

TOOLS FOR IMMEDIATE REGULATORY TAX IMPLEMENTATION: SUBSIDIARY LEGISLATION VS LEGISLATION BY PRESS RELEASE

CHEN JIANLIN*

A pertinent worry plaguing the implementation of economic regulations is the circumvention manoeuvres conducted by private entities during the time-consuming legislative process typically associated with legal change. During the recent imposition of stamp duties designed to curb its exuberant property market, the Singapore government utilised two distinct mechanisms—subsidiary legislation and legislation by press release—to eliminate any window of tax avoidance arising from the time lapse between the initial public announcements and formal implementation. This Article utilises this episode of economic regulation to examine legal and normative considerations regarding these two mechanisms that can be employed by the executive branch to effect immediate legal change. The Article argues that while both mechanisms are legal and are practically indistinguishable under the current legal framework and political reality in Singapore, the increased possibility of a more competitive political landscape necessitates greater legal constraints on the subsidiary legislation mechanism and greater political awareness of the legislation by press release mechanism.

I. INTRODUCTION

The advent of the regulatory state has co-opted law as the primary instrument to effect control over the intertwining complexities of modern socio-economic activities.¹ Yet amidst the rapidly changing circumstances that the regulatory state must constantly confront, the typical time-consuming process in which laws are formulated and enacted presents an Achilles heel vis-à-vis the function of law as economic regulation. Beyond exigency situations where urgent regulatory responses are required, the pertinent concern is the circumvention manoeuvres that exploit the time lag between an initial announcement of a pending legal change and the final enactment of the law. For example, where new taxes are to be imposed on certain goods that are deemed socially undesirable, private entities may rush to stock up on those goods during the

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¹ Jason M Solomon, "Law and Governance in the 21st Century Regulatory State" (2008) 86 Tex L Rev 819 at 821-837; Craig Bradley, "The Rule of Law in an Unruly Age" (1996) 71 Ind LJ 949; John Kay *et al.*, "Regulatory Reform in Britain" (1988) 3:7 Economic Policy 285 at 289-301.

legislative process, thus defeating the policy objective of reducing the consumption of those goods.²

The recent implementation of property-cooling tax measures in Singapore provides an illustrative case study to examine the measures that the government may employ to avoid any time lag in implementing new economic regulations. Between 2010 and 2011, the Singapore government imposed two new stamp duties on selected property transactions in an effort to rein in rapidly rising property prices. The first was the Seller's Stamp Duty ("SSD"), which is payable by the seller who disposed of property within a stipulated period after acquisition.³ The second was the Additional Buyer's Stamp Duty ("ABSD"), which is imposed on certain categories of buyers, particularly foreigners.⁴ Both stamp duties fall under the legislative ambit of the *Stamp Duties Act*, a statute governing transaction taxes for immovable property and shares. Interestingly, however, two distinct mechanisms were utilised to effect these legal changes immediately in a bid to eliminate any opportunities for tax avoidance.

The first mechanism, employed to effect the ABSD, was subsidiary legislation. Also known as delegated legislation in the United Kingdom ("UK"),⁵ subsidiary legislation typically involves regulations promulgated by a senior official of the executive branch (eg, a Minister) under the authority of a statute.⁶ By bypassing the cumbersome and public legislative process, the government can maintain secrecy during the formulation of the subsidiary legislation and eliminate any window for circumvention opportunities by making the subsidiary legislation immediately effective upon promulgation, as in the case of the ABSD.⁷

While expeditiously effective, the use of subsidiary legislation is dependent on a sufficiently broad empowerment provision under the parent statute to cover the promulgated regulations. Where new taxes require amendment of the parent statute itself—as in the case of the SSD⁸—the second mechanism of legislation by press release is used. Legislation by press release, a derisive terminology originating from Australia,⁹ involves an announcement (or press release) by the government notifying the public that an existing statute will be amended and that the amendment, upon legislative approval, will be made retrospectively effective from the announcement date. Notwithstanding the announcement's lack of any formal legal effect, the coining of the term "legislation" rather accurately reflects the practical effect of

² Joseph Jaconelli, "Tax Legislation, Forestalling, and Economic Information" (2013) Public Law 737 at 738-740; Charles Sampford, *Retrospectivity and the Rule of Law* (Oxford: Oxford University Press, 2006) at 157; Jill E Fisch, "Retroactivity and Legal Change: An Equilibrium Approach" (1997) 110 Harv L Rev. 1055 at 1089.

³ *Stamp Duties Act* (Cap 312, 2006 Rev Ed Sing) [*Stamp Duties Act*], First Schedule, Art 3(b).

⁴ *Ibid*, Art 3(bc).

⁵ See Paul Craig, *Administrative Law*, 7th ed (London, UK: Sweet & Maxwell, 2012) at 433-449; A W Bradley & K D Ewing, *Constitutional and Administrative Law*, 15th ed (Harlow: Pearson Education, 2011) at 625-638.

⁶ See *Interpretation Act* (Cap 1, 2002 Rev Ed Sing) [*Interpretation Act*], s 2(1). See also Kevin YL Tan, *Constitutional Law in Singapore* (Alphen: Wolters Kluwer, 2011) at 84.

⁷ Further discussion will be found at Part II-C, below.

⁸ Further discussion will be found at Part II-D, below.

⁹ Miranda Stewart & Kristen Walker, "Australia: National Report" (2007) 15 Mich St J Int'l L 193 at 239; Sampford, *supra* note 2, at 156; Andrew Palmer & Charles Sampford, "Retrospective Legislation in Australia: Looking Back at the 1980s" (1993) 22 Fed L Rev 217 at 262-270.

the announcement because private entities will more likely than not conduct their activities on the basis of the amended law immediately upon the announcement date.

This Article utilises this episode of economic regulation to examine the legal and normative considerations involved in these two mechanisms. Legally, the Article argues that both mechanisms conform to the existing law, whether in general or with specific regard to the ABSD and the SSD. For subsidiary legislation, the empowering provision of the *Stamp Duties Act*¹⁰ is worded with sufficient breadth to encompass the ABSD, while the absence of any generally applicable procedural requirements for the promulgation of subsidiary legislation renders immaterial the failure to present the ABSD measures in Parliament.¹¹ For legislation by press release, where the legal issues revolve around the use of retrospective laws¹² and the scope of taxing powers, there is no violation because the prohibition on retrospective laws is limited to criminal law, while constraints arising from the need for effective laws before taxes may be imposed can be managed by deferring the collection of the taxes until after the legislative enactment.¹³

Normatively, this Article argues that in the current political landscape of Singapore, which is dominated by a single political party,¹⁴ both mechanisms are practically indistinguishable in terms of legal certainty and checks and balances, notwithstanding the theoretically greater uncertainty associated with legislation by press release and the more limited parliamentary supervision for subsidiary legislation. Conversely, the increased possibility of a more competitive political arena—and consequently a more divided Parliament—would necessitate greater legal constraints on the subsidiary legislation mechanism and greater political/public awareness of the legislation by press release mechanism.

This Article is organised into six Parts. Part II presents the operative mechanisms of subsidiary legislation and legislation by press release by describing the implementation of the SSD and the ABSD. Part III examines the legal issues pertaining to these two mechanisms, while Part IV discusses the relevant normative considerations. Part V proposes possible reforms and responses and Part VI concludes.

¹⁰ *Stamp Duties Act*, *supra* note 3, s 78(1).

¹¹ Further discussion will be found at Part III-B-2, below.

¹² There is considerable confusion regarding the definition of “retrospective” and the related concept of “retroactive”, although the general consensus is that “retroactive law” is a narrower subset of “retrospective law”. Because the explicit backdating under legislation by press release renders immaterial the precise nuances of the definitional distinction between the two terms, this Article utilises the term “retrospective” to synchronise with the constitutional language in Singapore. See also *Planmarine AG v Maritime and Port Authority of Singapore*, [1999] 1 SLR(R) 669 (CA) at 681 (approving a distinction between a “retrospective” law that impairs vested rights under existing law or creates a new obligation regarding past events, and a non-retrospective law that “merely allows events which have occurred before the coming into force of the statute to be taken into account in determining the quantum of payments to be made under the statute after the statute has come into force”). For a general discussion of the confusing and conflicting uses of the term, see Ben Juratowitch, *Retroactivity and the Common Law* (Oxford: Hart Publishing, 2008) at 6-17; J Paul Salembier, “Understanding Retroactivity: When the Past Just Ain’t What it Used to Be” (2003) 33 Hong Kong LJ 99 at 104-107.

¹³ Further discussion will be found at Part III-A, below.

¹⁴ Stephan Ortmann, *Politics and Change in Singapore and Hong Kong: Containing Contention* (New York: Routledge, 2010) at 32; Thio Li-ann, “The Right to Political Participation in Singapore: Tailor-Marking a Westminster-Modelled Constitution to Fit the Imperatives of ‘Asian’ Democracy” (2002) 6 Sing J Intl & Comp L 181 at 183.

II. IMPLEMENTING SSD AND ABSD

This Part discusses the policy context underlying the SSD and the ABSD before examining the specifics of the mechanisms employed by the government to implement these two stamp duties.

A. Stamp Duties as Anti-Speculation and Cooling Policies Measures

With over six million people residing in the tiny, 718-square-kilometer island state,¹⁵ it is no surprise that the stability and sustainability of the property market is a salient economic, social and political issue. Rapid increases in property prices during a property bubble not only threaten the integrity of the financial system¹⁶ but also render housing unaffordable to the middle-class and low-income segments of the population, potentially triggering severe political backlash.¹⁷ The government has a wide array of possible tools to manage the property market, ranging from regulations of the financing of property purchases¹⁸ to direct market intervention through affecting the supply of land.¹⁹ Stamp duties were traditionally conceived by the government primarily in terms of revenue generation rather than as avenues for economic regulation.²⁰ Nonetheless, the direct proximity of stamp duties to property transactions—the subject matter of the property market—means that it was only a matter of time before stamp duties were co-opted as regulatory controls of the property market.

The first use of stamp duties as property-cooling economic regulations was in 1996, when the SSD was first introduced.²¹ The SSD was suspended indefinitely in November 1997²² as part of a whole host of property-simulating measures aimed at counteracting the heavy toll extracted by the Asian Financial Crisis on all forms of asset prices (including property) in Singapore and the surrounding region.²³ The SSD was formally repealed in 2005 after nearly eight years of inaction.²⁴ The spectre of a potential property bubble fuelled by a potent combination of United

¹⁵ Singapore Department of Statistics, *Census of Population 2010 Statistical Release 3: Geographic Distribution and Transport*, (Singapore: Department of Statistics, 2011).

¹⁶ Warwick J Mckibbin & Andrew Stoeckel, “Modelling the Global Financial Crisis” (2009) 25(4) *Oxford Review of Economic Policy* 581 at 586-589.

¹⁷ Elvin Ong & Mou Hui Tim, “Singapore’s 2011 General Elections and Beyond: Beating the PAP at Its Own Game” (2014) 54(4) *Asian Survey* 749 at 760-761.

¹⁸ For example, lowering the maximum allowed ratio of the loan to property value: “Cooling Private Residential Property Market . . . and Preventing Prices from Overshooting”, *Straits Times* (15 May 1996) 24 [*Cooling Property Market*].

¹⁹ For example, releasing more state land for private housing development: *ibid.*

²⁰ For a background overview of the historical development of the Singapore tax regime, see Andrew Halkyard & Stephen Phua Lye Huat, “Common Law Heritage and Statutory Diversion—Taxation of Income in Singapore and Hong Kong” 2007 *Sing J Legal Stud* 1 at 1-3.

²¹ *Stamp Duties (Amendment) Bill*, No 16 of 1996; *Parliamentary Debates Singapore: Official Report*, vol 66 at col 431 (12 July 1996).

²² *Stamp Duties (Seller’s Duty) Remission Order* (Cap 312, O 10, 2000 Rev Ed Sing).

²³ Chia Siow Yue, “The Asian Financial Crisis: Singapore’s Experience and Response” (1998) 15(3) *ASEAN Economic Bulletin* 297 at 302-306.

²⁴ *Stamp Duties (Amendment No 2) Bill*, No 38 of 2005; *Parliamentary Debates Singapore: Official Report*, vol 80 at col 1924 (21 November 2005).

States (“US”) quantitative easing, low interest rates and foreign capital seeking a safe haven²⁵ prompted the government to reintroduce the SSD in February 2010.²⁶ The SSD was set at an initial sliding scale of up to 3% for any residential property sold within one year of acquisition.²⁷ The taxable holding period was increased to three years in August 2010.²⁸ In January 2011, the maximum tax rate was increased from 3% to 16% , while the taxable holding period was further extended to four years.²⁹ Further exuberance in the property market and the increased proportion of foreign purchasers³⁰ prompted the implementation of the ABSD in December 2011.³¹ The ABSD was initially a 3% to 10% property value tax imposed on locals who owned more than one property and all foreigners and companies. In January 2013, the maximum tax rates of both the SSD and the ABSD were further increased.³²

B. Legislation by Press Release: Seller’s Stamp Duty

The legislation by press release employed to implement the SSD kick-started on 19 February 2010 with the Ministry of National Development, Ministry of Finance and Monetary Authority of Singapore jointly announcing at 5.30 pm the implementation of the SSD “that will take effect on 20 February 2010”, the day after the announcement.³³ The passage of the necessary legislative amendments on 12 March 2010 was retrospectively applied to 20 February 2010.³⁴ While the relatively mild 3% maximum tax rate and the short holding period of the initial SSD limited its impact,³⁵ the intended anti-speculation impact of the SSD prior to legislative enactment was still arguably felt by developers, who witnessed a decrease in demand for small apartments that were popular targets of speculators given their smaller lump-sum outlay.³⁶

This mechanism of legislation by press release was also utilised for the initial enactment in 1996. The 1996 enactment was initially announced on 14 May 1996,³⁷ and the legislative amendments that were passed on 12 July 1996 retrospectively

²⁵ Government of Singapore, “Measures to Ensure a Stable and Sustainable Property Market”, *Singapore Government News* (19 February 2010).

²⁶ *Stamp Duties (Amendment) Bill*, No 6 of 2010; *Parliamentary Debates Singapore: Official Report*, vol 86 at col 4194 (12 March 2010).

²⁷ *Stamp Duties Act*, *supra* note 3, First Schedule, Art 3(b).

²⁸ *Ibid*, Art 3(ba).

²⁹ *Ibid*, Art 3(bb).

³⁰ Ministry of Finance & Ministry of National Development, “Additional Buyer’s Stamp Duty for a Stable and Sustainable Property Market”, *ENP Newswire* (8 December 2011).

³¹ *Stamp Duties Act*, *supra* note 3, First Schedule, Art 3(bc).

³² *Ibid*, Arts 3(bd)-3(bf).

³³ Government of Singapore, *supra* note 25; Conrad Raj, “Targeting the Right Issue”, *Today* (22 February 2010) 2.

³⁴ *Stamp Duties (Amendment) Bill*, *supra* note 26.

³⁵ Uma Shankari & Emilyn Yap, “Developers Put Home Launches on Fast Track”, *Business Times* (26 February 2010).

³⁶ Leonard Lim, “Fresh Curbs Not Stopping Property Buyers”, *Straits Times* (28 February 2010).

³⁷ The government statement expressly stated that the new stamp duties would be applicable from the subsequent day, and the necessary legislative amendments would be tabled in Parliament in the following week (21 May 1996): *Cooling Property Market*, *supra* note 18; Warren Fernandez, “Govt Acts to Cool Private-Home Market”, *Straits Times* (15 May 1996).

applied to dispositions of property made on or after 15 May 1996.³⁸ However, there are three notable differences between the 1996 enactment and the 2010 reintroduction.

First, to speed up what was already a highly efficient legislative process in the context of a unitary Parliament overwhelmingly dominated by one political party,³⁹ a “Certificate of Urgency” was employed for the 2010 reintroduction.⁴⁰ The “Certificate of Urgency” dispensed with the otherwise required seven-day interval between the publication of the Bill in the Gazette and the second reading of the Bill.⁴¹ This allowed the second reading of the Bill to proceed immediately after the first reading as long as printed copies of the Bill were made available during the parliamentary session.⁴² Thus, instead of the “lengthy” legislative process of nearly two months in 1996, the time lapse in the 2012 reintroduction was reduced to three weeks. Indeed, the entire legislative passage of the amendment effecting the SSD (*ie*, first, second and third readings) was completed in less than fifteen minutes.⁴³

Second, an empowering provision was inserted in the 2010 reintroduction such that any subsequent variation, suspension or reinstatement of the SSD could be performed via a simple Ministerial Order.⁴⁴ This was achieved through a combination of (i) having the relevant SSD provision refer to the First Schedule for the rates and holding period⁴⁵ instead of having the holding period stipulated in the provision itself, as in the case of the 1996 enactment⁴⁶; and (ii) adding a new section stipulating that the operation of the SSD provision is dependent on the prevailing Ministerial Order.⁴⁷ For the latter, the absence of this provision meant that the suspension of the SSD in 1997 had to be achieved through a remission order⁴⁸ under the general power of reducing duties that might otherwise be applicable.⁴⁹ According to the Minister tabling the Bill, the reason for the empowerment provision was that “the process of introducing and repealing provisions in the *Stamp Duties Act* each time we have to introduce, vary or remove a seller’s stamp duty is not efficient, especially when we have to respond in a timely and calibrated fashion to changes in the property market cycle.”⁵⁰ This empowering provision was especially useful for the subsequent changes of the rates and holding periods between 2010 and 2013.⁵¹

Third, the 1996 enactment was applicable to all dispositions of property that took place after the announcement date,⁵² *ie*, a property that was purchased when there was

³⁸ *Stamp Duties (Amendment) Bill*, *supra* note 21, s 6; *Parliamentary Debates Singapore: Official Report*, *supra* note 21.

³⁹ Ortmann, *supra* note 14, at 32; Thio, *supra* note 14, at 183.

⁴⁰ *Stamp Duties (Amendment) Bill*, *supra* note 26.

⁴¹ *Standing Orders of the Parliament of Singapore* (2010 Rev Ed) [*Standing Orders of Parliament*], s 70(1).

⁴² *Ibid*, s 86.

⁴³ *Stamp Duties (Amendment) Bill*, *supra* note 26, *Parliamentary Debates Singapore: Official Report*, *supra* note 26 (In that fifteen minutes interval, there was even time to pass two resolutions of the Committee of Supply, and the second and third readings of the Supply Bill).

⁴⁴ *Stamp Duties Act*, *supra* note 3, s 22B.

⁴⁵ *Ibid*, s 22A(1).

⁴⁶ *Stamp Duties Act* (Cap 312, 1997 Rev Ed Sing), s 22A(1).

⁴⁷ *Stamp Duties Act*, *supra* note 3, s 22B(2).

⁴⁸ *Supra* note 22.

⁴⁹ *Stamp Duties Act*, *supra* note 3, s 74.

⁵⁰ *Stamp Duties (Amendment) Bill*, *supra* note 26.

⁵¹ *Supra* notes 27-32 and accompanying text.

⁵² *Stamp Duties (Amendment) Bill*, *supra* note 21, s 6.

no indication of additional tax liabilities associated with a sale within a certain period after purchase was nevertheless subjected to the SSD. Unsurprisingly, some members of the public wrote to the press crying foul and urging that the SSD should only be applicable to purchases made after announcement,⁵³ but to no avail.⁵⁴ The 2010 reintroduction, on the other hand, was only applicable to property that was acquired after the announcement,⁵⁵ *ie*, property that was purchased prior to the announcement could be sold without being subject to the additional stamp duty regardless of the holding period.

C. Subsidiary Legislation: Additional Buyer's Stamp Duty

The initial implementation of the ABSD on 8 December 2011 was much more straightforward. Having made the public announcement on 7 December 2011,⁵⁶ the First Schedule of the *Stamp Duties Act* was amended by a Ministerial Order to give immediate legal effect to the ABSD.⁵⁷ The First Schedule, pursuant to section 4 of the *Stamp Duties Act*,⁵⁸ describes the various instruments for which a stamp duty is chargeable. Examples of chargeable instruments include conveyances, assignments or transfers of immovable property.⁵⁹

What is noteworthy was the massive scale of the amendment made to the First Schedule, which was previously a mundane and simple list of the stamp duty rates. Given that the ABSD—as a property transaction tax that was contingent on the citizenship status of the purchaser—was an entirely novel form of taxation in Singapore and possibly around the globe,⁶⁰ the amendment of the First Schedule involved not only a brand new sub-section to establish the respective tax rates for the various possible property purchase scenarios (six scenarios were provided initially, but it was later expanded to eight)⁶¹ but also a massive expansion of the definitional section to define the various new legal terms that were necessary for the implementation of the ABSD (*eg*, “foreigner,” “entity,” “residential property,” “Singapore citizen owning one property”).⁶² In total, nearly 1400 words were added to effect the ABSD—a staggering amount given that the total number of words in the entire pre-amended

⁵³ *Eg*, Ngiam Kee Jin, “Homeowner Hit by Clamp on Speculation”, Letter to the Editor, *Straits Times* (22 May 1996); Lau Tiong Seng, “New Policy Hitting Genuine Investors as Well”, Letter to the Editor, *Straits Times* (17 May 1996).

⁵⁴ The issue was not even discussed in the parliamentary debate, see *Parliamentary Debates Singapore: Official Report*, *supra* note 21, at Col 431.

⁵⁵ *Stamp Duties Act*, *supra* note 3, First Schedule, Art 3(b). For the actual announcement, see Government of Singapore, *supra* note 25.

⁵⁶ Ministry of Finance & Ministry of National Development, *supra* note 30.

⁵⁷ *Stamp Duties Act*, First Schedule, as amended by *Stamp Duties Act (Amendment of First Schedule) (No. 2) Notification 2011*, No S 644 of 2011 [*Stamp Duties Amendment 2011*].

⁵⁸ *Stamp Duties Act*, *supra* note 3, s 4(1).

⁵⁹ *Ibid*, First Schedule.

⁶⁰ After Singapore’s implementation, Macau and Hong Kong’s implemented similar measures near the end of 2012: see Hong Kong, Transport and Housing Bureau, *The Administration’s Response to the Issues Raised at the Meeting of the Bills Committee on the Stamp Duty (Amendment) Bill 2012 Held on 25 January 2013*, 5th Leg, No CB(1) 511/12-13(02) (2013) at Annex C (setting out the overseas experiences in relation to the purchase of residential properties by non-locals).

⁶¹ *Stamp Duties Act*, *supra* note 3, First Schedule, Arts 3(bc) & 3(bf).

⁶² *Stamp Duties Amendment 2011*, *supra* note 57, s 2.

First Schedule (including the two lengthy amendments on account of the SSD) was only 1400. The same procedure was used to increase the rates of the ABSD (from 10% to 15% for foreigners and from 3% to 5~10% for locals) on 12 January 2013.⁶³

D. Why the Different Mechanism

One interesting question is why the SSD was not simply implemented through an amendment of the First Schedule, as in the case of the ABSD. The fact that the SSD—which targets property speculation to cool the property market—represented a departure from the conventional revenue generation purpose associated with stamp duties does not provide an adequate explanation.⁶⁴ The ABSD was similarly not driven by fiscal considerations and was also primarily an economic regulation that was designed to curb a particular category of market activity.

The fact that the new section 22A⁶⁵ implementing the SSD contained lengthy descriptions of taxable scenarios that were not previously described in the main statute (eg, declaration of trust,⁶⁶ voluntary winding-up,⁶⁷ lease beyond prescribed term,⁶⁸ and exchange⁶⁹) is also probably not the determinative reason in light of the flexibility of the First Schedule to provide for chargeable instruments that were not explicitly mentioned in the main statute. The First Schedule already contained separate provisions for tax rates on exchanges,⁷⁰ declarations of trust,⁷¹ and leases,⁷² among others. Those newly specified transactions relating to the SSD could have simply been added to the First Schedule in a manner akin to the extensive addition necessary to impose the ABSD.

The real reason is perhaps a rather mundane one. Stamp duties on sales of property have conventionally been borne by the purchaser and are expressly stipulated as such in section 22 of the main statute.⁷³ The ABSD, notwithstanding its novel nature, was still borne by the purchaser. However, the SSD was borne by the vendor⁷⁴ and therefore required a new provision to impose the obligation to pay stamp duties on this new category of taxpayer.⁷⁵

⁶³ *Stamp Duties Act*, First and Third Schedules, as amended by *Stamp Duties Act (Amendment of First and Third Schedules) Notification 2013*, No S 12 of 2013, s 2.

⁶⁴ See Halkyard & Phua, *supra* note 20, at 8 (stating that the broader delegated power to enact subsidiary legislation under the Singapore's *Income Tax Act*, as compared to Hong Kong equivalent, is "generally confined to circumstances where expediency may dictate that certain administrative or computational details be kept out of the enabling [statute]").

⁶⁵ *Stamp Duties Act*, *supra* note 3, s 22A.

⁶⁶ *Ibid*, s 22A(2)(b)(ii).

⁶⁷ *Ibid*, s 22A(2)(c).

⁶⁸ *Ibid*, s 22A(3).

⁶⁹ *Ibid*, s 22A(5).

⁷⁰ *Ibid*, First Schedule, Art 6.

⁷¹ *Ibid*, Art 4.

⁷² *Ibid*, Art 8.

⁷³ *Ibid*, s 22(1).

⁷⁴ *Ibid*, s 22A(1).

⁷⁵ It is worth noting that section 34(1) of the *Stamp Duties Act* actually expressly provided that the person liable to pay the stamp duty is to be specified in the Third Schedule, and the Third Schedule was concurrently amended when the SSD was implemented. Thus, the provision "payable by purchaser" (for conventional stamp duties) and "payable by vendor" (for the SSD) in the primary statute (section

III. LEGALITY

The public reception of the ABSD and the SSD was generally positive, although there were some reservations regarding the necessity and possible side effects of the measures.⁷⁶ However, beyond complaints about “lack of consultation” by developers during the implementation of the ABSD,⁷⁷ there were no objections or qualms expressed in the public discourse, parliamentary debate or academic writings as to the use of subsidiary legislation to implement what was an entirely new category of tax or the use of legislation by press release that necessarily entailed the use of retrospective laws. This Part dissects the relevant legal issues inherent in these two mechanisms to confirm the apparently uncontroversial legality under existing law.

A. Legislation by Press Release

There are two main aspects in relation to the legality of legislation by press release. The first aspect is the retrospectivity of the eventual legislation, and the second concerns the state actions undertaken between the announcement and the passage of the legislation.

1. Retrospectivity

Legislation by press release inevitably involves retrospective laws, given the back-dating of the eventual legislation to the announcement date. Notwithstanding the intense hostility generally associated with retrospective laws,⁷⁸ there is no absolute prohibition of retrospective laws in most jurisdictions.⁷⁹ In Singapore, the main constitutional provision addressing retrospective laws is Article 11(1), which provides, “No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.”⁸⁰ As is clear from the plain wording of the provision and the provision’s heading (“protection against retrospective criminal laws”), the prohibition on retrospective laws is limited to criminal sanctions. There is an unavoidable ambiguity on the margin as to when a law in question constitutes “criminal law” or “criminal sanction/punishment.” Courts elsewhere have grappled with difficult cases such as whether the confiscation of property from convicted drug traffickers, mandatory sex offender registration,

22 and section 22A, respectively) may not be entirely necessary, except perhaps to limit the ability of the Minister to change the payer via subsidiary legislation.

⁷⁶ Eg. Jeremy Torr, “Introduction of Additional Buyer’s Stamp Duty is a Heartening Move for Singaporeans”, *Today* (10 December 2011) 18; “The Right Balance”, *Business Times* (5 April 2010).

⁷⁷ Tan Weizhen, “Govt Moves to Curb Foreign Home Ownership”, *Today* (8 December 2011) 1.

⁷⁸ Sampford, *supra* note 2, at 1; John Prebble, Rebecca Prebble & Catherine Vidler Smith, “Legislation with Retrospective Effect, with Particular Reference to Tax Loopholes and Avoidance” (2006) 22 *New Zealand Universities Law Review* 17.

⁷⁹ Hungary and Sweden are two examples where retrospective civil laws are constitutionally prohibited: Daniel Deák, “Pioneering Decision of the Constitutional Court of Hungary to Invoke the Protection of Human Dignity in Tax Matters” (2011) 39:11 *Intertax* 534 at 540-541; Robert Pålsson, “Retroactivity: Swedish Practice on Legislation by Governmental Communication” (2011) 39:5 *Intertax* 271 at 272.

⁸⁰ *Constitution of the Republic of Singapore* (1999 Rev Ed) [*Constitution*], Art 11(1).

indefinite civil confinement for “dangerous” sex offenders and other legal sanctions contravene the ban on retrospective criminal laws.⁸¹ In Singapore, the issue typically revolves around scenarios where a person convicted under a new or recently modified criminal offence is subjected to enhanced punishment because of past offences.⁸²

Nevertheless, the general consensus among various jurisdictions is that taxation per se is not criminal in nature.⁸³ As explained by Andrew Palmer and Charles Sampford, “[t]ax is not a penalty for earning income, nor is there any social disapproval attaching to the fact that a demand for unpaid taxes has been made.”⁸⁴ For the particular case of the SSD, which for both the 1996 enactment and the 2010 reintroduction involved only an additional retrospective tax rate of 3% , and which was neither a consequence of a criminal conviction nor associated with a punitive characterisation by the government, it is most unlikely to be considered a criminal sanction.⁸⁵

Retrospective civil legislation is subjected to a presumption of retrospectivity. A well-established common law principle in statutory interpretation, the presumption requires express and unambiguous statutory language before a legal provision can be construed to have retrospective operation.⁸⁶ However, the presumption poses no difficulty for legislation by press release because the retrospective operation of the SSD provisions is explicitly and comprehensively provided for in the short title of the amendment bill,⁸⁷ the empowering provision,⁸⁸ and the relevant subsidiary legislation.⁸⁹

At this juncture, it is worth noting the jurisprudential developments elsewhere, where Courts have begun to utilise general constitutional requirements of legality and proportionality to scrutinise retrospective civil legislation in the absence of a per se prohibition against such laws. The requirement of legality is premised on the term “prescribed by law” and similar phrases that are commonly considered the proscribed precondition for any imposition of legal burdens (including taxes) on

⁸¹ Short answer, respectively, yes (European Court of Human Rights); no (European Court of Human Rights and US Supreme Court); no (US Supreme Court): see Sampford, *supra* note 2, at 135-141. See also Chan Wing Cheong, “Retrospective Confiscation Laws: Corruption (Confiscation of Benefits) Act; Drug Trafficking (Confiscation of Benefits) Act” 1997 Sing J Legal Stud 329 at 335-342 (comparatively examine jurisprudence from UK and India on the issue of whether confiscation of criminal proceeds constitute prohibited retrospective criminal sanctions).

⁸² *Eg, Ho Sheng Yu Garreth v Public Prosecutor*, [2012] 2 SLR 375 (HC) at 423-427 (unlicensed money-lending); *Johari bin Kanadi v Public Prosecutor*, [2008] 3 SLR(R) 422 (HC) at 428 (illegal drug consumption); *Public Prosecutor v Tan Teck Hin*, [1992] 1 SLR(R) 672 (CA) at 681 (driving under influence of alcohol).

⁸³ Sampford, *supra* note 2, at 151-156 (discussing the cases from various jurisdictions); Melvin RT Pauwels, “Retroactive Tax Legislation in view of Article 1 First Protocol ECHR” (2013) 22:6 EC Tax Review 268 at 272-273; Fisch, *supra* note 2, at 1066.

⁸⁴ Palmer & Sampford, *supra* note 9, at 261.

⁸⁵ See Chan, *supra* note 81, at 336-337.

⁸⁶ Juratowitch, *supra* note 12, at 68-71; Salembier, *supra* note 12, at 112-118. For examples of judicial application in Singapore, see *Planmarine AG v Maritime and Port Authority of Singapore*, [1999] 1 SLR(R) 669 (CA) at 681; *Bank of Canton Ltd v Dart Sum Timber (Pte) Ltd*, [1979-1980] SLR(R) 681 (HC) at 686.

⁸⁷ *Stamp Duties (Amendment) Bill*, *supra* note 26, s 1.

⁸⁸ *Stamp Duties Act*, *supra* note 3, s 22B(6).

⁸⁹ *Ibid*, First Schedule, Art 3(b).

private entities. Under a broad construction of the term “law” to require qualitative requirements such as accessibility and foreseeability,⁹⁰ the legality of retrospective civil legislation is at risk given that one is arguably unable to access laws that have yet to be enacted and therefore unable to foresee the legal consequences of one’s actions. Alternatively, the retrospective alteration of legal consequences may also be deemed by the Courts to be a negative factor in assessing proportionality in light of the disruption to an individual’s reliance on the then-existing laws when conducting one’s affairs. Retrospective tax legislation has been reviewed by the European Court of Human Rights on the issue of whether it is a “lawful” interference and/or proportionate.⁹¹

However, it is unlikely that such an expansive scope of judicial review would be adopted by Singapore Courts in the foreseeable future. First, notwithstanding signs of more robust scrutiny by courts in judicial review cases in recent times, Singapore’s courts remain largely conservative in their approach.⁹² The seminal Singapore Privy Council case of *Ong Ah Chuan v Public Prosecutor*⁹³ did interpret “law” to incorporate the qualitative requirement of “fundamental rules of natural justice” for the purpose of assessing an alleged violation of fundamental liberties enshrined in the *Constitution*,⁹⁴ but the absence of a constitutional protection of the right to property in the *Constitution*⁹⁵ would prevent its application to taxes. There is also uncertainty as to whether “fundamental rules of natural justice,” which are generally considered procedural rights enjoyed by an individual in the context of adjudication rather than directly applicable to the establishment of generally applicable rules,⁹⁶ can be used by Courts to invalidate retrospective laws. Indeed, the basic requirement of proportionality has yet to be embraced by Singapore Courts.⁹⁷ More fundamentally, even the adoption of such expansive scope of judicial review in Singapore is not likely to disturb the legality of legislation by press release. The prospective warning as to the operation and specifics of pending retrospective laws provided by the

⁹⁰ Robin C A White & Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights*, 5th ed (Oxford: Oxford University Press, 2010) at 312-315.

⁹¹ Pauwels, *supra* note 83, at 272; Pålsson, *supra* note 79, at 273. See also *Multi-Purpose Holdings Bhd v Ketua Pengarah Hasil Dalam Negeri*, [2006] 2 MLJ 498 (CA) at 508 & 526-527 (relying on Indian cases to hold that “it is well settled that an excessively retrospective taxing statute may be struck down as violative of a citizen’s fundamental rights”).

⁹² Daniel Tan, “An Analysis of Substantive Review in Singaporean Administrative Law” (2013) 25 SAclJ 296 at 319-323 (discussing the judicial deference of government actions); Thio Li-ann, “Westminster Constitutions and Implied Fundamental Rights: Excavating an Implicit Constitutional Right to Vote” 2009 Sing J Legal Stud 406 at 426; Jolene Lin, “Administrative Law in Singapore” in Clauspeter Hill & Jochen Hoerth, eds, *Administrative Law and Practice from South to East Asia* (Berlin: Konrad Adenauer Stiftung, 2008) 47 at 78-79.

⁹³ [1980-1981] SLR 48 (PC).

⁹⁴ *Ibid.* See Thio, *supra* note 92, at 408.

⁹⁵ See *Constitution*, *supra* note 80, in particular the conspicuous absence of property rights protection under “Part IV Fundamental Liberties”.

⁹⁶ Craig, *supra* note 5, at 339-341 & 348; Bradley & Ewing, *supra* note 5, at 687-697; Thio Li-ann, “Law and the Administrative State” in Kelvin YL Tan, ed, *The Singapore Legal System*, 2nd ed (Singapore: Singapore University Press, 1999) 160 at 191-195. See Chen Siyuan & Lionel Leo, “Natural Justice: A Case for Uniform Rigour” (2008) 20 SAclJ 820 (case note discussing two recent Singapore cases applying natural justice).

⁹⁷ Tan, *supra* note 92, at 306-307; Lin, *supra* note 92, at 66; Thio, *supra* note 96, at 186-187.

initial public announcement would largely satisfy the requirements of accessibility and foreseeability while minimising any issues of proportionality.⁹⁸

2. Taxing power

Beyond retrospectivity, a question may arise as to whether state actions between the announcement and the eventual passage of the law was duly authorised by law. The absence of any effective legislation during the transitional interval meant that the state actions pursuant to the pending legislation were arguably without a legal basis. This legal lacuna is particularly acute where taxation—as in the case of the SSD—is involved.⁹⁹ Article 143 of the *Constitution*¹⁰⁰ specifically provides that “[n]o tax or rate shall be levied by . . . except by or under the authority of law.”¹⁰¹ This constitutional provision is not an issue for implementing new taxes through subsidiary legislation (as in the case of the ABSD) because properly enacted subsidiary legislation provides the necessary legal authorisation.¹⁰² However, a government announcement stipulating pending legislative changes is merely a government statement that is not currently recognised as “law.”¹⁰³

This problem appears to be moot during the 2010 reintroduction of the SSD due to a combination of the nature of the SSD and the expediency of the legislative process. The SSD is only payable when a property that was acquired after the announcement date is sold. Given the short duration of a mere three weeks under the expedited legislative process,¹⁰⁴ the number of such transactions taking place before the law was effective is likely to be minimal. However, the same cannot be said with regard to the 1996 enactment, where the legislative period was nearly two months, and the SSD was applicable to properties acquired prior to the announcement. From press reports, it appears that tax authority did collect the SSD even before the law was officially passed.¹⁰⁵ There were no reported disputes or litigation arising from this arguably illegal collection of taxes, likely because the legal deficiencies would have already been cured by the passage of the legislation well before any litigation could have commenced. Nonetheless, this issue might be salient in circumstances where a speedy and uneventful legislative process can no longer be taken for granted.¹⁰⁶

⁹⁸ Pauwels, *supra* note 83, at 278; *M.A. v Finland* (10 June 2003), 27793/95 (ECtHR). See also *Johari bin Kanadi v Public Prosecutor*, [2008] 3 SLR(R) 422 (HC) at 430-431 (observing that an advance notice given by the government on its intention to change the law—here making a drug illegal—is relevant in assessing whether the statutory provision is arbitrary and unsupportable).

⁹⁹ See Jaconelli, *supra* note 2, at 738 (“the imposition of taxation is a legislative function par excellence . . . [because] there exists no power at common law to tax, in contrast to other areas of governmental regulation”).

¹⁰⁰ *Constitution*, *supra* note 80.

¹⁰¹ *Ibid*, Art 143.

¹⁰² *Ibid*, Art 2(1); *Interpretation Act*, *supra* note 6, ss 26 & 26A.

¹⁰³ Given that private entities will unsurprisingly conduct their activities on the basis of the pending law stipulated on the announcement date such that the announcement is, practically speaking, no different from duly enacted legislation in its effect on private entities, one may legitimately question whether the announcement should be considered “law” for certain purposes (*eg*, subject matter of judicial review, duty of legal compliance).

¹⁰⁴ See Part II-B, above, for more on this topic.

¹⁰⁵ “Property Curbs: Government Announces Transitional Rules”, *Straits Times* (4 June 1996) 3; Agnes Wee, “Property Sellers Cannot Use CPF Savings to Pay Stamp Duty”, *Business Times* (4 June 1996) 4.

¹⁰⁶ Further discussion will be found at Part IV-C, below.

In this regard, this constitutional requirement can be easily side-stepped by simply recording the taxable activities as they occurred during the transitional interval and only issuing collection demands for the taxes after the legislation effecting the tax has been duly enacted.¹⁰⁷

B. *Subsidiary Legislation*

The power to amend the Schedules of the *Stamp Duties Act*¹⁰⁸ is a form of subsidiary legislation that is governed by the *Interpretation Act*.¹⁰⁹ The legality of subsidiary legislation is essentially two-fold.¹¹⁰ The first aspect concerns whether the substantive content of the subsidiary legislation is duly authorised by the parent statute and/or other written law. The second relates to procedural requirements in the promulgation of subsidiary legislation.

1. *Scope of the Empowering Provision*

The power to promulgate subsidiary legislation is derived from the underlying parent statute, and therefore it is unsurprising that the purpose and scope of subsidiary legislation must be consistent with the empowering provision of the parent statute to avoid invalidity on the basis of *ultra vires*.¹¹¹ In addition, while the *Interpretation Act*¹¹² allows subsidiary legislation to infuse legislative expressions with different meanings from the same expressions used in the source statute,¹¹³ the subsidiary legislation cannot be inconsistent with the provisions of *any* statute passed by Parliament.¹¹⁴

The ABSD was implemented via amendment of the First Schedule of the *Stamp Duties Act*.¹¹⁵ The First Schedule is nested in section 4(1) of the *Stamp Duties Act*, which establishes the obligation to pay stamp duties for “every instrument mentioned in the First Schedule” at “the amount specified in that Schedule.”¹¹⁶ Section 78(1) of the *Stamp Duties Act* provides that the “Minister may by notification in the Gazette add to, vary or revoke the whole or any part of the First, Second, Third, Fourth or Fifth Schedule.”¹¹⁷ Beyond the restrictions on extraterritoriality in section 4(1), there are no discernible constraints on the power to amend the First Schedule of the *Stamp Duties Act*. Indeed, it is worth noting that in *Public Prosecutor v Pillay MM*,¹¹⁸ the

¹⁰⁷ This “record first collect later” approach has been used in Hong Kong when it utilises legislation by press release to implement the equivalent of SSD and ABSD: Hong Kong, Legislative Council, *Official Reports of Proceedings*, (8 December 2010) at 3442-3443.

¹⁰⁸ *Stamp Duties Act*, *supra* note 3.

¹⁰⁹ *Interpretation Act*, *supra* note 6, s 2(1).

¹¹⁰ Tan, *supra* note 6, at 84 & 179; Thio, *supra* note 96, at 170-171; Craig, *supra* note 5, at 456-460; Bradley & Ewing, *supra* note 5, at 634-636.

¹¹¹ Tan, *supra* note 6, at 84 & 179; Thio, *supra* note 96, at 170-171; Craig, *supra* note 5, at 457-458; Bradley & Ewing, *supra* note 5, at 634.

¹¹² *Interpretation Act*, *supra* note 6.

¹¹³ *Ibid*, s 21.

¹¹⁴ *Ibid*, s 19(c).

¹¹⁵ *Stamp Duties Act*, *supra* note 3.

¹¹⁶ *Ibid*, s 4(1).

¹¹⁷ *Ibid*, s 78(1).

¹¹⁸ *Public Prosecutor v Pillay MM*, [1977-1978] SLR(R) 45 (HC).

then Chief Justice Wee Chong Jin had no difficulty finding the empowering provision authorising the making of rules “generally for the purpose of carrying this Act into effect”—read together with the stated purpose in the “regulation of road traffic” in the long title of the parent statute (*Road Traffic Act*)—was sufficient to encompass the subsidiary legislation implementing the entirely novel congestion pricing scheme that was the first of its kind in the world.¹¹⁹ Thus, the addition of the provisions of the ABSD—while representing a significant alteration of the nature and purposes of stamp duties from revenue-generating taxes to economic regulations—does appear to fall under the broadly worded provisions.

2. Procedural Requirements

The procedural aspect of subsidiary legislation is more interesting and worth further investigation. As per the empowering provision, a notification in the Gazette was posted to give immediate legal effect to the ABSD.¹²⁰ This notification reflects the default—but variable—manner of enacting subsidiary legislation stipulated in the *Interpretation Act*.¹²¹ However, this notification was not subsequently presented to the Parliament, as revealed by a survey and search of the Votes and Proceedings of the Singapore Parliament during the relevant time periods.¹²² The lack of presentation to Parliament appears to be prima facie contrary to the stipulation on the Singapore Parliament website¹²³ and indeed to the conventional view of legal academics in Singapore.¹²⁴

Closer examination reveals that there is actually no written law (including the *Interpretation Act*)¹²⁵ that actually mandates this requirement of presentation to Parliament, let alone one that stipulates the consequences for failure to do so. No explicit mention of subsidiary legislation is made in the Standing Orders of the Parliament of Singapore—a document which describes, among others, the procedures for the passage of laws.¹²⁶ This lack of explicit direction is not entirely unusual because there are similarly no general principles governing the making of subsidiary legislation

¹¹⁹ *Ibid* at 45-46. For discussion on the implemented Area Licensing Scheme, see Jianlin Chen & Jiongzhe Cui, “More Market-Oriented Than United States and More Socialist Than China: A Comparative Public Property Story of Singapore” (2014) 23 Pac Rim L & Poly J1 at 18-19; Michael H. Schuitema, “Road Pricing as a Solution to the Harms of Traffic Congestion” (2007) 34 Transp LJ 81 at 99-100. The parent statute has nevertheless since been amended to provide more explicit authorisation for pricing schemes designed to tackle traffic congestion: eg, *Road Traffic Act* (Cap 276, 2006 Rev Ed Sing) [*Road Traffic Act*], ss 114 & 114(A).

¹²⁰ *Stamp Duties Amendment 2011*, *supra* note 57.

¹²¹ *Interpretation Act*, *supra* note 6, s 23(1).

¹²² Singapore Parliament, “Votes and Proceedings—12th Parliament (10 October 2011)”, online: The Singapore Parliament <<http://www.parliament.gov.sg/publications/votes-and-proceedings12th>>.

¹²³ Online: The Singapore Parliament <<http://www.parliament.gov.sg/publications/s/>> (the definition of subsidiary legislation was provided together with the statement that “All subsidiary legislation made must be presented to Parliament”).

¹²⁴ Tan, *supra* note 6, at 178 (“Any subsidiary legislation must be laid before Parliament”). See Thio, *supra* note 96, at 169 (“[delegated legislation] may have to be laid before Parliament”).

¹²⁵ Cf, Tan, *supra* note 6, at 178 (referencing section 23 of the *Interpretation Act* to support his proposition on the requirement of laying subsidiary legislation before the Parliament).

¹²⁶ See *Standing Orders of Parliament*, *supra* note 41.

(aka delegated legislation) in the UK¹²⁷ Under such a legal framework, it is entirely up to the parent statute to specifically provide for parliamentary oversight, as in the case of the *Stamp Duties Act*,¹²⁸ which requires subsidiary legislation amending the First and Third Schedule to be “presented to Parliament as soon as possible after publication in the *Gazette*”.¹²⁹

Yet this provision ironically highlights the rampant lack of parliamentary oversight because this provision was only inserted into the empowering provision in 2013, arguably implying that there was no such legal requirement prior to 2013 (as when the ABSD was implemented). Moreover, this requirement is explicitly restricted to a subset of subsidiary legislation. The requirement of parliamentary presentation is only triggered if an amendment of the First or Third Schedule involves modifying the application of certain provisions of the *Stamp Duties Act* itself.¹³⁰ Thus, for other general amendments, including the future amendment or repeal of the ABSD, no such parliamentary oversight is mandated.

Tellingly, this procedure stands in sharp contrast to the presented subsidiary legislation immediately before and after the December 7, 2011, ABSD notification, such as the *Customs (Authorised Piers and Places for Import by Sea) (Amendment) Regulations 2011*¹³¹ and the *State Lands (Fees) (Amendment) Rules 2011*.¹³² Notwithstanding the fact that these two amendments involve technical changes whose policy impact is nowhere near the ABSD,¹³³ the presentation is unsurprising because the respective parent statutes of these pieces of subsidiary legislation, the *Customs Act*¹³⁴ and the *State Lands Act*,¹³⁵ both include express provisions requiring parliamentary presentation as soon as possible after publication in the *Gazette*.

Notwithstanding the undesirability of the current situation, which will be explored below,¹³⁶ there is no legal violation for the failure to present the subsidiary legislation implementing the ABSD to Parliament.

¹²⁷ Craig, *supra* note 5, at 440-442; Bradley & Ewing, *supra* note 5, at 629-630.

¹²⁸ *Stamp Duties Act*, *supra* note 3.

¹²⁹ *Ibid*, s 78(3). See also s 22B(7), *ibid* (same requirement for the notification regarding the commencement, operation and scope of section 22A, which sets out the SSD).

¹³⁰ *Ibid*, ss 78(2)-(3). The power to modify the application of certain provisions of the *Stamp Duty Act* was inserted together with the requirement of parliament presentation in 2013. During the parliamentary debate, this insertion was described as “technical amendments” and did not attract any specific questions (questions were raised about the underlying policy of property cooling and the specific operation of the substantive provisions): *Parliamentary Debates Singapore: Official Report*, vol 90 (14 January 2013). This new power has yet to be invoked, but in light of the provisions covered (which essentially state that the respective classes of transactions are equivalent for stamp duty purposes as if they were an actual conveyance), the power is possibly designed for future fine-tuning of the stamp duties to allow for the exclusion of certain classes of transactions from the stamp duties or to specifically target certain classes of transactions for additional stamp duties.

¹³¹ (S 128/2011 Sing) (effective on November 18, 2011 and presented to parliament on December 16, 2011).

¹³² (S 129/2011 Sing) (effective on January 2, 2012 and presented to parliament on December 30, 2011).

¹³³ The former involved the change of an authorised pier, while the latter made some upward adjustment as to the modest fees (max of \$880 post adjustment) for services that are not frequently utilised (application in relation to state land).

¹³⁴ *Customs Act* (Cap 70, 2004 Rev Ed Sing) [*Customs Act*], s 143(2).

¹³⁵ *State Lands Act* (Cap 314, 1996 Rev Ed Sing) [*State Lands Act*], s 19(2).

¹³⁶ Further discussions will be found at Parts IV-B & V-A, below.

IV. NORMATIVITY

Having established that both legislation by press release and subsidiary legislation are both legal, this Part turns to normative considerations of legal certainty and parliamentary supervision and observes the complications posed by the underlying political dynamic.

A. *Legal Certainty: Subsidiary Legislation's Edge*

The key advantage of subsidiary legislation lies in its legal certainty.¹³⁷ Notwithstanding any qualms about an excessively broad empowering provision or the copious lack of a general parliamentary presentation requirement, there is no ambiguity about duly enacted subsidiary legislation. Such legislation is of full legal effect with specifics described in the wording of the provision. Lawyers discerning the scope, meaning and operation of subsidiary legislation need only apply the conventional tools of statutory interpretation under the usual constraints of ambiguous statutory language and differing judicial interpretations.¹³⁸

Legislation by press release, on the other hand, is theoretically plagued by two forms of uncertainty. The first arises from the fact that the announcement, however specific and consistent with the substantive content of the pending legal amendment, is ultimately not a legal provision. When there are doubts arising from the precise meaning and/or scope of a new law, there is little guidance provided by scrutinising the wording of the announcement with conventional statutory interpretation techniques. Coupled with imprecise wording in the announcement,¹³⁹ such ambiguity can lead to confusion among lawyers and laypersons alike.¹⁴⁰ While the timely presentation of the Bill containing the draft of the law might help mitigate the uncertainty—even if this is not the norm¹⁴¹—additional uncertainty will continue to reside in the possibility of subsequent amendments to the Bill before the Bill's eventual enactment. Notwithstanding the pressure on Parliament to simply accede to the original Bill that reflects the specifics of the announcement in light of the population's reliance on the announcement,¹⁴² Parliament remains at liberty to amend or reject the Bill,¹⁴³ which can result in nasty surprises for individuals who adhere

¹³⁷ For discussion of the value of legal certainty, see Ji Lian Yap, "Constructive Notice and Company Charges" (2010) 10 J Corporate L Stud 265 at 274-277; Justin F Marceau, "Lifting the Haze of Baze: Lethal Injection, the Eighth Amendment, and Plurality Opinions" (2009) 41 Ariz St LJ 159 at 162-164.

¹³⁸ *Interpretation Act*, *supra* note 6, s 9A. See DR Miers, "Review of the 1st Edition of Statutory Interpretation", Book Review of *Statutory Interpretation* by Francis Bennion, (1986) Public Law 160 at 160.

¹³⁹ Sampford, *supra* note 2, at 158.

¹⁴⁰ For example, in the implementation of the SSD in 1996, the tax authority received many queries due to ambiguity in the announcement as to the precise operation of the new law: Wee, *supra* note 105. The press even served as intermediary to facilitate clarifications: "Q & A—You and the Taxman", *Straits Times* (18 May 1996).

¹⁴¹ Sampford, *supra* note 2, at 158.

¹⁴² *Ibid* at 160.

¹⁴³ Pahlsson, *supra* note 79, at 274-275; Palmer & Sampford, *supra* note 9, at 269.

to the spirit and letter of the initial announcement but are confronted with changes arising from subsequent amendments or rejections.¹⁴⁴

B. *Parliamentary Supervision: Advantage Legislation by Press Release*

Both subsidiary legislation and legislation by press release are powerful tools that the executive branch can use to promptly implement economic regulations without first going through the formal legislative process. These tools can be crucial in situations where an immediate regulatory response is required to tackle an emerging financial meltdown or some other type of socio-economic crisis.¹⁴⁵ More generally, these tools negate opportunities for circumvention by private entities seeking to exploit a time lag between the public notice of pending new laws and the actual enactment of those laws.¹⁴⁶ This risk of circumvention is particularly severe where the regulated activities/goods are durable, such as transactions involving real property where the substantial investment involved in any purchase is likely to forestall future purchases over an extended period. Nevertheless, these otherwise legitimate justifications for the prompt implementation of economic regulations should not distract from the fact that the executive branch is in effect exercising legislative powers that institutionally and traditionally belong to the province of the legislature.¹⁴⁷ Thus, another key normative consideration beyond legal certainty is the adequacy of parliamentary supervision of the executive's use of subsidiary legislation and legislation by press release.

Any parliamentary supervision in subsidiary legislation is primarily described in the initial grant of powers. The power to issue subsidiary legislation must be derived directly and expressly from the parent statute, such that the Parliament can always deny or restrict subsidiary legislative power when considering the enactment (or subsequent amendment) of the empowering provision. However, once the parent statute has been enacted, the procedures for parliamentary supervision of the actually enacted subsidiary legislation are haphazard at best.¹⁴⁸ There is no general requirement for even the most basic procedure of parliamentary presentation, and it is not uncommon for a parent statute to omit any such requirement, even for subsidiary legislation that has a substantial impact on a broad range of socio-economic activities and/or represents a novel departure from the scenarios originally conceived by the legislature when formulating the empowering provision. The ABSD is a perfect case in point.

Admittedly, the lack of parliamentary presentation is not necessarily a material detriment to parliamentary supervision because in most situations it is a mere formality, and it is unrealistic to expect members of the legislature to even provide a

¹⁴⁴ For example, during the implementation of the ABSD equivalent in Hong Kong, the eventual legislative amendment retrospectively removed a tax exemption granted to minor that was otherwise expressly provided in the initial announcement, resulting in unexpected tax bills for purchasers who had relied on that tax exemption: Zhang Weiwei, "Minor Property Purchasers May Face Retrospective Tax Bill", *Singdao Daily* (HK) (22 February 2014) A4.

¹⁴⁵ Craig, *supra* note 5, at 435.

¹⁴⁶ Jaconelli, *supra* note 2, 738-740; Sampford, *supra* note 2, at 157; Fisch, *supra* note 2, at 1089.

¹⁴⁷ Sampford, *supra* note 2, at 160-161; Palmer & Sampford, *supra* note 9, at 264-265.

¹⁴⁸ See Part III-B-2, above, for more on this topic.

cursory survey of the copious amount of subsidiary legislation promulgated at any given time.¹⁴⁹ When the promulgated subsidiary legislation indeed includes substantive economic regulations rather than technical stipulations, Parliament is likely to have actual knowledge of the legislation in light of the typical prominent media coverage associated with such salient measures. There was certainly no lack of publicity of the ABSDs in Singapore, or even abroad.¹⁵⁰ The more problematic issue flowing from a lack of parliamentary presentation is the manner in which Parliament can reject and/or amend subsidiary legislation that it objects to.

At this juncture, it is worth taking stock of the three different types of procedural provisions—beyond publication in the Gazette—that are commonly stipulated for subsidiary legislation in Singapore. The first is *none*, as in the case of the *Stamp Duties Act*¹⁵¹ prior to the 2013 amendments. The second is the requirement of parliamentary presentation, but without more. An example is the *Customs Act*¹⁵² discussed above in Part III-B-2. The third—as seen in the *State Land Act*, similarly discussed above in Part III-B-2¹⁵³—is the requirement of parliamentary presentation together with the possibility of Parliament annulling the presented subsidiary legislation by passing a resolution pursuant to a motion.¹⁵⁴ This mechanism to annul subsidiary legislation is caveated by two restrictions. One is time—the notice for motion for such a resolution must be provided within one month of the presentation (or by the earliest available sitting day of Parliament after the expiration of the one-month period). The other is effect—the resolution would void the subsidiary legislation from the specific date stipulated in the notice for motion, but without affecting the validity of anything done prior to the passage of the resolution.¹⁵⁵

Of course, the fact that the possibility of annulling subsidiary legislation via parliamentary resolution is only provided in the third category of procedural provisions does not mean that Parliament cannot reject/amend subsidiary legislation characterised by the first two categories. Parliament does have the power to amend or repeal subsidiary legislation via the same process in which statutes are amended, namely through passing a Bill. However, there remains a tremendous difference in terms of the procedural and substantive ease of passing a parliamentary resolution compared with passing a Bill. Parliamentary resolutions have shorter notice periods than a Bill, especially with the requirements of first, second and third readings for the latter.¹⁵⁶ More substantially, while any member of Parliament has the inherent right to submit and request a resolution to be voted on,¹⁵⁷ the right to present a Bill is more curtailed,¹⁵⁸ with the most significant restriction for tax-related subsidiary

¹⁴⁹ Craig, *supra* note 5, at 442; Bradley & Ewing, *supra* note 5, at 629-634.

¹⁵⁰ Eg, Justin Harper, "Singapore becoming 'Less Attractive' for Expats", *The Telegraph* (12 December 2011).

¹⁵¹ *Stamp Duties Act*, *supra* note 3.

¹⁵² *Customs Act*, *supra* note 134, s 143(2).

¹⁵³ See also *Road Traffic Act*, *supra* note 119, s 141(2).

¹⁵⁴ *State Lands Act*, *supra* note 135, s 19(2).

¹⁵⁵ *Ibid.*

¹⁵⁶ See *Standing Orders of Parliament*, *supra* note 41, ss 33-46 & 66-88. See also Tan, *supra* note 6, at 81-84 (outlining the legislative procedure).

¹⁵⁷ *Ibid.*, ss 34 & 38.

¹⁵⁸ For example, leave is required to bring in a Bill: s 66, *ibid.*

legislation (*ie*, the ABSD), which requires “the recommendation of the President signified by a Minister.”¹⁵⁹

The mismatch between the ease of imposing the new ABSD by the executive branch and the cumbersome repeal procedure by the legislature is rather stark. Indeed, the President¹⁶⁰ is constitutionally required to “act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet” for matters that are not stipulated in the *Constitution*¹⁶¹ as falling under the President’s discretion, and recommendations on Bills addressing taxes are not expressly provided for.¹⁶² Unless it could be argued that “recommendation of the President” necessarily implied exercise of the President’s discretion,¹⁶³ then it is practically impossible for Parliament to repeal tax-related subsidiary legislation over the objection of the executive branch.

In comparison, parliamentary supervision of legislation by press release appears to be significantly more robust. The procedural requirements necessary to pass a Bill mean that the economic regulations in question must be subjected to the active attention of Parliament. While actual scrutiny of the Bill implementing the SSD during the short fifteen-minute session appeared to be cursory at best,¹⁶⁴ it still represents a marked improvement from the ABSD subsidiary legislation, which was not even officially included in the parliamentary proceedings. The procedure for parliamentary rejection of legislation by press release is also much easier when compared with subsidiary legislation. It requires a mere simple majority at the appropriate and inevitable moment of voting, without the need to actively navigate the various procedural requirements of proposing a Bill or even an annulment resolution.

C. Political Dynamic and Transition

That legislation by press release suffers from legal uncertainty and subsidiary legislation lacks parliamentary supervision does not mean that the implementation of the SSD and the ABSD suffered from those shortcomings. Throughout the SSD’s legislative process, not a single doubt was expressed as to the successful and speedy

¹⁵⁹ This requirements apply to all Bills involving state finance, including “imposing or increasing any tax or abolishing, reducing or remitting any existing tax”: *Constitution, supra* note 80, Art 59(1).

¹⁶⁰ The President is an elected position set up in 1991 to serve as institutional check on the parliamentary executive over various public finance and public administration matters: *Constitution, ibid*, Arts 17-22P. For discussion of these novel institutional checks, see Kevin YL Tan, “Constitutionalism in Times of Economic Strife: Developments in Singapore” (2009) 4 Nat’l Taiwan U L Rev 115 at 125-134; Li-Ann Thio, “Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore” (2002) 20 UCLA Pac Basin LJ 1 at 15-22 & 50-53.

¹⁶¹ *Constitution, supra* note 80.

¹⁶² *Ibid*, Art 21(1).

¹⁶³ While the answer should arguably be yes from the perspective of ensuring that the independently elected President can serve as an effective checks and balance, the President only has the expressly stipulated discretion to veto a much narrower subset of Bills that otherwise requires his/her recommendation. Given the withholding of a recommendation by the President would immediately halt the legislative process, allowing President’s discretion for the recommendation stage is arguably inconsistent with the express limitations on President’s function. See also Tan, *supra* note 6, at 58-59 & 65-67 (discussing the issues and limits in relation to the exercise of the President’s discretion).

¹⁶⁴ See Part II-B, above, for more on this topic.

passage of the relevant Bill.¹⁶⁵ There was also no suggestion that the form and substance of the ABSD was in any way inconsistent with the collective will of the parliamentary majority. This section discusses how the underlying political dynamic of a jurisdiction profoundly affects the manifestation of two normative considerations and highlights the implications arising from a potential increase in political competition in Singapore.

The political dynamic refers to the composition of the formal constitutional structure and political competition on the ground. For Singapore, its Westminster-style unicameral parliamentary system means that the members of the executive branch (the Prime Minister and the various Ministers) usually belong to the political party that commands a majority in Parliament.¹⁶⁶ This intentionally close proximity between Parliament and the executive under the formal institutional arrangements renders concerns about a lack of parliamentary supervision more apparent than real. Any absence of effective control over subsidiary legislation is well mitigated by the direct accountability of the executive to Parliament.¹⁶⁷ Similarly, uncertainty and delay as to the legislative approval of legislation by press release is also less pronounced in such circumstances. This situation can be contrasted with the US-style separation of powers, where it is common for the executive and the legislature to be of different—and at times severely opposing—political compositions.¹⁶⁸

However, consideration of the formal constitutional structure alone is insufficient because underlying political competition will materially affect the actual power dynamic between the executive and Parliament. When the parliamentary majority is weak or there are internal divisions within the majority party, the power of the Westminster executive to effectively implement its policies is more circumspect,¹⁶⁹ which increases the uncertainty associated with legislation by press release and also the risk of the executive promulgating subsidiary legislation that Parliament finds objectionable and would not have passed if presented as a Bill. Conversely, the actual electoral dominance of one political party can potentially transcend any formal institutional separation and provide consistency between the executive's policy objectives and the legislature's legislative activities.¹⁷⁰

In the case of Singapore, the overwhelming political majority in Parliament, where since 1968 the political opposition has never captured more than 10% of the total available parliamentary seats,¹⁷¹ unequivocally cements the institutional affinity between the executive and Parliament. Subject only to limited checks from the elected President on matters involving drawing on financial reserves, detention

¹⁶⁵ This can be contrasted with Hong Kong's own experience with using legislation by press release to implement the equivalents of SSD and ABSD, where speculation raved among commentators as to the prospect of law enactment: "Amendment of Double Cooling Measures Unlikely to Pass", *Hong Kong Economic Journal* (11 February 2014) A1.

¹⁶⁶ Tan, *supra* note 6, at 29-31; Thio, *supra* note 92, at 406-408.

¹⁶⁷ *Constitution*, *supra* note 80, Arts 24 & 25.

¹⁶⁸ Charles A Shanor, *American Constitutional Law: Structure and Reconstruction: Cases, Notes, and Problems*, 4th ed (St Paul: West, 2009) at 119-156 & 170-201.

¹⁶⁹ See Alex Carroll, *Constitutional and Administrative Law*, 5th ed (Harlow: Pearson, 2009) at 227-230 & 235-239.

¹⁷⁰ Daryl J Levinson & Richard H Pildes, "Separation of Parties, Not Powers" (2006) 119 Harv L Rev 2311 at 2315.

¹⁷¹ Ortmann, *supra* note 14, at 32; Thio, *supra* note 14, at 192.

without trial and minority rights protection,¹⁷² the executive and Parliament in Singapore for all practical purposes act as a unified entity,¹⁷³ effectively negating any concerns about uncertainty and parliamentary supervision in relation to the use of legislation by press release and subsidiary legislation.

However, this situation is not necessarily desirable moving forward. Regardless of one's assessment as to whether the previous 2011 election represents the beginning of the end of ruling party dominance or simply a usual fluctuation within clear majority support,¹⁷⁴ it is always precarious in a democratic jurisdiction to premise the normative desirability of state instruments solely on the continued dominance of the current ruling party. Even without political turnover, a weak parliamentary majority coupled with internal divisions within the majority party could severely undermine the current normative indifference regarding legislation by press release and subsidiary legislation. When it is no longer safe to assume that the parliamentary majority will consistently approve without question proposed legislation by the executive, the otherwise theoretical uncertainty associated with legislation by press release will become a serious problem in reality. Similarly, there will be disquiet about abuse of subsidiary legislative powers when the executive utilises the mechanism to promulgate substantive legal rules that are not supported by the parliamentary majority.

V. THOUGHTS OF REFORM

The implications arising from the normative considerations are straightforward. There should be reforms to address the lack of parliamentary supervision for subsidiary legislation and the problems of uncertainty associated with legislation by press release. The absence of any immediate manifestations of these shortcomings does not distract from the real possibility of such issues emerging in the foreseeable future. This Part examines some possible reforms.

A. Greater Legally Mandated Parliamentary Supervision of Subsidiary Legislation

The lack of parliamentary supervision in the promulgation of subsidiary legislation is due to the current legal regime that fails to provide any general requirement of an official presentation to Parliament, which makes it very difficult for Parliament to repeal subsidiary legislation. This defect can be significantly remedied by making the current most stringent procedural checks (*ie*, the requirement of parliamentary presentation coupled with annulment via parliamentary resolution within a stipulated period)¹⁷⁵ the basic general procedural requirement for all subsidiary legislation. This change can be achieved by simply replicating the current provision found

¹⁷² *Constitution*, *supra* note 80, Art 21(1). See Tan, *supra* note 160, at 130-131.

¹⁷³ Tan, *supra* note 6, at 31.

¹⁷⁴ The election produced two unprecedented results—namely the lowest percentage of the popular vote since 1968 (60.14%) and the defeat of a current Minister in a Group Representative Constituency—that led numerous commentators to consider it a watershed moment, even though the opposition still holds only 6 out of the 87 total seats. For discussion, see Ong & Mou, *supra* note 17, at 750-751; Kenneth Paul Tan, “Singapore in 2011: A “New Normal” in Politics?” (2012) 52(1) *Asian Survey* 220 at 223-225.

¹⁷⁵ See Part IV-B, above, for more on this topic.

in selected statutes that contain such requirements into a new clause within “Part III—Subsidiary Legislation” of the *Interpretation Act*¹⁷⁶ to impose the procedural requirement as the generally applicable default rule.

It is true that the diverse variety of possible subsidiary legislation is a legitimate argument against the imposition of a universally applicable procedure. Narrowly conferred powers to promulgate subsidiary legislation on technical matters represent categorically different issues compared with broadly conferred powers that can be used to effect substantively new economic regulations and/or regulatory offences. There is a similar lack of general procedural requirement in the diversity of stipulated requirements (at least six) in the empowering provisions in the UK.¹⁷⁷ Nonetheless, the proposal here involves minimal risk of imposing an unnecessary administrative procedure on subsidiary legislation that merely involves relatively inconsequential regulatory technicalities or an over-onerous burden for subsidiary legislation designed to effect prompt regulatory responses. The current most stringent procedural check in Singapore is itself mild, requiring only the formality of parliamentary presentation. Notably, subsidiary legislation remains capable of being effective from the date of notification in the Gazette, securing full and immediate legal effect for new rules. The possibility of annulment by parliamentary resolution—while significantly more likely when compared to a legislative amendment—still requires the support of an outright parliamentary majority. The executive can hardly complain about the voiding of its subsidiary legislation in such circumstances, especially when the annulment resolution would not disturb the validity of the concluded actions.

Of course, Parliament may and probably should consider enacting more stringent procedural checks when formulating empowerment provisions in the first place. Options include allowing subsidiary legislation to become effective only after no annulment resolution is passed within a stipulated period from presentation or even requiring an affirmative parliamentary resolution to give effect to the subsidiary legislation.¹⁷⁸ This proposed legal reform is only meant to secure a minimum standard of parliamentary supervision over subsidiary legislation.¹⁷⁹ Indeed, notwithstanding the far from onerous procedural burden associated with the proposed minimum standard, it would be a dramatic improvement over the current largely negligible parliamentary checks over much subsidiary legislation—including those affecting regulatory taxes.

B. Greater Political and Public Awareness of Legislation by Press Release

There is no easy legal reform, however, for legislation by press release. The capacity of an announcement to effectively require compliance with a pending law does not originate from any constitutional or legal source. At its core, the de facto legal

¹⁷⁶ *Interpretation Act*, *supra* note 6.

¹⁷⁷ Craig, *supra* note 5, at 440-442; Bradley & Ewing, *supra* note 5, at 629-630.

¹⁷⁸ Bradley & Ewing, *supra* note 5, at 629-630.

¹⁷⁹ In upholding the validity of a subsidiary legislation implementing a novel congestion pricing scheme, the then Chief Justice Wee Chong Jin found it noteworthy to “observe” that the empowering provision “provides for all rules made under the Act to be published in the Gazette and to be laid before Parliament as soon as may be after publication and for Parliament, if it thought fit, by due resolution to annul any rules made under the Act”: *Public Prosecutor v Pillay MM*, *supra* note 122, at 49.

effect is simply a combination—a potent combination—of government speech and retrospective law. Unfortunately from the perspective of attempted legal reform, both aspects are not readily amicable to legal constraints.

While government speech is not immune to legal restrictions—the most notable being the US constitutional prohibition against government speech in favour of a particular religion¹⁸⁰—government speech announcing pending changes to laws and/or describing the specifics of legal changes are not only legitimate but necessary. Such announcements are part and parcel of political discourse and are an integral method of engaging the public in the formulation of laws and policies. It is neither feasible nor desirable to limit the ability of government to pronounce its intention to initiate legal reforms.

The other component—retrospective law—does provide a possible, if blunt, avenue for legal controls over legislation by press release. An extension of the current ban on retrospective criminal laws to include civil legislation, while uncommon,¹⁸¹ would eliminate the use of legislation by press release. Without the retrospective application of a pending law to the date of announcement, the initial announcement itself will no longer compel private entities to behave in *accordance* with a pending law but only in *anticipation* of it. This change would defeat the rationale for legislation by press release because the prevention of circumvention manoeuvres undertaken in anticipation of pending laws is precisely the reason for short-circuiting the legislative process.

The problem with this attempted legal reform is overkill in two respects. First, all uses of legislation by press release will be excluded. While a blanket exclusion of legislation by press release preserves the status quo on legal certainty, there are many circumstances where the use of legislation by press release is amply justified, such as where the proposed legal changes are uncontroversial and in alignment with the parliamentary majority, and where the risks of circumvention are dire. Indeed, the common use of legislation by press release to tackle tax avoidance in other jurisdictions highlights the paramount necessity of this mechanism. Without the possibility of retrospective application, an initial announcement of legal changes to close tax loopholes would serve as public notification of the existence and legality of those tax loopholes that in cruel irony would invite exploitation by taxpayers prior to enactment.¹⁸²

Second, all uses of retrospective civil legislation would be excluded. Notwithstanding the general bad reputation of retrospective laws, a total ban would be a dramatic departure from the legal regime in most jurisdictions that permit retrospective laws for non-criminal matters.¹⁸³ That most jurisdictions allow such laws is unsurprising because retrospective laws often serve the uncontroversial role of “curative legislation,” where retrospective amendments are undertaken to correct minor errors (*eg*, typographical errors or unforeseen changes caused by amendments to other legislation), validate reasonable but possible erroneous interpretations of the law by the government and private entities, or restore legislative schemes that

¹⁸⁰ See Andrew Koppelman, “Corruption of Religion and the Establishment Clause” (2009) 50 *Wm & Mary L Rev* 1831 at 1930-1932.

¹⁸¹ *Supra* note 79.

¹⁸² Sampford, *supra* note 2, at 157; Palmer & Sampford, *supra* note 9, at 263-264.

¹⁸³ See Part III-A-1, above, for more on this topic.

have unintentionally been allowed to lapse.¹⁸⁴ Retrospective legislation may also be necessary to address systemic deficiencies in a current regime that is in need of change¹⁸⁵ or more radically, a democratic transition from a formerly despotic regime.¹⁸⁶

The most compelling argument against banning retrospective civil legislation to restrict legislation by press release, however, is simply that the retrospectivity in legislation by press release is the least harmful among retrospective laws. The key objection to retrospective laws is the violation of the people's reliance on the law as a guide for their conduct,¹⁸⁷ a principle closely connected to the notion of the rule of law.¹⁸⁸ Yet while private entities are arguably caught off-guard by subsequent retrospective changes to a law upon which they based their behaviour, such criticisms cannot be levied on legislation by press release given the public and *prospective* announcement on a pending retrospective legal change.¹⁸⁹ There may ultimately be good reasons to prohibit all retrospective civil legislation, but legislation by press release should hardly be the ideal or primary reason to motivate such a radical legal change.

The lack of an appropriate legal solution to govern legislation by press release does not negate the need for reform. Rather, in line with the conspicuous parliamentary endorsement necessary to complete legislation by press release, the enhancement of checks would be political in orientation. There should be greater political and public awareness of the legislation by press release mechanism—its operational mechanics, its value in preventing circumvention opportunities, its potential shortcomings due to legal uncertainty, and other related normative considerations.¹⁹⁰ This need for awareness is particularly pertinent in the case of Singapore, where there was zero public awareness/recognition of the use of the legislation by press release mechanism when implementing the SSD. Both the relevant government ministries¹⁹¹ and the press¹⁹² simply assumed from the day of the announcement that the SSD would be effective the day after the announcement, without any mention of the retrospective legislative amendment necessary to impose the tax.

¹⁸⁴ Sampford, *supra* note 2, at 104-118.

¹⁸⁵ For example, rampant tax avoidance in Australia during the 1970s due to a combination of legal and political factors: *ibid* at 147-151.

¹⁸⁶ Martin P Golding, *Legal Reasoning, Legal Theory and Rights* (Burlington: Ashgate, 2007) at 258-261.

¹⁸⁷ Juratowitch, *supra* note 12, at 44-64; Golding, *ibid* at 246; Sampford, *supra* note 2, at 77; Salembier, *supra* note 12, at 106-107; Fisch, *supra* note 2, at 1084-1085. See also Ji Lian Yap, "Apparent Authority: Doctrinal Underpinnings and Competing Policy Goals" (2014) 1 J Business L 72 at 77-81 (discussing the importance of protecting the reasonable expectations of parties).

¹⁸⁸ For a discussion about relationship between rule of law and retrospective law, see Golding, *supra* note 186, at 240-252; Sampford, *supra* note 2, at 77-98.

¹⁸⁹ Pauwels, *supra* note 83, at 278; Sampford, *supra* note 2, at 157; Palmer & Sampford, *supra* note 9, at 263.

¹⁹⁰ Such considerations include necessity of speedy implementation, separation of powers and consistency between announcement and final legislation: see Jianlin Chen, "The Yet-to-be Effective But Effective Tax: Hong Kong's Buyer's Stamp Duty as a Critical Case Study of Legislation by Press Release" (2014) 10 U Pa E Asia L Rev 1. See also Ji Lian Yap, "Considering the Enlightened Shareholder Value Principle" (2010) 31(2) Company Lawyer 35 at 38 (discussing how public education is necessary in light of the limitations in advancing corporate social responsibilities via conventional legal mechanism).

¹⁹¹ Government of Singapore, *supra* note 25.

¹⁹² Eg, Raj, *supra* note 33; "Property Rules may Herald Stronger Curbs", *My Paper* (22 February 2010) A21; Joyce Teo, "New Rules to Curb Property Speculation", *Straits Times* (20 February 2010).

Armed with a better understanding of the mechanism, Parliament would be in a better position to exercise its legislative power and modify/reject the use of legislation by press release that is normatively undesirable. For example, Parliament may reject the retrospective application of legislation by press release where the initial announcement does not describe the specifics of the pending law with sufficient clarity, or where the final legislation departs from the initial announcement. In addition, where a legal change proposed in legislation by press release is substantively at odds with the sentiment of the parliamentary majority, the appropriate representative of that parliamentary majority should also voice an objection at a much earlier stage, prior to the actual legislative voting, to minimise private entities' adherence to a new law that is ultimately likely to be rejected. At a more basic level, Parliament—working with the executive or otherwise—may also propose guidelines regarding an appropriate approach to legislation by press release. An example is in Australia, where the upper house of the bicameral parliamentary system resolved to reject the retrospective operation of legislation by press release when there have been excessive delays—and thus aggravated legal uncertainty—between the initial announcement and the conclusion of the legislative process.¹⁹³

More research is necessary to formulate the precise substantive content of the most optimal governance approach to legislation by press release. In this regard, such an inquiry would have to pay careful attention to the specifics of the institutional arrangement in the jurisdiction, the procedural nuances of all of the possible legislative instruments, and the underlying political dynamic. The key takeaway from the proposed reform is simply the initiation of dialogue to begin the systematic examination of this otherwise under-theorised but increasingly used mechanism, whether in Singapore or in jurisdictions elsewhere.¹⁹⁴

VI. CONCLUSION

In the current era of pervasive economic regulations, heated debate surrounding the substantive content of regulations often eclipses examinations of their implementation mechanisms. This is unfortunate. This case study of the subsidiary legislation and legislation by press release employed by the Singapore government to implement the ABSD and the SSD highlights the mechanisms' potency and flexibility in effecting immediate regulatory controls. The normative indifference of these two mechanisms under the current political circumstances should not distract from the need for reform to address their respective weaknesses. Given that the scope and frequency of economic regulations will only increase moving forward, it is pertinent to take stock of these implementation measures because the mechanisms and checks through which regulatory actions are carried out are significant factors that affect the efficacy and effectiveness of such regulations.

¹⁹³ Stewart & Walker, *supra* note 9, at 239-240; Sampford, *supra* note 2, at 160-162; Palmer & Sampford, *supra* note 9, at 268. For a discussion of the Senate role and power in Australian legislative process, see Stewart & Walker, *supra* note 9, at 204-207.

¹⁹⁴ In Australia, the mechanism has become prevalent since the late 1970s: Stewart & Walker, *supra* note 9, at 239; Sampford, *supra* note 2, at 156. In Canada, see Salembier, *supra* note 12, at 107. In the UK, see Infobank, "Taxation: Legislation by Press Release" (1992) 13 Business Law Review 176 at 176-177. In Sweden, see Pahlsson, *supra* note 79, at 274.