firms and lawyers; establish a framework for the forming of ‘associations’ between foreign and local firms; and permit the establishment of local practices by foreign law firms.

First, the committee proposes a formal system of registration for all foreign lawyers, law firms and associations between local and foreign firms. The new registration scheme would replace the current informal process and would be administered by the Law Society. Only those lawyers and firms registered under the system would be permitted to practise the law of any jurisdiction in Hong Kong. Once registered, however, such lawyers could practise law in foreign law firms or as ‘foreign legal consultants’ in local law firms. The proposal also sets out some of the requirements for foreign law firms to open an office in Hong Kong. Thus, if it is a branch of a firm based outside Hong Kong, at least one of the lawyers must be a partner, normally associated with the firm for at least two years and in practice for not less than five years.

In contrast to the 1988–89 government proposal, the Law Society’s scheme would not permit foreign lawyers to employ Hong Kong lawyers or take them as partners. Instead, it proposes that foreign law firms be permitted to form ‘associations’ with local law firms. The association must be registered, after which the firms would be able to share fees, premises, administrative and other support services as they agreed. Foreign law firms, however, could only form an association with one local firm (the reverse is not true) and the number of local lawyers must equal or exceed the number of foreign lawyers.

<sup>20</sup> The number of times the two committees met before agreeing on the proposals may be indicative of the complexity of the issues and the importance attached to the results (or perhaps to the difficulty in reaching agreement). Thus, the Regulation of Foreign Lawyers Committee met some 39 times between Sept 1990 and Oct 1991, whereas the Foreign Lawyers Accreditation Committee met only six times. See their reports, cited above.

Nevertheless, under certain conditions foreign firms would be permitted by the FLF Proposal to establish a Hong Kong practice, using the firm name. As a result, in that case the prohibition against hiring or taking local solicitors as partners would no longer apply. But such firms would still be subject to the requirement that all persons practising Hong Kong law in the firm be Hong Kong solicitors and that a 1:1 ratio of foreign to locally qualified lawyers be maintained in the firm. Other restrictions, waivable at the discretion of the Law Society Council, include registration in Hong Kong for at least three years before opening a local practice, and a requirement that at least one of the local solicitors be a partner in the firm. Depending on how this proposal is actually administered it would represent a significant change to the Law Society's position, in allowing foreign and local lawyers to be partners under the firm's name.<sup>21</sup>

The FLF Proposal would offer many advantages over the present informal system, not least of which is the regularisation of a system held together with strings and safety pins. In many respects it also represents a more liberal approach than the current scheme or even the Law Society's initial proposals.<sup>22</sup> Certain restrictions appearing even in the July 1991 version of the scheme have now been dropped and some of the proposed restrictions may also be waived by the Law Society in appropriate cases.

The scheme would also introduce certain features new to Hong Kong's regulatory scheme: it is clear that a sole proprietorship could be approved; 'foreign legal consultants' have a regularised status and may be identified as such on the local firm's letterhead; and the way would be opened, at least in principle, for foreign law firms to establish a local practice in their own name. In the Law Society view, these features would offer the possibility of 'multi-jurisdictional practice' even though multinational partnerships would not be permitted.<sup>23</sup>

Though less liberal than the English scheme (which does allow multinational partnerships), the FLF Proposal may well represent the compro-

<sup>21</sup> This is a long way from the position stated by an English member of the Law Society Council in mid-1989: Foreign lawyers who qualified to practise Hong Kong law could not practise their own country's law because 'we can't have lawyers practising laws of different jurisdictions in firms as that would cause confusion to the public.' Reported in HKS, July 5, 1989. As late as Jan 1991, the Law Society president stated, 'That means in any firm that practises Hongkong law, all the partners have to be Hongkong qualified.' Letter to the editor, SCMP, Jan 15, 1991.

<sup>22</sup> Proposals reported in the SCMP, May 19, 1989, and Sept 27, 1990, for example, were still extremely restrictive in terms of permissible 'associations.' Former Law Society president Donald Yap has stated — correctly — that the society's position had changed since its initial fierce opposition to any liberalisation of rules on multi-jurisdictional practice. SCMP, Sept 18, 1991.

<sup>23</sup> Letter to the editor, SCMP, Jan 15, 1991.

mise position to be adopted in other jurisdictions. To its credit, the proposal would also apply equally, at least in principle, to all foreign law firms, including English firms. Thus it recognises, as the qualification scheme does not, that the English-based firms and lawyers are *foreign*, like other non-Hong Kong firms.<sup>24</sup> Nevertheless, the FLF Proposal may still when it is implemented prove to be more restrictive than it at first appears. The 1:1 ratio, the scope of practice allowed to foreign firms and the actual administration of the scheme may all present problems.

### *The 1:1 ratio*

The Law Society committee would also introduce a further restriction in the form of ratios of foreign to local lawyers. In no combination, under the proposal, may the ratio of foreign lawyers to Hong Kong solicitors exceed 1:1. This restriction applies across the board to an association between foreign and local firms, the employment of foreign legal consultants by local firms or the operation of a local practice by a foreign firm, presumably in order to prevent its circumvention. At present, most foreign firms are small, so this restriction would pose no immediate problems for them; most foreign lawyers could therefore probably live with the 1:1 ratio in practice.

But is such a restriction desirable in all circumstances, or even logical? Obviously it must be viewed in light of Hong Kong's special circumstances and the fears the Law Society has expressed in the past. From the outset, society representatives have argued that the real problems are the domination by foreign lawyers of the local profession and the use by foreign firms of one or two local lawyers to engage in the practice of Hong Kong law themselves. But foreign lawyers have countered that these are not entirely realistic concerns, and that such restrictions are in fact insulting to members of other legal professions.<sup>25</sup>

Moreover, the proposed solution might well prove ineffective. The 1:1 requirement implies that numerical ratios are the most important factor in the power balance of a law firm, but other factors, such as finances,

<sup>24</sup> Ironically, many members of the Law Society failed to recognise or at least acknowledge this publicly during the 1988–89 controversy over foreign law firms. Most objections made against the American firms could just as easily have been made against the English-based firms. It is true that their members are admitted in Hong Kong — but that is only because the *Legal Practitioners Ordinance* grants them special treatment.

<sup>25</sup> A requirement that multinational firms be controlled by the English solicitor members was considered in the UK, at least for multinational partnerships between English lawyers and lawyers from non-EC countries, and for similar reasons (for EC members, it was considered inappropriate, since it might contravene EC law). The *Financial Times*, Feb 12, 1990. But no such requirement was adopted.

prestige, or drawing power for clients, may count more heavily. Its mechanical approach may in the future prove unduly restrictive of the practice of law, without necessarily providing an effective answer to the Law Society's concerns. Applying the ratio even in the context of a local practice established by a foreign firm also seems hard to justify. Is the real reason to restrict the number of foreign lawyers allowed to practise in any form of association with local lawyers? That may be its effect if not its purpose.

### *Scope of practice*

The 'practice of law' as defined in the FLF Proposal is extremely broad, encompassing not only the aspects of legal practice over which solicitors have a statutory monopoly, but almost every activity lawyers (or even non-lawyers) might engage in. The definition includes any 'activities customarily performed' by persons qualified to practise in that jurisdiction, including not only drawing up documents but also advising on any matter involving a broad range of rights. The definition is important because 'practice of law' is what the proposal seeks to regulate, and because foreign law firms would still be barred from the practice of Hong Kong law.

Would this proposal seek to regulate the practice of non-Hong Kong law? Its purpose seems to be restriction of competition from foreign firms, even in areas where non-lawyers may compete, rather than protection of the client from work by unqualified people. If the scheme is intended to relax past rules, it is important to ensure that the proposal does not lead to a more restrictive view being taken of their permitted scope of work as foreign law firms, under the guise of regulating their practice.

### *Administration of schemes*

It is proposed that the Law Society should administer both schemes, which would require the development of more detailed rules as well as the considerable exercise of discretion in applying them. The Law Society's role in the Admission Scheme seems appropriate, since foreign lawyers would be applying for admission to practise in Hong Kong, which is controlled by the society.

Administration of the FLF Proposal is another matter, however. Although the proposed flexible application of some restrictions is praiseworthy, the fact that the Law Society would be the organisation responsible for the approval or denial of applications by foreign firms, and for their further regulation, is troubling in some respects. During the 1988-89 foreign lawyers controversy, the Law Society leadership vehemently opposed any expansion of the foreign law firms' role; few outsiders who witnessed the

campaign would now feel comfortable being regulated by the society. Moreover, under the proposed rules, foreign lawyers would remain ineligible to join the Law Society; they could not be admitted in any capacity and would be seen as outside competitors by many members.

Under the government's 1988 proposal, the Chief Justice would have been responsible for the admission and regulation of foreign firms — and even the July 1991 Law Society proposal allowed the High Court to play a role in the process. It seems that only in the October 1991 version of the report is the Law Society granted an exclusive role. Many would argue that the Law Society is not the appropriate body to regulate foreign firms; instead, the courts should do so, as in many other jurisdictions.<sup>26</sup>

## V WHAT ABOUT THE PRC?

Though all foreign lawyers were portrayed during the height of the 1988–89 foreign lawyers controversy as potential threats to Hong Kong's legal profession, it was implied — or stated outright — that PRC lawyers posed the 'greater threat.'<sup>27</sup> Representatives of the Law Society argued that the rules could not be relaxed for American or Commonwealth lawyers without at the same time relaxing them for PRC lawyers — a move that would be unacceptable. Such a measure would have given mainland Chinese lawyers 'a legitimate means of seizing control of our legal system.' Mainland lawyers could 'call the shots' over local partners and employees, subvert the legal system and eventually infiltrate the judiciary.<sup>28</sup> In support of this position, scare stories appeared in the newspapers, reporting that 'China is poised to export its lawyers into Hongkong.'<sup>29</sup> Law Society spokesmen predicted a huge influx of mainland lawyers if the government proposal allowing foreign firms to hire local lawyers was adopted; they argued that their plans would not prevent PRC lawyers from coming to

<sup>26</sup> According to many of the foreign lawyers. SCMP, May 21, 1989; 'Whose Fault?' Lawyer, Sept 1990, p 8.

<sup>27</sup> One Law Society spokesman was quoted as saying that the PRC factor was paramount; if American, Canadian and other lawyers could hire local lawyers, so could mainland lawyers. 'They pose the greater threat, obviously.' Quoted in 'Foreign Partnerships to be Ruled Out,' The New Gazette, June 1991, p 18.

<sup>28</sup> Simon Ip as quoted in SCMP, July 13, 1989. Similar comments by Donald Yap were reported in the SCMP, July 5, 1989. 'You are talking about a Communist system whose principles, ethics and culture are entirely different to ours.' It is true that, with a few exceptions, lawyers in the PRC are not private independent professionals but 'state legal workers.' See the *Provisional Regulations of the PRC on Lawyers*, adopted on Aug 26, 1980, effective from Jan 1, 1992.

<sup>29</sup> HKS, Sept 26, 1988.

Hong Kong but would at least stop them from practising Chinese and Hong Kong law together.<sup>30</sup>

Certainly many local solicitors have no wish to see PRC lawyers practise in the territory, with or without local partners, or to have them admitted too easily as local practitioners. Do the proposed schemes of regulation and admissions provide suitable control over PRC lawyers and firms, and adequate protection against any dangers they might represent to the local profession? At the same time, do they permit PRC lawyers with the proper training to practise in Hong Kong if they so wish?

Neither proposal contains specific provisions for handling PRC lawyers or firms; presumably they are simply 'foreign' or civil lawyers under the proposed schemes, to be treated like any other non-Hong Kong lawyers in similar circumstances. Of course, placing special restrictions on Chinese lawyers might have been difficult to justify to the PRC authorities. Moreover, the Law Society's repeated emphasising of the danger presented by *all* foreign lawyers and the society's failure during the 1988–89 controversy to draw distinctions between the Chinese and other legal professions would also have made that position harder to adopt.

But the proposed restrictions may prove ineffective if the real concern is to limit PRC practitioners or prevent their law firms from practising Hong Kong law. Maintaining the prescribed 1:1 ratio of Hong Kong to PRC lawyers might not work at all if sufficient political pressure were brought to bear on local lawyers, for example. And what about admission to practise? Mainland lawyers with less than five years of experience would be required to undergo legal training and complete their articles before being admitted to practise. But more experienced lawyers might present a problem. Their admission through a transfer test would depend on a finding that PRC law degrees were equivalent to LLB degrees earned in Hong Kong. It might still be difficult to maintain that PRC degrees were not equivalent, or that PRC lawyers should not receive favoured treatment (as English lawyers now do).

Nevertheless, it would be possible to include in the proposed schemes conditions that might act as more effective barriers, or at least address aspects of the Chinese profession that Hong Kong lawyers find most troubling. First, for example, the admissions plan could apply its requirements across the board, with no exceptions. If UK-trained lawyers receive special treatment now only because of the tie between Britain and Hong

<sup>30</sup> HKS, July 5, 1989. The Law Society had rejected earlier suggestions that the government allow only foreign firms from common law countries to hire local lawyers as 'not viable' since it would not sufficiently increase the internationalisation of legal practice. SCMP, July 15, p 189.

Kong, why should the PRC not be favoured in the future (or even now)? Secondly, the Law Society could emphasise the importance of reciprocity and make it a requirement of both schemes. If, for example, the PRC will not admit Hong Kong lawyers or allow them to take its own lawyers examination, then its profession must be viewed as dissimilar and its lawyers should not be eligible for admission in Hong Kong either. But neither scheme suggests or requires reciprocity, and the Law Society consistently downplayed its importance in the earlier campaign against foreign lawyers, possibly because of American arguments that they should be accorded reciprocal rights in Hong Kong.

Of course, whatever the rules eventually adopted, the Law Society must actually enforce them. Unfortunately, current practice suggests that might not be the case: the rules have not been enforced against the only PRC firm to operate in the territory, China Legal Services (Hongkong) Limited. That firm has been practising as a limited liability company in the territory since 1987, apparently without regulation by the Law Society.<sup>31</sup> Yet the Law Society — which binds other foreign firms through strict undertakings and does not hesitate to issue warnings for perceived violations — maintains that the Chinese company is beyond the society's jurisdiction. According to one Law Society spokesman, 'once you get past immigration you can do anything you want.' 'If the Chinese firms happen to be here what control have I got?'<sup>32</sup>

Treatment of mainland lawyers is an important issue, but the PRC factor presents other difficulties for these proposals, which arguably would introduce a new regime governing foreign lawyers. During the foreign lawyers controversy, some Hong Kong solicitors sought the intercession of the PRC to block the government plan to allow foreign firms to hire local lawyers. One local solicitor even made an open appeal for China's help at the Law Society's September 1988 emergency meeting.<sup>33</sup> As a result, at least one PRC official, the Minister of Justice, reportedly 'expressed concern' over the proposal to allow foreign firms to hire local lawyers.<sup>34</sup> And the Chinese representative in the Sino-British Joint Liaison Group at one point suggested that such a move might 'contravene the Joint Declaration.'<sup>35</sup>

<sup>31</sup> This issue is discussed more fully in Edward J Epstein, 'The PRC Lawyer in Hong Kong: Preliminary Issues,' a paper delivered at a Meeting on the Legal Profession and Socio-Legal Issues at the University of Hong Kong, June 12, 1991.

<sup>32</sup> SCMP, Jan 13, 1992.

<sup>33</sup> HKS, Sept 26, 1988. Another solicitor reportedly lobbied the Chinese Minister of Justice on the issue. SCMP, Feb 17, 1989.

<sup>34</sup> SCMP, Feb 17, 1989.

<sup>35</sup> Reported in HKS, Sept 26, 1988.

The current proposals would not permit foreign firms to hire local lawyers, but those appeals to the Chinese authorities set a dangerous precedent. Article 94 of the *Basic Law* provides that:

'On the basis of the system previously operating in Hong Kong, the Government of the Hong Kong Special Administrative Region may make provisions for local lawyers and lawyers from outside Hong Kong to work and practise in the Region.'

That provision might be used to criticise any changes to the treatment of foreign lawyers, including the two schemes now proposed. PRC spokesmen have not so far commented publicly on the Law Society proposals, but legislation has yet to be enacted or even formally presented to the Legislative Council. PRC attacks on Hong Kong government activities relating, for example, to the construction of Hong Kong's new airport, the planned corporatisation of Radio and Television Hong Kong and the latest budget proposal as contrary to the *Basic Law* indicate that Chinese representatives will not remain silent if they feel in any way disadvantaged by the proposed schemes.

## VI CONCLUSION

Hong Kong is a unique jurisdiction for many reasons. Still a colony and not an independent state, it will in 1997 revert to the PRC, which has no tradition and little experience of a private, independent legal profession. The Hong Kong profession itself is relatively small, and (despite growing confidence three years after June 4, 1989) it is feared that many senior members of the profession will emigrate before 1997.<sup>36</sup> At the same time, some branches of the profession, including government lawyers, judges and law teachers, have long been dominated by foreign or foreign-trained lawyers, so localisation has officially been given a high priority.

It might be argued, therefore, that some forms of international practice thought appropriate elsewhere are unsuitable for Hong Kong; the test is not simply what will benefit international law firms and businesses. But neither is it what is good for some Hong Kong lawyers, especially the most established and highest paid; they have no inherent right to block all competition in order to maintain high fees. Ideally, any proposals should enhance Hong Kong's status as an international commercial and financial centre and at the same time support the legal profession's independence. The American firms' arguments in 1988 were not entirely self-serving;

<sup>36</sup> A survey taken a few years ago indicated that 63 per cent of Hong Kong's solicitors intended to leave Hong Kong before 1997. SCMP, Jan 13, 1991.

international firms may be here as long as other law firms and could help to provide stability to the legal profession.

What about the 'floodgates' argument, the spectre raised by the Law Society during the 1988–89 controversy (and still adverted to) that the territory will be overrun by foreign lawyers if their entry is not hedged in with restrictions? Most lawyers will probably wish to register as foreign firms and form associations (or later, partnerships) with local lawyers rather than seek admission for themselves, but the numbers are not likely to be high in either case. Besides the remaining restrictions, it is simply too expensive to set up practice for Hong Kong to be flooded by US or other common law lawyers.

But if many reputable firms do wish to establish offices in Hong Kong, there seems little reason to prevent it. Law practice is not necessarily the zero-sum game that the Law Society portrays. During the 1988–89 controversy, the society managed to have it both ways: at the same time that they maintained that Hong Kong would be flooded with foreign lawyers, they also argued that no benefits (such as increased or varied opportunities for new graduates, or more business overall) would follow from their presence, because there would be too few foreign lawyers! If the real concern is with Chinese lawyers, it would be better to confront that issue directly.

How should the Law Society proposals be judged? On balance, they are more liberal than might have been expected, given the society's past opposition to internationalising law practice and the admission of foreign lawyers in Hong Kong. Considered together, they represent a great improvement over the current schemes; if the proposals were enacted, most lawyers who wished to do so could qualify in Hong Kong, and at least some 'multi-jurisdictional practice' would be allowed. The absence of any reciprocity requirement in either scheme also has the potential to broaden the scope of international practice in Hong Kong. Although some Law Society spokesmen appear to recognise the advantages of such a requirement, they also argue that it is 'to Hong Kong's advantage to provide the very best international corporate legal services.'<sup>37</sup>

<sup>37</sup> 'Hong Kong Law Society Opposes Mergers and Full Partnerships,' LAWASIA, Sept 1991, p 8. The Law Society president also said that 'it goes against the grain a bit to agree to admit such foreign lawyers as do not accord us reciprocal treatment.' This is ironic in light of the fact that members of the Law Society have for some years taken advantage of the easier admission requirements in the US and Australia, while making the admission of their lawyers in Hong Kong difficult or all but impossible.

Despite the greater flexibility offered by these proposals, however, the plans should be viewed as compromise and in some respects transitional, hardly 'propelling Hongkong into the forefront of innovation and reform in multi-jurisdictional legal practice,' as claimed by the Law Society.<sup>38</sup> They still reflect to some extent the monopolistic concerns of the society, as well as a somewhat old-fashioned view that legal services cannot cross legal boundaries. Thus, the special position of UK lawyers is maintained in the Admission Scheme, while the foreign law firm scheme stops short of the multinational partnerships that are now permitted in England and may well be the wave of the future for international centres.<sup>39</sup> Some requirements contained in the proposals, such as the 1:1 ratio and the scope of practice, may also prove unduly restrictive, undercutting the society's claims to openness. Moreover, by the time these schemes are enacted and implemented, they may have been further overtaken by agreement on the GATS. Given the short time remaining before 1997, a less transitional approach might therefore have served Hong Kong better.

One must also remember that so far these schemes are no more than proposals. The FLF Proposal in particular is presented in outline form only; the details of the scheme, which will be crucial, have yet to be worked out. Clearer judgement can only be reached when the legislation appears, and even then supporting rules by the Law Society will be required. It is to be hoped that the schemes will indeed be implemented by next year, and that the process will not, as some fear, drag on indefinitely. After all, the Law Society has effectively managed to postpone action for four years already.

<sup>38</sup> 'Foreign Lawyers to Come under New Regulations Next Year,' *The New Gazette*, Jan 1992, p 6.

<sup>39</sup> The *Courts and Legal Services Act 1990*, s 66 removed previous legislative barriers to the formation of multinational partnerships in England.