Sze Ping-fat JP

The Hon The President
Legislative Council
Jackson Road
Hong Kong February 3 2000

Dear Madam

May I refer to the recent debate on the admission of foreign lawyers to the Hong Kong Bar which has aroused much concern insofar as it appears to be an attempt to restrict rather than relax the admission of Australian lawyers (among others) to practise in the territory.

If I may respectfully say so, the stance assumed by the current Bar Council on the issue represents a marked departure from both the 'World Cup' approach of the Chief Justice and my discussion with the Chair of the HK Bar in 1998. Worse still, the Bar Council appears to have misled both the legislature and the public over the requirements of the GATS.[1]

It is noteworthy, under the proposed admission scheme, that even Australian or NZ lawyers would have to undergo a number of exams before being allowed to practise in Hong Kong.

Allow me to say frankly albeit quite reluctantly, this exam requirement does not seem justified at all inasmuch as the Australasian lawyers are clearly no less inferior in quality and legal scholarship to their PCLL brethren and

[1] Allow me to say modestly, I am reasonably versed in the GATS given my graduate studies at the Centre for Advanced Legal Studies in Leuven/Louvain a couple of years ago. Incidentally, my mentors included Prof Dr Erik Suy (the former Director-General of and Chief Legal Adviser to the United Nations), among others.

indeed, the law and practice of these jurisdictions are substantially similar.[2] Furthermore, the requirement does not pay due regard to the different role of a Barrister - *vis-a-vis* his Solicitor-brethren - as an advisor/advocate limiting his practice to a number of specialized areas alone.[3]

It is also noteworthy that the number of exams that an Australasian lawyer would be required to take is comparable to that for an LLB to complete for the PCLL at a local university.[4] In other words, he is equated with *just* an LLB.

There is grave concern that this onerous requirement was imposed not so much out of any consideration of merits as on the premise that the local Bar (more appropriately, the livelihood and personal development of local lawyers) ought to be protected, if not also enhanced.

With all due respect, proponents of such protection seem to have overlooked the litigant's *choice* of legal representation as specifically provided by both article 12 of the Bill of Rights and article 35 of the Basic Law.[5] Indeed, what concerns the Court most is, and ought to be, the issue of whether he is properly and competently represented and not the comparatively narrower interest of the legal profession.[6]

The case advanced by the local Bar appears a bit sensational, if I may respectfully say so. Indeed, even the Hong Kong Bar Association conceded, once and again, the perceived decline in the standard of local law graduates.[7]

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[2] Whether one likes it or not, Hong Kong has been a recipient, and not, strictly speaking, the provider, of the common law, as evidenced by her heavy reliance upon British and Australasian jurisprudence. It does seem very odd that Australasian lawyers should be precluded from practising there, or subject to exam requirements.

[3] Eg Admiralty or Chancery work. The law and practice in these areas are almost identical in England, Hong Kong and Australia.

[4] In the result, the position of an Australasian lawyer is in no way ameliorated *vis-a-vis* the existing arrangements (through the PCLL route) notwithstanding the express intention of the Chief Justice to treat him at par with his British and PCLL brethren.

[5] This point was briefly referred to in my humble article 'Unqualified Persons and the LPO' (1997) 161 JPN 791. The free and voluntary choice of legal representation may also be a requisite under art 10 (fair hearing) of the Bill of Rights.

[6] Incidentally, the Court has an inherent jurisdiction over the grant (or restriction) of rights of audience.

[7] The rapid expansion of tertiary education in Hong Kong over the past decade was ascribable to the policy of the then British administration to produce as many university graduates and professionals - the middle-class in general - as a counter-Communist momentum upto and beyond the hand-over. True, there are more places at the law schools than suitably qualified applicants. But much of the problem on standard lies with the law-teaching profession itself. First, many university lecturers in these days are tempted to pass all students in order to keep their rice-bowls. Secondly, only a very small number of law lecturers in Hong

That being the case, how could one rationally substantiate, for instance, the hypothesis that foreign lawyers are not as good as local ones, particularly as, for example, those London silks recently admitted in Hong Kong are really big names at the English Bar[8] and as long as the case law (if not also the statutory law) of other common law jurisdictions (England and Australia in particular) is so frequently and heavily relied upon, not only by the Court, but also by Counsel practising at the Hong Kong Bar, *even after the hand-over of the territory to China.*[9]

At this juncture, it is worth recalling that a good number of the highly successful members of the local Bar were originally 'foreign lawyers' - in the sense that they were brought up overseas. Many of them came to Hong Kong (from Australia and NZ) working in the Government or the Judiciary and, *without having to satisfy any local exam or experience requirement*, discharging professional duties no differently than their local brethren pursuant to the **Legal Officers Ordinance** and the **High Court Ordinance** (among others). Are they to be treated as local or rather, foreign, lawyers? If anything, when does an expatriate lawyer cease to be an expatriate and become a local lawyer? After all, why could they not also practise privately on the same basis?

Under the existing arrangements, British lawyers are treated at par with PCLL-holders for admission to the Hong Kong Bar.[10] In a sense, therefore, the distinction between local and foreign (in this case, British) lawyers simply does not exist,[11] although there does not appear any reason why such recognition should not be extended to Australian and NZ lawyers.[12]

The Bar Council attempts to justify the proposed changes on the grounds, first, that, following the handover, the law and practice of the territory have changed (thus necessitating any foreign lawyer to be familiar with these

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Kong possess a record of scholarly publications or a higher degree from a reputable law school. Indeed, many of the local academics cannot even write or speak idiomatic English and/or Chinese. Nevertheless, they seem to have much more time for 'gossip' or 'office politics' than for teaching or research proper!

[8] Hopefully, Australian or NZ silks will similarly be allowed to conduct cases in Hong Kong.

[9] See eg the citation of English and Australian cases in most of the judgments handed down by the superior Courts of the territory.

[10] Without any local exam requirement. *Quaere* the rationale for applying generally a local exam requirement under the proposed scheme insofar as existing members of the Hong Kong Bar (originally qualified in the UK or elsewhere) would not be required to be 're-examined' thereunder.

[11] Also, the value or usefulness of such a dichotomy is blurred with the advancement in information technology (such as the Internet).

[12] In practice, Australasian lawyers are admitted in England without any exam requirement.

changes) and, secondly, that the exam requirements have to be imposed to comply with the GATS.

With all due respect, may I say that both grounds are totally misconceived. As to the contention on the 'unique' legal system of the post-1997 era, it is noteworthy that the Bar Council has never provided any example or evidence of these alleged changes in law and practice, although it has been the strongly-held view of both the local Bar and Government that the application of the common law has never been affected by and following the handover. A search of the HKLRD and academic writings in the post-1997 era shows rather that the superior Courts in Hong Kong have been increasingly relying on British and Australian cases in reaching their decisions and indeed, the recent statutory reform is also proposed on the British or Australian model.[13] Whilst the Basic Law may point in some way to changes in the legal system, it is reasonably clear that the jurisprudence that may have developed on this law remains too small to be examined as a subject proper[14] and worse still, even those Court decisions are controversial. Both the Bar and academic writers hold different views on various provisions of the Basic Law. Should we expect an examinee to reproduce these views or, rather, the decisions of the Court or the NPC, in such an exam?[15]

Adverting to the GATS requirements, I understand that they aim to remove, and not justify, 'unnecessary' artificial barriers to entry. Thus, insofar as British lawyers are still allowed to practise without any local law or experience requirement after the handover (notwithstanding the alleged changes in the legal system after 1997 according to the Bar Council), that concession must also be extended to other similarly qualified foreign lawyers (such as those from Down Under).

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[13] I bet that the reform committee to be chaired by the Chief Judge of the High Court on court procedure will simply adopt the 'case management' approach (among others) as has already been applied in Australia and England. Also, the Australian model will probably be adopted in Hong Kong by the Legal Education Reform Committee to which two Australian academics were appointed to assume a leading role.

[14] Very few of the articles there have been litigated. Given the generality of the provisions, I would say that it serves no practical purpose at all to expect an examinee just to reproduce the provisions particularly as their legal meaning is (just) a matter *ad hoc* for the Standing Committee of the NPC in Beijing

[15] I need not mention the Bill of Rights or the ICCPR because the local Courts rely more heavily on foreign jurisprudence in the adjudication process.

Following the Bar Council's rationale (if any), both Sir Anthony Mason and Lord Cooke should also be required to sit local law exams before being allowed to sit on the Court of Final Appeal. By the same token, the many British and Australasian lawyers currently practising in Hong Kong (or working in the Judiciary or the Government) must also be required to do a local law exam if, as alleged, Hong Kong now has a different law and practice following the handover. Well, if they were to be exempted on the ground of local experience, then, my question would be why 'late' comers could not also learn this 'unique' local law and practise by experience (*eg* during their pupillage for 6 months)?

Allow me again to say frankly albeit most reluctantly, I am most disappointed by the sophism that the Bar Council is advancing on this issue (which, quite unjustifiably indeed, has been sensationalized), given, in particular, that a number of its office-bearers have been held by me in very high regard. At this juncture, may I also refer to my correspondence with both Mr Simon SO Ip (the then legislator for the legal constituency) and Mr Ronny Wong QC (the then Chairman of the HK Bar) in 1994 inasmuch as both of them were liberally-minded enough to accept my proposal to allow those having passed the English Solicitors Finals to be admitted to the HK Bar.[16]

I admit that, in these days, my interest lies more in legal practice Down Under than in Hong Kong but it does not follow that I should shut up and allow this blatant unfairness (if not also laughing-stock) to fly around. Following the proposal, I would nonetheless be subject to the 'humiliation' of writing an exam in Hong Kong law notwithstanding (1) my competence as a university law lecturer (at degree/professional level) and a legal executive in a HK law firm for more than 5 years in Hong Kong; (2) my long list of scholarly publications (in reputable law journals and the *International Encyclopedia of Laws*) in the context of Hong Kong law; (3) my recognition, rightly or wrongly, as an expert in commercial and shipping law (where the law and practice in Australia, Britain and Hong Kong is virtually identical); and (4) the fact that my former students, now practising law in Hong Kong, frequently seek my professional advice on Hong Kong law despite my having migrated Down Under.

[16] On the ground that PCLL-holders may elect to enter either branch of the profession without any further exam requirement.

Frankly speaking, I fail to see why the Bar Council could not be a bit productive, for instance, by considering instead the question of whether or not the admission to the Hong Kong Bar be restricted to those who, albeit qualified overseas, are Hong Kong belongers, or following the English practice, are eligible for a work permit in Hong Kong. This has the advantage of 'integrating' certain foreign lawyers into the local Bar, at a time when a good number of locally-trained lawyers do not seem to be competent enough to do their jobs (and there is now no practical means to get rid of them).

That said, however, one should not forget that even a foreign lawyer (admitted *ad hoc*) has to pay tax to the Government of Hong Kong on his earnings no differently than his local counterpart whereas there is virtually nothing to stop a local lawyer migrating one day (taking all his fortune reaped during his professional life in Hong Kong) or practising for some time in Hong Kong and for other time elsewhere.

The admission of foreign lawyers to the Hong Kong Bar, which will surely benefit, in the long run, the development and provision of legal services at large,[17] ought to be considered calmly and on a generous and sympathetic basis. Incidentally, Singapore has just relaxed her admission requirements with a view to exporting her legal services to the region.

With all good wishes for the Year of the Dragon,

Truly

PS It is also very doubtful if the exam requirement was imposed essentially for the purpose of increasing the revenue of the professional body (*of* the Law Society's admission of foreign lawyers).

PPS Hasn't the English Bar been in breach of the GATS by allowing automatic admission of HK barristers (among others)?

[17] From another perspective, the admission of other common law practitioners is a positive step towards the maintenance of the territory as a common law jurisdiction.