has the potential to be developed in ways that would make it both relevant to law practice *and* broadly transferable. Perhaps the answer to the question of how to make legal education serve both general and professional purposes, is to create an efficient and sophisticated curriculum focused on learning complex professional skills such as problem solving. This argument is a powerful one and merits further investigation.

If legal educators are to reform legal education successfully, they ought to concentrate first on clarifying its purpose. Mixing general purposes with professional ones is confusing to teachers and students. It results in a product that is mired in tradition, out of date, and inadequate to the needs of students and society. Legal educators ought to design a curriculum that helps students develop knowledge and skills that will contribute to their competence, and to their confidence, as professionals. For the legal profession to maintain its high standards and to continue to gain respect from society, law programmes must adhere to the purpose of educating students for legal practice. The future of legal education lies in focusing exclusively on this purpose.

Stephen Nathanson[*]

The Old Age Pension Scheme: A Tax by Any Other Name ...

In July 1994 the Education and Manpower Branch, Government Secretariat issued a pamphlet on its proposals to introduce an old age pension scheme (the '*Pension Consultation Paper*').[1] The proposals are based in large part on a feasibility study prepared by the Wyatt Company, an employee benefits firm.

The government has proposed that old age pension benefits in the amount of HK$2,300 per month[2] will be payable to individuals aged 65 or over[3] who continue to reside in Hong Kong[4] and who have resided in Hong Kong for a minimum of seven continuous years prior to the date of application for the pension.[5] Pension benefits will be paid to eligible individuals whether or not they are employed at the time of payment and will be payable in addition to benefits payable under the civil service pension schemes or under voluntary

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1 Education and Manpower Branch, Government Secretariat, *Taking the Worry out of Growing Old: A Consultation Paper on the Government's Proposals for an Old Age Pension Scheme*, July 1994 (the '*Pension Consultation Paper*').

2 Ibid, para 5.1, p 9.

3 Ibid, para 4.1, p 7.

4 Absences of up to 180 days per year would be permitted. Ibid, para 4.4, p 7.

5 Ibid, para 4.3, p 7. Benefits presently payable under the Normal Old Age Allowance ('NOAA') and the Higher Old Age Allowance ('HOAA') will be subsumed by the new scheme, but transitional arrangements will enable recipients of the NOAA and HOAA who do not satisfy the proposed residency requirements for the new scheme to receive pension benefits. Ibid, para 3.6, p 6.

retirement schemes.[6] Future pension benefits payable under the pension scheme will be linked to the Composite Consumer Price Index to enable pension benefits to keep pace with inflation.[7]

The suggested pension scheme will not require Hong Kong residents to have been employed in Hong Kong, or to have contributed to the pension scheme, in order to be eligible to receive pension benefits. However, potential pension beneficiaries between the ages of 65 and 69 who have not contributed to the pension scheme for at least ten years[8] will not be able to receive pension benefits unless they are able to declare that their overall financial resources do not exceed $2 million.[9] Assets declarations will not be required of individuals who have contributed for at least ten years[10] or are aged 70 or above.[11]

A further criterion that may limit the eligibility of individuals to benefit from the pension scheme is that during the seven years of continuous residence prior to the date of application for pension benefits, a potential beneficiary may not be absent from Hong Kong for more than 392 days.[12] It will make no difference if the absence is for personal or business reasons.[13]

The government has proposed that contributions to fund the pension scheme should be borne equally by employers and employees.[14] All employers will be required to contribute 1.5 per cent of their employees' assessable income,[15] and all employees earning more than $4,000 per month (to be adjusted upwards in line with inflation)[16] will also be required to contribute 1.5 per cent of their earnings into the scheme.[17] Thus, employers of wage earners earning less than $4,000 per month will still have to contribute the

6 Ibid, paras 7.1–7.4, p 15.
7 Ibid, para 5.2, p 9.
8 During the initial ten year transition period, years of continuous residence may be substituted for years of contribution. Ibid, para 4.5, p 7.
9 More particularly, the assets declaration will involve declaring that one's overall financial resources, defined as monthly disposable income x 12, plus disposable capital, does not exceed $2 million. Certain specified deductions and personal allowances will be allowed in respect of disposable income. Ibid, para 4.6, pp 7-8.
10 See note 8 above.
11 *Pension Consultation Paper* (note 1 above), para 4.5, p 7.
12 Ibid, para 4.3, p 7.
13 Telephone interview with A M Reynalds, Principal Assistant Secretary for Education and Manpower, Government Secretariat, 10 October 1994 ('Telephone interview with A M Reynalds, 10 October 1994'). Mr Reynalds stated that this eligibility restriction involving absences from Hong Kong will continue a policy currently applicable to NOAA benefits.
14 *Pension Consultation Paper* (note 1 above), para 6.6, p 11. The Government will also contribute to the pension scheme those funds that currently finance the government's existing old age assistance programs — the NOAA, the HOAA, and the standard rate paid under the Comprehensive Social Security Assistance Scheme to persons aged 65 or above — as well as inject $10 billion as a start-up fund. Ibid, paras 6.15, 6.18 & 6.21, pp 12 & 13. The government will also contribute to the scheme as an employer. Ibid, paras 6.15 & 6.20, pp 12 & 13.
15 Ibid, para 9.5, p 19.
16 Telephone interview with A M Reynalds, 10 October 1994 (note 13 above).
17 *Pension Consultation Paper* (note 1 above), para 6.10, p 11 & para 9.5, p 19. The *Pension Consultation Paper* notes that under these guidelines, about 9 per cent of Hong Kong workers will not have to contribute to the pension scheme. Ibid, para 6.10, p 11. There will not be an earnings level above which contributions to the pension scheme will not be required. Ibid, para 6.12, p 12.

employer's portion on behalf of such individuals.[18] Owners of unincorporated businesses, including the self-employed, will be required to contribute 3 per cent of their assessable income.[19]

The *Pension Consultation Paper* explicitly recommends that all 'non-local' employees and 'non-local' owners of unincorporated businesses should be required to contribute to the pension scheme on the same terms as their local counterparts.[20] Subject to the exemption for personal contributions by wage earners earning less than $4,000 per month, foreign domestic helpers will also have to contribute to the scheme, as will all other expatriate workers with the exception of workers imported under the General Labour Importation Scheme.[21] Implicit in the government's proposals is that refunds will not be given to individuals (either expatriates or locals) who intend to or actually leave Hong Kong before reaching the age of 65.[22]

Given the inadequacy of the government's current benefits for the elderly,[23] few would object to the creation of a formal pension scheme. Indeed, a recent survey claims that as many as 1.5 million workers in Hong Kong are not participating in any retirement plans.[24] Not surprisingly, the question of how to *finance* the scheme has proven more controversial. For example, in a recent editorial in *The Asian Wall Street Journal*, Professor Isaac Ehrlich criticises the proposed contribution/benefit formula as unworkable, disputing the government's projections and arguing that the pension scheme cannot be self-financing.[25] He also claims that indexing the monthly pension benefits to inflation will not enable recipients to keep pace with the projected increase in the standard of living: 'The sum of $2,300 is about 30 per cent of the median salary today. But in 50 years, the same inflation-adjusted sum would be a mere 11 per cent of the median salary, assuming real wages grow 2 per cent a year ... This is very much like expecting today's retirees to be content with the quality of life of a retiring rickshaw operator in 1944.'[26]

I leave it to the economists to debate the economic fundamentals of the scheme, but I want to raise two objections to the pension scheme: (1) the inherent unfairness of compelling individuals — such as foreign workers, Hong

18 Ibid, para 6.11, p 12.
19 Ibid, para 6.8, p 11 and para 9.5, p 19.
20 Ibid, para 6.4, p 10. The *Pension Consultation Paper* does not define the term 'non-local.')
21 Ibid, paras 6.4 & 6.5, p 10.
22 Interview with A M Reynalds, Principal Assistant Secretary for Education and Manpower, Government Secretariat, 27 September 1994 ('Interview with A M Reynalds, 27 September 1994'). See also 'No refund proves controversial,' Hong Kong Pension Guide, South China Morning Post, 4 September 1994, p 6.
23 Which include the Social Security Allowance Scheme and the Comprehensive Social Security Assistance Scheme. See *Pension Consultation Paper* (note 1 above), paras 3.1–3.7, p 6.
24 'New survey shows 1.5 million workers do not have cover,' HK Pension Guide, South China Morning Post, 4 September 1994, p 5 (citing a study prepared by the insurance firm Eagle Star).
25 Isaac Ehrlich, 'Hong Kong's Rickshaw Retirees,' Asian Wall Street Journal, 19 September 1994, p 10.
26 Ibid.

Kong emigrants, and Hong Kong residents who travel for extended periods — to contribute to a pension scheme (without the possibility of receiving a rebate or exemption) from which they may never benefit, and indeed, may not be permitted to benefit, and (2) the government's failure to admit that compelled contributions to the proposed pension scheme are in fact a tax.

I shall first set out the government's position. The *Pension Consultation Paper* states that the proposed pension scheme 'functions on the principle of collective social insurance whereby all members of the working population are required to contribute towards the scheme. In return, they will be eligible for pension benefits ...'[27] Mr Lam Woon-kwong, Deputy Secretary for Education and Manpower, reiterates this point: 'The principle is, if you are working in Hong Kong, you should contribute to it.'[28] Furthermore, he claims that allowing individual workers to opt out of the scheme 'would involve "a disproportionate amount of administrative complexity."'[29] In addition, he argues that '[a] pay-as-you-go scheme like this operates as joint social insurance in return for a degree of safeguard in the form of an old-age benefit. This is not a saving scheme, so there is no question of opting out.'[30]

What is most troubling about the government's proposal is the requirement that foreign domestic helpers contribute to the pension scheme when their monthly salary reaches $4,000 per month and that their employers must contribute an additional 1.5 per cent of the helper's salary as well. Foreign domestic helpers are disadvantaged by 'the two-week rule' — the condition stamped in a foreign domestic helper's passport that provides that she may remain in Hong Kong for twelve months, or for two weeks after the termination of her employment contract, whichever is earlier.[31] The two-week rule also penalises foreign domestic helpers under the proposed pension scheme, because if a foreign domestic helper has her employment contract terminated, unless she finds other employment within two weeks she must leave Hong Kong and thereby relinquish her right to collect pension benefits. Thus, a foreign domestic helper will be entitled to receive pension benefits only if she

27 *Pension Consultation Paper* (note 1 above), para 6.4, p 10.

28 'Foreign workers included in plan,' HK Pension Guide, South China Morning Post, 4 September 1994, p 1.

29 Ibid.

30 Ibid.

31 Harriet Samuels, 'Discrimination Against Foreign Domestic Helpers in Hong Kong,' *Report by the Hong Kong Council of Women on the Third Periodic Report by Hong Kong under Article 40 of the International Covenant on Civil and Political Rights*, March 1991, p 8.

continues to work in Hong Kong after reaching the age of 65.[32] The vast majority of foreign domestic helpers will not be able to continue working here at that age and will therefore be forced to return to their home countries without collecting anything from the fund to which they and their employers were forced to contribute.

The government has softened the financial effect of the pension scheme for those foreign domestic helpers whose monthly salary is below $4,000 by not mandating contributions for less than that amount. However, the minimum monthly salary for new contracts for domestic helpers was recently increased to $3,750, and if the salary increases for domestic helpers outpace inflation it will only be a matter of time until the wages of domestic helpers exceed the inflation adjusted minimum level at which contributions to the pension scheme will be required. Moreover, thousands of foreign domestic helpers currently earn more than $4,000 per month — and would therefore be required to contribute 1.5 per cent of their *entire* monthly salary. In any event, even a partial exemption for foreign domestic helpers is insufficient. These workers should either be granted the right to remain in Hong Kong after the termination of their full-time employment (either to retire or to work part-time) or be permitted to receive pension benefits after departing from Hong Kong. If neither of these amendments is possible, then foreign domestic helpers should be altogether exempted from having to contribute to the pension scheme.

Like foreign domestic helpers, many other expatriates will find that the only way to collect their pension benefits will be to continue working in Hong Kong past the age of 65. This is because many expatriates do not have the *right* to retire in Hong Kong. Currently, only Hong Kong permanent residents enjoy the right of abode in Hong Kong,[33] and resident British citizens and resident United Kingdom belongers have the right to land in Hong Kong and to enjoy an unconditional stay.[34] The Immigration Ordinance provides that other expatriates may seek permission to land in Hong Kong and to unconditionally stay.[35]

32 As noted earlier, the *Pension Consultation Paper* recommends that unlike foreign domestic helpers, workers imported under the General Labour Importation Scheme should not be required to contribute to the pension scheme. *Pension Consultation Paper* (note 1 above), para 6.5, p 10. During my interview with Mr Reynalds, I asked why the government treated these two groups differently. Mr Reynalds stressed the ability of workers to continue working in Hong Kong and responded that unlike foreign domestic helpers who are able to renew their employment contracts, workers imported under the General Labour Importation Scheme are not normally allowed to renew their contracts beyond six years. Interview with A M Reynalds, 27 September 1994 (note 22 above). See also *Pension Consultation Paper* (note 1 above), para 6.5, p 10. However, in my view this distinction is irrelevant. Pension benefits will be of the greatest value to those individuals who *retire* in Hong Kong. Since neither foreign domestic helpers nor workers imported under the General Labour Importation Scheme may remain in Hong Kong after their employment is terminated, they should be similarly treated under the scheme.

33 Immigration Ordinance, cap 115, s 2A. Section 2 of the Immigration Ordinance defines a Hong Kong permanent resident as 'a person who belongs to a class or description of persons specified in Schedule 1 [to the Immigration Ordinance].'

34 Ibid, s 8(1).

35 Ibid, s 11.

It is understood that the current policy at the Immigration Department is to approve such requests by expatriates from some countries (from the United States or Western European countries, for example, but not from China) if the expatriates have resided in Hong Kong for a period of at least seven continuous years. But this policy may not be maintained after 1997. Indeed, it is difficult to predict whether any expatriates will be permitted to remain in post-1997 Hong Kong after the termination of their employment.

Moreover, given the uncertainties and fears engendered by 1997, as well as the ever increasing cost of living in Hong Kong, it is very likely that many expatriates presently working in Hong Kong will choose to retire elsewhere. It is also likely that the current pace of emigration of the local Hong Kong Chinese will continue. For example, the estimated number of emigrants during 1992 ranges from the official government estimate of 66,000[36] to more than 100,000.[37]

Thus, the government is in the unusual position of setting up a pension scheme at the very time that a significant portion of the population is considering retiring abroad. It would appear that the government will reap substantial financial benefits from this situation, having proposed a scheme in which the contributions collected from expatriates and locals who leave Hong Kong before reaching the age of 65 will subsidise the pension benefits of those individuals who remain in Hong Kong, some of whom will not have worked in Hong Kong and will not therefore have contributed to the scheme. To put the point more strongly, perhaps the solvency of the proposed scheme depends at least in part on this subsidisation.

Many expatriates and emigrating locals will receive a double blow. Because they will not be retiring in Hong Kong, they will not collect from the Hong Kong pension scheme to which they will have contributed regularly over their working years in Hong Kong. Yet, they will also be unlikely to fulfil the eligibility requirements relating to periods of residence in their country of retirement because they will have spent most of their careers in Hong Kong. It would be fairer to repatriating expatriates and emigrating locals if they were entitled to at least a partial rebate of their contributions, or better still, if they were entitled to receive their pension benefits after they have left Hong Kong. Similarly, it would be fairer if the seven-year residency requirement did not have to be fulfilled immediately prior to the date of application for the pension benefits and if the residence period could be cumulative.

One of the premises supporting the government's refusal to pay pension benefits to individuals living abroad is that 'it would be administratively very

[36] Government Secretariat, cited in Ronald Skeldon, 'Hong Kong in an International Migration System,' ch 2 in Ronald Skeldon (ed), *Reluctant Exiles? Migration from Hong Kong and the New Overseas Chinese* (Hong Kong: Hong Kong University Press, 1994), p 30.

[37] Skeldon, 'Hong Kong in an International Migration System' (note 36 above), p 31.

complicated and costly to do so.'[38] However, this principle of avoiding administrative complexity should not be primary, especially if its effect is that many people who contribute to the pension scheme will never benefit from it.

It would not be too difficult to include a box on salaries tax returns to be filled in with the amount contributed by individuals to the pension scheme. (A similar box could be included on corporate profits tax returns.) Then, when the government issues a tax demand note, it could include a running total of the amount contributed by the individual since arriving in Hong Kong. If an individual were to leave Hong Kong before reaching the age of 65, a portion of these contributions could be refunded to the individual at the time of his or her departure. Alternatively, individuals who retire abroad could give the government an address to which pension benefits could be remitted. All in all, the administrative complexity of rebating contributions or paying pension benefits abroad could be minimised.

In addition to disadvantaging repatriates and emigrating locals who do not, or cannot, retire in Hong Kong, the proposed pension scheme penalises individuals who remain in Hong Kong beyond the age of 65 but who (1) were absent from Hong Kong for more than 392 days during the period of seven years of continuous residence,[39] or (2) are absent from Hong Kong for more than 180 days per year after becoming eligible to receive pension benefits.[40] Individuals who take extended vacations or who travel frequently on business would be at risk. It is surprising that the government would propose such restrictions, as it must be aware that many residents of Hong Kong are required as part of their employment to travel extensively. For example, a businesswoman could live all of her life in Hong Kong, devote her career to building a successful China trade business, and, over the years, contribute a large amount of money to the pension scheme — only to find herself ineligible to receive pension benefits when she retires in Hong Kong because she travelled too often during her working years. Such a result is illogical and blatantly unfair. The 392-day and 180-day absence tests should be abolished.

As noted earlier, the government has justified its refusal to allow certain groups of workers to opt out of the pension scheme on the ground that the scheme operates as 'joint social insurance in return for a degree of safeguard in the form of an old-age benefit.'[41] But this implies that everyone who contributes to the pension scheme has a reasonable chance of benefitting from it. In fact, under the proposed scheme whole categories of workers can expect to have little or no chance of collecting any of the pension benefits that they helped to fund.

38 *Pension Consultation Paper* (note 1 above), para 4.4, p 7. Indeed, Mr A M Reynalds also stressed this point to me. Interview with A M Reynalds, 27 September 1994 (note 22 above).

39 See note 12 above.

40 See note 4 above.

41 See note 30 above.

My second objection to the pension scheme relates to the government's refusal to admit that the scheme will be funded by a 'tax.' Indeed, the government strongly denies that the pension scheme is a tax. Mr A M Reynalds, Principal Assistant Secretary for Education and Manpower, told me that the proposed scheme is not a tax because 'the funds generated by the scheme will go into a separate fund rather than into general revenue.'[42] I cannot see this distinction. Certainly, it is possible to have a tax that is earmarked to fund retirement benefits. In the United States, for example, the contributions that fund the government's pension scheme are called 'social security taxes.' The government may claim that the contributions to the scheme are not a tax because the scheme is 'collective social insurance,' but such an argument is, at best, semantic. The reality is that the forced contributions to the scheme are a tax and that the government is being somewhat disingenuous when it claims the opposite.

The effect of the pension scheme, if implemented, will be that the highest salaries tax rate for employees will increase from 15 per cent to 16.5 per cent, a rise of 10 per cent, and for the self-employed from 15 per cent to 18 per cent, a rise of 20 per cent. Furthermore, what is also hidden in the government's proposal is not only that the contributions are a tax, but that the government in effect is proposing a major redistribution of income from the wealthier residents in Hong Kong to the less affluent. Under the government's proposals, an employee need not contribute personally to the scheme until his or her monthly salary reaches $4,000. At the $4,000 per month level, the individual and the employer would together contribute $120 per month, or $1,440 per year into the scheme. Given that the government intends to pay pensioners the flat rate of $2,300 per month, it is unlikely that such an individual and the employer would ever be able to contribute enough into the scheme to cover the individual's personal pension benefits.[43]

In contrast, if an employee earns $80,000 per month, the personal and employer contributions would equal $2,400 per month, or $28,800 per year. Over a ten year period, those contributions, even without interest, would be sufficient to cover more than ten years of pension benefits for that individual.[44] Lastly, for extremely high earners, who earn $1,000,000 per month,[45] the employee's and employer's contributions would total $30,000 per month, or $360,000 per year. One year's contributions paid by this individual and the employer would be sufficient, again without interest, to cover more than

42 Interview with A M Reynalds, 27 September 1994 (note 22 above).
43 For simplicity, in this and the following examples, I ignore the fact that the individual's wages and pension benefits would be affected by inflation.
44 Similarly, if an individual earns $40,00 per month, twenty years of contributions (without interest) would be sufficient to cover more than ten years of pension benefits for that individual.
45 It is possible that companies will adjust their compensation packages for high earners to avoid the effects of the pension scheme tax. See Ehrlich (note 25 above).

thirteen years of pension benefits for that individual, and each additional year's contributions would cover the pension benefits for more than thirteen other individuals.

I do not object to the concept of using a pension scheme to redistribute wealth from wealthier residents to the less affluent. But I am concerned about the government's failure to state that it intends to effect such a redistribution. The government's protestations aside, its proposed pension scheme *will* be funded by a tax, one that departs from the 'laissez faire' principles that the government has traditionally embraced.

The government should be more forthright in its public consultations on the pension scheme and admit that the pension scheme is redistributive and will result in higher taxes for all workers in Hong Kong. It should also consider paying pension benefits to individuals living abroad or, at a minimum, granting rebates to individuals who will never benefit from the scheme. The required seven-year residence period should be cumulative and should be able to be fulfilled at any time, not just immediately prior to the date of application for the payment of pension benefits. Moreover, the 392-day and 180-day absence tests should be dropped from the residence requirements.

If the above changes cannot be made, then at the very least, foreign domestic helpers either should be allowed to remain in Hong Kong after the termination of their full-time employment or should be exempted from participating in the scheme. At present they have the least prospect of being permitted to stay in Hong Kong long enough to receive pension benefits. Granted, these changes would likely increase the required rate of contributions, but it is only reasonable to ask those who will benefit from this 'collective social insurance' scheme to pay their fair share for their 'insurance' policies.

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