

# 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

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## Abstract

When a government announces that an existing law will be amended and that the amendment, when finally enacted by the legislature, will be made effective from the announcement date, it is natural and inevitable that private entities will conduct their activities on the basis of the amended law immediately upon the announcement date, notwithstanding the announcement's lack of any formal legal effect. This practice of effecting immediate de facto legal changes is known derisively, but perhaps aptly, as "legislation by press release." This Article utilizes the recent use of legislation by press release to implement the Buyer's Stamp Duty in Hong Kong as a case study to critically examine the legality and normative considerations of this increasingly common but under-theorized practice. Legally, this Article argues that the prospective notice provided by the initial announcement ensures the practice's legality in all but an explicit prohibition of retrospective civil legislation. Normatively, this Article highlights the various criteria of clarity, consistency, necessity and political dynamic that affect the desirability of the practice. On a broader note, the formal retrospectivity inherent in the practice - but which does not disrupt the reliance interests of private entities - provides a useful reexamination of the conventional aversion towards retrospective laws.

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## I. INTRODUCTION

Retrospective laws<sup>1</sup> have never failed to capture the attention of legal scholars. From the early writings of eminent jurists such as Blackstone and Hobbes<sup>2</sup> to modern journals and books devoted to the subject,<sup>3</sup> the notion of laws that catch individuals off-guard by subsequently changing the legal consequences of past actions has always had the capacity to excite discussions thereof. This copious literature has delved into the various aspects of the concept, such as the tension between the hostility towards statutory retrospectivity versus the more tacit acquiescence of adjudicative retrospectivity,<sup>4</sup> the relationship between retrospectivity and the rule of law,<sup>5</sup> the distinction between the common law presumption against retrospectivity and the presumption against interference with vested rights,<sup>6</sup> and the compatibility of retrospective laws with general constitutional and/or human rights requirements of “in accordance with law” or similarly worded provisions.<sup>7</sup>

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<sup>1</sup> For a discussion about the various – and at times confusing – definitions of retrospective laws and the related concept of retroactive laws, *see infra* II.A.

<sup>2</sup> For a concise discussion about the historical origin on retrospectivity, including the early scholarly works, *see* BEN JURATOWITCH, *RETROACTIVITY AND THE COMMON LAW* 27-35 (Hart Publishing 2008); CHARLES SAMPFORD, *RETROACTIVITY AND THE RULE OF LAW* 9-17 (Oxford University Press 2006). For examples of early treatise devoted to retrospective law, *see* WILLIAM G. MYER, *VESTED RIGHTS: SELECTED CASES AND NOTES ON RETROSPECTIVE AND ARBITRARY LEGISLATION AFFECTING VESTED RIGHTS OF PROPERTY* (Gilbert Book Company 1891); WILLIAM PRATT WADE, *A TREATISE ON THE OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS: AS AFFECTED BY CONSTITUTIONAL LIMITATIONS AND JUDICIAL INTERPRETATIONS* (F. H. Thomas & Company 1880).

<sup>3</sup> *E.g.*, JURATOWITCH, *supra* note 2; John Prebble, Rebecca Prebble & Catherine Vidler Smith, *Legislation with Retrospective Effect, with Particular Reference to Tax Loopholes and Avoidance*, 22 *NEW ZEALAND UNIVERSITIES LAW REVIEW* 17 (2006); CHARLES SAMPFORD, *supra* note 2, at (Oxford University Press 2006); J. Paul Salembier, *Understanding Retroactivity: When the Past Just Ain't What it Used to be*, 33 *HONG KONG L. J.* 99 (2003); Ulf Bernitz, *Retroactive Legislation in a European Perspective – On the Importance of General Principles of Law*, 2000 *INTERNATIONAL ASPECTS* 43 (2000); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 *HARV. L. REV.* 1055 (1997); Andrew Palmer & Charles Sampford, *Retrospective Legislation in Australia: Looking Back at the 1980s*, 22 *FED. L. REV.* 217 (1993).

<sup>4</sup> *E.g.*, JURATOWITCH, *supra* note 2, at 67-109 & 220-222 (detailed analysis of court’s divergence approach towards the two types of retrospectivity, and argued that a more uniform and principled approach is desirable); Fisch, *supra* note 3 (arguing against the disparate treatment towards the two types of retrospectivity and for a uniformed approach where retrospective laws is permissible if the regulatory context is in flux).

<sup>5</sup> *E.g.*, MARTIN P. GOLDING, *LEGAL REASONING, LEGAL THEORY AND RIGHTS* 239-262 (Ashgate 2007) (examining the implication on rule of law arising from the retrospective criminal sanctioning of individuals who committed morally reprehensible acts that are formally legal in a prior totalitarian regime); SAMPFORD, *supra* note 2, at 257-288 (contextual discussion of the various types of retrospective laws and argues that there will be circumstances where retrospective laws are both normative desirable and consistent with the rule of law properly understood).

<sup>6</sup> *E.g.*, Salembier, *supra* note 3, at 116-118 & 137-138 (arguing for a clear conceptual distinction between the two presumptions since, notwithstanding the close relationship between the two, each deals with specific and distinct harm).

<sup>7</sup> *E.g.*, Melvin R.T. Pauwels, *Retroactive Tax Legislation in View of Article 1 First Protocol ECHR*, 2013/6 *EC TAX REVIEW* 268 (2013) (discussing how European Court of Human Rights assess the permissibility of retroactive taxes in light of Article 1 of the First Protocol that provides “No one shall be deprived of his possessions except in the public interest and *subject to the conditions provided by law* and by the general principles of international law.”)

There is a particular type of retrospective law that has received relatively scant attention. Known derisively as “legislation by press release,” this practice involves the government announcing that an existing law will be amended and that the amendment, when finally enacted by the legislature, will be made effective from the announcement date.<sup>8</sup> The coining of “legislation” is rather apt because, notwithstanding the announcement’s lack of any formal legal effect, it is natural and inevitable that private entities will conduct their activities on the basis of the amended law immediately upon the announcement date. Yet, despite the increasing usage in various jurisdictions<sup>9</sup> of this potent tool of the executive branch to exercise immediate de facto legal influence on the behavior of private entities without any legislative authorization, the considerations that are applicable in assessing the normative desirability of legislation by press release has remained largely unexamined.<sup>10</sup> In what circumstances, if any at all, can the use of legislation by press release be desirable?

Legislation by press release also poses interesting conceptual challenges to the conventional understanding of retrospective laws. The retrospectivity of the new law is unquestioned given the explicit backdating of legal effect, yet the typical objections to retrospective laws that are based on the protection of reliance interests of individuals<sup>11</sup> are not applicable if the government announcement is accompanied by a sufficiently clear and detailed description of the new law. In this regard, does “retrospectivity” still warrant a categorical “heightened scrutiny” in legal doctrines such as the presumption against retrospectivity<sup>12</sup> and the

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(emphasis added)). See also Daniel Deák, *Pioneering Decision of the Constitutional Court of Hungary to Invoke the Protection of Human Dignity in Tax Matters*, 39 *INTERTAX* 534 (2011) (discussing the Hungarian Constitutional Court use of the “protection of human dignity” to invalidate the retrospectivity of certain confiscatory tax); Bernitz, *supra* note 3, at 51-55 (the requirement of “legal certainty” and retrospective law). See *infra* IV.B.2.

<sup>8</sup> Joseph Jaconelli, *Tax Legislation, Forestalling, and Economic Information*, 2013 *PUBLIC LAW* 737, 745 (2013); Terry Hayes & Kirk Wilson, *Proposed Amendments to Australia’s Anti-Avoidance Laws Cause Business Uncertainty*, 23 *JOURNAL OF INTERNATIONAL TAXATION* 52, 52 (2012); Robert Pålsson, *Retroactivity: Swedish Practice on Legislation by Governmental Communication*, 39 *INTERTAX* 271, 271-272 (2011); Miranda Stewart & Kristen Walker, *Australia: National Report*, 15 *MICH. ST. J. INT’L L.* 193, 239 (2007); SAMPFORD, *supra* note 2, at 156-157; Palmer & Sampford, *supra* note 3, at 235.

<sup>9</sup> In Australia, the use become prevalent since the late 1970s: Stewart & Walker, *supra* note 8, at 239; SAMPFORD, *supra* note 2, at 156. In Canada, see Salembier, *supra* note 3, at 107. In the U.K., see Infobank, *Taxation: Legislation by Press Release*, 1992(7) *BUS. L. R. (U.K.)* 176, 176-177 (1992). In Sweden, see Pålsson, *supra* note 8, at 274.

<sup>10</sup> The most detailed treatment of legislation by press release is by Charles Sampford, see SAMPFORD, *supra* note 2, at 156-162; Palmer & Sampford, *supra* note 3, at 262-270. For other mentions/discussions, see II.C.

<sup>11</sup> JURATOWITCH, *supra* note 2, at 44-64; SAMPFORD, *supra* note 2, at 77; Prebble, Prebble & Smith, *supra* note 3, at 19; Salembier, *supra* note 3, at 106-107; Fisch, *supra* note 3, at 1084-1085. See *infra* II.B.

<sup>12</sup> JURATOWITCH, *supra* note 2, at 67-118; Salembier, *supra* note 3, at 112-116. See VICTOR E. SCHWARTZ & EVELYN F. ROWE, *COMPARATIVE NEGLIGENCE* 188-192 (LexisNexis 5<sup>th</sup> ed. 2010) (discussing U.S. courts’ approach in the specific context of statutory retroactivity in comparative negligence rules).

outright ban of retrospective laws,<sup>13</sup> or should the inquiry be reoriented towards the underlying harms that are commonly associated with but not inevitable or exclusive to retrospective laws?

The recent implementation of the Buyer's Stamp Duty ["BSD"] in Hong Kong provides an illustrative case study to examine these pertinent issues. On October 27, 2012, the Financial Secretary (akin to the Finance Minister) made a sudden announcement that a new transaction tax of 15% of a property's value would be imposed on all residential property purchasers who are not permanent residents of Hong Kong.<sup>14</sup> This new tax is a property-cooling measure intended to curb the rapid rise in property prices that has occurred over the past couple of years.<sup>15</sup> The BSD would be applicable to all property transactions taking place on or after October 28, 2012, one day subsequent to the announcement. Notwithstanding the fact that the draft bill giving effect to this new tax would only be ready a few months after the announcement<sup>16</sup> and that the draft bill would continue to languish in the legislature for sixteen months before its eventual enactment,<sup>17</sup> the effects of this yet-to-be-enacted law have been keenly felt by all relevant parties since the purported effective date of October 28, 2012. Demand from foreigners—the target of the new tax—dropped precipitously.<sup>18</sup> Land developers made more conservative bids for new land.<sup>19</sup> Lawyers handling property transactions collected several billion Hong Kong dollars (HKD) in pending BSDs.<sup>20</sup> Most significantly, the purported legislative objective of cooling the property

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<sup>13</sup> E.g., Hungary: Deák, *supra* note 7, at 540-541; Sweden: Pålsson, *supra* note 8, at 272; Bernitz, *supra* note 3, at 43-47 (the constitutional prohibition of retroactive tax and fee was added in 1979 to complement the existing prohibition on retroactive criminal law); Oman: Jaconelli, *supra* note 8, at 744.

<sup>14</sup> Tom Holland, *Excluding Mainlanders Won't Allay Main Property Grievance*, SOUTH CHINA MORNING POST (HK), Oct. 29, 2012, at 8. There is no "Hong Kong citizen" in Hong Kong – "Permanent Resident" is the highest level of immigration/residency status that can be obtained and which enjoyed the most rights and privileges in Hong Kong. For a concise exposition on the various aspects of "citizenship" in Hong Kong, including historical evolution, manners of acquisition and legal implications, see Johannes Chan, *Nationality and Permanent Residence*, in LAW OF THE HONG KONG CONSTITUTION 143 (Johannes Chan & C.L. Lim eds., Sweet & Maxwell 2011).

<sup>15</sup> Joyce Ng, Amy Nip & Joshua But, *Buyers Rush to Beat Surprise Homes Tax*, SOUTH CHINA MORNING POST (HK), Oct. 27, 2012, at 1. For a discussion of the property market in Hong Kong, see *infra* III.A.

<sup>16</sup> Joyce Ng & Sandy Li, *C.Y. Snubs City Companies' Pleas for Tax Exemption*, SOUTH CHINA MORNING POST (HK), Dec. 19, 2012, at 1; Joyce Ng, *Stamp Duty's Loophole will not be Closed by Bill*, SOUTH CHINA MORNING POST (HK), Nov. 3, 2012, at 3.

<sup>17</sup> *Stamp Duty (Amendment) Ordinance 2014*, 18(9) GAZETTE (H.K.), Feb. 28, 2014; Liang Yongsi, "Shuangla" shihu le! ["Double Cooling Measures" Finally Passed], SINGTAO DAILY (HK), Feb. 23, 2014, at A1.

<sup>18</sup> Sandy Li, *SHKP Trims Luxuries at Top End of Town*, SOUTH CHINA MORNING POST (HK), Dec. 28, 2012, at 3 (Business); Paggie Leung, *Home Tax Puts Chill in Mainland Buyers*, SOUTH CHINA MORNING POST (HK), Nov. 2, 2012, at 1 (Business); Peggy Sito, *New Buyer's Hopes Rise with Tax*, SOUTH CHINA MORNING POST (HK), Oct. 31, 2012, at 1 (Property).

<sup>19</sup> Yvonne Liu, *Big Two Developers Cool Their Heels*, SOUTH CHINA MORNING POST (HK), July 10, 2013, at 1 (Property); Sandy Li, *Developer Caution Hangs Over Land Sale Prospects*, SOUTH CHINA MORNING POST (HK), Jan. 2, 2013, at 4 (Business).

<sup>20</sup> Caiye gaoji: foujue lazhaou lougu zheng [*Financial Secretary Warning: Vetoing Cooling Measures Would Result in Tumor in Property and Stock Market*], SINGTAO DAILY (HK), Feb. 22, 2014, at A4; *Lazhao zaoan zhao labu shuyi suikuan jiya* [*Filibuster of Property Cooling Measures Causes Backlog of Several Hundred Millions of Tax*], ORIENTAL DAILY NEWS (HK), Nov. 27, 2013. The exchange rate of HKD pegged to the USD at a rate of about 7.8:1:

market was at least partially achieved, with secondary home prices witnessing a modest fall, a reversal of the substantial increase over the previous two years.<sup>21</sup>

This Article critically examines this episode of legislation by press release to make three main arguments. The first is a relatively narrow but previously unexplored legal issue—namely, that regardless of the normative desirability of legislation by press release, the practice is legal in Hong Kong. The constitutional prohibition of retrospective laws<sup>22</sup> is limited to criminal sanctions and is not applicable to a property-transaction tax that is not punitive in nature. More significantly, although the jurisprudence of the European Court of Human Rights have indicated that retrospective non-criminal laws may be potentially at risk of violating the expanded notion of “law” in the “prescribed by law” requirement typically stipulated in human rights documents for imposition of legal burdens,<sup>23</sup> the detailed specifics of the proposed law set out in the initial announcement under a typical legislation by press release would have effectively shielded it from this legal challenge.

The second argument draws on the insight arising from this first-ever detailed contextual examination of actual legislation by press release to articulate the considerations that affect the normative desirability of the practice. Beyond the relatively obvious requirement that the initial announcement must be sufficiently clear and consistent with respect to the new legal rules, there must also be sufficient justifications for what is essentially a short-circuiting of the legislative process. Reflecting the mixed assessment of whether the use of legislation by press release to implement the BSD is actually necessary to achieve the policy goal of property cooling,<sup>24</sup> the necessary inquiry would first entail identifying the purported legislative objectives, before being followed up by an examination of the incentives created for private entities by the policy announcement to predict and assess whether a forward shift of the activities targeted by the legal change would derail the legislative objectives.

In addition, given that the main critique of legislation by press release is the violation of separation of powers, with the executive essentially engaging in a de facto form of law-making,<sup>25</sup> the desirability of legislation by press release is intrinsically linked to the underlying political dynamic. The political dynamic of a jurisdiction is the product of the interplay between the

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Y. Y. Kueh & Raymond C. W. Ng, *The Interplay of the “China Factor” and US Dollar Peg in the Hong Kong Economy*, 170 CHINA QUARTERLY 387 (2002).

<sup>21</sup> Sandy Li, *Curbs Likely to Stay Until Prices Fall*, SOUTH CHINA MORNING POST (HK), Aug. 21, 2013, at 1 (Property); Peggy Sito & Joyce Ng, *Secondary Home Prices Continues Fall on Duties*, SOUTH CHINA MORNING POST (HK), Dec. 8, 2012, at 2 (Business).

<sup>22</sup> §12, Hong Kong Bill of Rights Ordinance, c. 383 (1997) (HK). *See infra* IV.B.

<sup>23</sup> For a discussion of the European Court of Human Rights jurisprudence on this issue, *see* Pauwels, *supra* note 7, at 272; Pålsson, *supra* note 8, at 273. For the argument in the context of Hong Kong, *see* Sir Anthony Mason, *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong*, 37 HONG KONG L. J. 299, 314-315 (2007). *See infra* IV.B.2.

<sup>24</sup> *Infra* IV.B.2.

<sup>25</sup> SAMPFORD, *supra* note 2, at 160-161; Palmer & Sampford, *supra* note 3, at 264-265.

formal constitutional structure and political competition on the ground.<sup>26</sup> Legislation by press release is most undesirable where a formal separation of powers between the executive and legislature is combined with an agnostic and divided political landscape. Conversely, the various criticisms against legislation by press release<sup>27</sup> are largely moot under a Westminster system that envisages a close relationship between the executive and the legislature, when both are dominated by a single political party.

The final argument challenges the conventional aversion towards formally retrospective laws and highlights the irrelevancy of a law's formal retrospectivity to the disruption caused to the reliance interests of private individuals. This argument echoes the insight provided by the well-established U.S. legal literature on "legal transition,"<sup>28</sup> but with an additional contribution observing how the assumption of stable legal regime that underpins the general objections toward retrospective laws is particularly ill-suited for jurisdictions undergoing major political and democratic transitions. In these jurisdictions—which are more the norm than the exception around the globe today—stability in the maintenance of the prior regime is neither expected nor desired.

This Article is organized into seven Parts. Part II explores the existing literature to present the theoretical framework governing retrospective laws and legislation by press release. Part III examines the implementation of the BSD in Hong Kong—in particular, the twists and turns in the protracted legislative process and the real effect of the announcement in shaping the behaviors of the relevant parties. Part IV addresses the legality of legislation by press release with respect to the legal doctrines of retrospectivity, "in accordance with law" and taxing powers. Part V analyzes the factors relevant to assessing whether the employment of legislation by press release is normatively justified. Part VI discusses the broader implications on the understanding of retrospective laws. Part VII concludes.

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<sup>26</sup> *Infra* V.C.1. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (critically discussing how competition between political parties can vary and even at times overshadow the institutional competition between the different branches of government); Anthony Kammer, *Privatizing the Safeguards of Federalism*, 29 J.L. & POL. 69 (2013) (examining how political coordination between influential private entities can transcend the formal jurisdictional boundaries of federalism). *C.f.* Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 312-314 (2012) (arguing that for the judicial branch at least, formal inter-branch separation of power remains salient even in the context where the executive and legislature are of the same political affiliation).

<sup>27</sup> These primarily include uncertainty, especially from the delay in legislative ratification, and violation to the separation of powers, see *infra* II.C.

<sup>28</sup> Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986); Michael J. Graetz, *Legal Transitions: the Case of Retroactivity in Income Tax Revision*, 126 U. PENN. L. REV. 47 (1977). See *infra* VI.

## II. THEORETICAL FRAMEWORK: RETROSPECTIVE LAWS AND LEGISLATION BY PRESS RELEASE

This Part initiates the discussion by first addressing definitional issues surrounding retrospective laws before reviewing the existing literature on the normative considerations surrounding retrospective laws in general and legislation by press release in particular.

### A. *Retrospectivity and Retroactivity*

A discussion of retrospective laws naturally should begin with the definition of “retrospective,” especially in comparison with the similar and related concept of “retroactivity.” Despite numerous attempts to provide a conclusive working definition, both terms have been used to denote different meanings by different scholars.<sup>29</sup> The fact that the two terms are commonly cross-referenced in the dictionary<sup>30</sup> only serves to aggravate the confusion, especially in non-legal discourse (i.e., political and public debate). The general consensus reflected in modern literature is that “retroactive law” is a narrower—and, often, normatively more problematic—conceptual subset of “retrospective law,”<sup>31</sup> although some scholars have begun to advocate abolishing the formal distinction between the two.<sup>32</sup>

Beyond this broad consensus, the precise content of the definition remains unsettled. For example, Ben Juratowitch’s 2008 book on “retroactivity” and English common law proposed restricting “retroactive” laws to mean only laws that “apply to a past event as though it was applicable at the time of the event,”<sup>33</sup> such as “[a] law entering into force on Wednesday making it an offence to have parked on High Street from the preceding Monday onwards.”<sup>34</sup> This usage is to be contrasted with the broader concept of “retrospective” laws, which include not only “retroactive” laws but also laws that have inter-temporal effects, such as how a law prospectively banning parking might affect a long-term parking permit.<sup>35</sup> By contrast, Charles Sampford, in his book on the broader concept of “retrospectivity,” defined “retrospective” laws “as laws which alter the future legal consequences of past actions and events because the legal texts that will be

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<sup>29</sup> For a general discussion about the confusing and conflicting use of the term, see JURATOWITCH, *supra* note 2, at 6-17; Salembier, *supra* note 3, at 104-107. See also SAMPFORD, *supra* note 2, at 9-17 (providing a historical perspective on the development of the concept of retrospectivity).

<sup>30</sup> Salembier, *supra* note 3, at 105.

<sup>31</sup> E.g., Pauwels, *supra* note 7, at 270-272; Hans Gribnau, *Equality, Legal Certainty and Tax Legislation in the Netherlands*, 9(2) UTRECHT L. REV. 52, 71 (2013); Pålsson, *supra* note 8, at 272; JURATOWITCH, *supra* note 2, at 9-12 & 17; SAMPFORD, *supra* note 2, at 17; Salembier, *supra* note 3, at 102-106.

<sup>32</sup> E.g., Prebble, Prebble & Smith, *supra* note 3, at 24-29; SAMPFORD, *supra* note 2, at 17-23. The tendency to dispense the distinction most pronounced in the predominantly U.S. legal literature on “legal transition”: see *infra* VI.

<sup>33</sup> JURATOWITCH, *supra* note 2, at 17.

<sup>34</sup> *id.*, at 5.

<sup>35</sup> *id.*, at 9-12.



applied to determine the legal consequences of an action at a hearing in the future are not same as the texts that were discoverable at the time the action commenced.”<sup>36</sup> This definition appears similar to Juratowitch’s definition of “retroactivity,”<sup>37</sup> even if Sampford appeared to agree that “retroactive” should “refer to retrospective laws whose retrospective effect is formally and explicitly stated by indicating that an enactment is to take effect before its promulgation.”<sup>38</sup> The journal article by John Prebble, Rebecca Prebble and Catherine Vidler Smith similarly presented an illustrative example of the difficulty in defining the concept of “retrospectivity.” In their article, they began by explicitly adopting the definition that “[r]etropective legislation can be seen as altering the direct legal consequences of past events or statuses,”<sup>39</sup> then distinguished this definition by also stating that “[r]etropective legislation can be seen as altering the future legal consequences of past events” (i.e., the difference between “direct” and “future”),<sup>40</sup> and finally emphasized that the definition used in their article “addresses both legislation that is clearly retrospective in that it applies to dates before its commencement and legislation that is not explicitly retrospective but that affects pre-existing rights and expectations.”<sup>41</sup>

Part of the reason for the confusion is due to the different context in which the definition and/or distinction is formulated. In jurisdictions where “retroactive” laws—but not “retrospective” laws—are constitutionally prohibited, the definition of “retroactive” must be given a clearly defined and narrow meaning to mitigate the dire legal significance that flows from it.<sup>42</sup> Unsurprisingly, the distinction is less material in jurisdictions where there is no outright prohibition against “retroactive” laws, such as under EU law, for which the European Court of Human Rights has employed both terms interchangeably.<sup>43</sup> In English common law jurisdictions, where the issue of the “presumption against retrospectivity” in statutory interpretation is at stake, the inquiry inevitably focuses on “retrospectivity” to the neglect of “retroactivity.”<sup>44</sup> Alternatively, in the U.S., where the rule is known as the presumption against statutory

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<sup>36</sup> SAMPFORD, *supra* note 2, at 37.

<sup>37</sup> Ben Juratowitch considered, and disagreed with, Sampford’s position in the debate as simply that distinction between retrospective and retroactive is immaterial since the effect of both is the same: JURATOWITCH, *supra* note 2, at 11-12.

<sup>38</sup> SAMPFORD, *supra* note 2, at 17.

<sup>39</sup> Prebble, Prebble & Smith, *supra* note 3, at 20.

<sup>40</sup> *Id.*, at 24.

<sup>41</sup> *Id.*, at 25.

<sup>42</sup> See Deák, *supra* note 7, at 540-541 (discussing how the Hungarian Constitutional Court found that “[a] tax law that provides during the tax year subsequently for the taxation of the income derived during the year cannot be considered as retroactive [and is instead permissible retrospective legislation] ... because the process of earning income under taxation has not yet been closed by a tax return to be filed following the year in which the taxable income is derived.”). See also Pålsson, *supra* note 8, at 272 (discussing Swedish constitutional prohibition on retroactive tax legislation).

<sup>43</sup> Pauwels, *supra* note 7, at 270.

<sup>44</sup> Salembier, *supra* note 3, at 112-116. For a detailed discussion on the presumption, see JURATOWITCH, *supra* note 2, at 67-118.

“retroactivity,” the conceptual distinction of “primary retroactivity” and “secondary retroactivity” enjoyed considerable—if ultimately temporary—usage in the literature.<sup>45</sup>

In Hong Kong, an English common law jurisdiction,<sup>46</sup> the salience of the common law doctrine of the “presumption against retrospectivity” most likely explains why “retrospective” is commonly employed to describe laws that are otherwise clearly “retroactive.” For example, in the context of drafting a law that was going to be expressly backdated, questions were raised in the legislative process about existing laws that have “retrospective effects.”<sup>47</sup> This concern prompted the administration to produce a list of legislation where the stipulated effective dates preceded the date of enactment/amendment.<sup>48</sup> This usage of “retrospective” is perpetuated by legal professionals, with the Law Society of Hong Kong raising, in the same context, the “question of the constitutionality of making the [law] retrospective.”<sup>49</sup>

For the purpose of this Article, the precise nuances of the definitional distinction between “retrospective” and “retroactive” are immaterial because legislation by press releases would clearly satisfy even the narrower category of “retroactive” laws, given the explicit backdating of the effective statutory date. This Article utilizes the term “retrospective” partly to synchronize with the usage in Hong Kong and partly to reflect this Article’s inclination that addressing the broader concept of “retrospectivity” is *normatively* more meaningful than trying to carve out a separate conceptual category of “retroactivity.”<sup>50</sup>

## ***B. General Concerns about Retrospective Laws***

Regardless of the precise definition and understanding of “retrospective”/“retroactive” laws, it is indisputable that such laws are generally viewed with great hostility. Charles Sampford

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<sup>45</sup> See Fisch, *supra* note 3, at 1067-1069 (discussing and rejecting the conceptual dichotomy). In Germany, the distinction is between “real” retroactivity and “apparent” retroactivity: Georg Nolte & Peter Radler, *German Public Law Cases in 1996/97*, 3(4) EUROPEAN PUBLIC LAW 489, 495 (1997).

<sup>46</sup> Johannes Chan, *The Judiciary*, in LAW OF THE HONG KONG CONSTITUTION 289, 289 (Johannes Chan & C.L. Lim eds., Sweet & Maxwell 2011).

<sup>47</sup> E.g., Stamp Duty (Amendment) (No. 2) Bill 2010 Bills Committee, *Responses to Follow-up Actions Arising from Discussion at the Meeting on 9 February 2011*, Feb., 2011, LegCo Paper No: CB(1) 1371/10-11(02). See also Official Reports of Proceedings (Legislative Council of Hong Kong), June 14, 2010, 7550-7553 (on the retrospective effect of the Family Status Discrimination (Amendment) Bill in 2000).

<sup>48</sup> The Stamp Duty (Amendment) (No. 2) Bill 2010 Bills Committee, *supra* note 47; Stamp Duty (Amendment) (No. 2) Bill 2010 Bills Committee, *Responses to Follow-up Actions Arising from Discussion at the Meetings on 17 and 21 December 2010 (Part II)*, Jan., 2011, LegCo Paper No: CB(1) 1125/10-11(01), at 2.

<sup>49</sup> Stamp Duty (Amendment) (No. 2) Bill 2010 Bills Committee, *Summary of Views Submitted by Organizations/Individuals on the Stamp Duty (Amendment) (No. 2) Bill 2010*, LegCo Paper No: CB(1) 1689/10-11(04), at 18.

<sup>50</sup> *Infra* VI. *C.f.*, while Juratowitch argues the opposite (that “intertemporal effects of “retrospectivity” are meaningfully different to retroactivity – so different as to demand separate categorization”), his discussions about the various rationales for the presumption against “retroactivity” (such as certainty, negative liberty, fair warning and defeasibility) is equally applicable to “retrospectivity”: see JURATOWITCH, *supra* note 2, at 12 & 43-65.

candidly observed that “[n]othing is more certain to cause apoplectic explosions of fear and loathing among some lawyers than the mere mention of the dreaded word ‘retrospectivity.’”<sup>51</sup> This homage to the negative image of retrospective laws is typically the starting point, especially common in academic literature that has sought—perhaps somewhat ironically—to present a more nuanced approach towards retrospectivity.<sup>52</sup> Even in the absence of explicit legal prohibition of retrospective laws, retrospectivity is often a cause for concern, especially in statutory law. The common law doctrine of the presumption against retrospectivity in statutory interpretation is precisely intended to compel the legislature to directly confront the issue of retrospectivity.<sup>53</sup> In Australia, retrospectivity in the legislation bill is routinely grounds for objection by the Senate Standing Committee for the Scrutiny of Bills, the committee in the upper house of the bicameral parliamentary system that is responsible for vetting legislation.<sup>54</sup> In the Netherlands, a memorandum setting out guidelines limiting the use of retrospective statutes was issued by the government in response to “serious concerns” by Parliament.<sup>55</sup> Similarly, in Hong Kong, retrospectivity—especially for explicit legislative backdating—invites scrutiny occasionally.<sup>56</sup>

The central theme of the various objections to retrospective laws is people’s reliance on the law as a guide for their conduct.<sup>57</sup> Closely connected to the notion of the rule of law,<sup>58</sup> the normative principle is that private individuals should be able determine the legal consequences of their intended activities and arrange their affairs accordingly. Given their nature of being subsequently created legal rules that seek to alter the legal consequences of past actions, retrospective laws run afoul of this normative principle because private individuals cannot

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<sup>51</sup> SAMPFORD, *supra* note 2, at 1.

<sup>52</sup> The central thesis of Charles Sampford’s book is that while the importance of the reliance interest weighs generally against retrospective laws, this factor is neither overwhelming nor unequivocal and the same reliance interest may be used to justify retrospective law: SAMPFORD, *supra* note 2, at 7. For other examples, *see* Pauwels, *supra* note 7 (discussing without strong criticism the European Court of Human Rights ambivalent and context sensitive treatment of retrospective laws); JURATOWITCH, *supra* note 2 (examining the circumstances in which the presumption against retrospectivity may be justifiably rebutted); Prebble, Prebble & Smith, *supra* note 3 (arguing that retrospective laws are neither illegal or unconstitutional under New Zealand law, and are at times justified). *C.f.* PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, THE TYRANNY OF GOOD INTENTIONS 67-68 (Forum 2000) (retrospective laws, including those imposing monetary losses from civil liability, are plainly undesirable).

<sup>53</sup> JURATOWITCH, *supra* note 2, at 68-71; Salembier, *supra* note 3, at 112-118.

<sup>54</sup> Stewart & Walker, *supra* note 8, at 239-240; CHARLES SAMPFORD, *supra* note 2, at 160-162; Palmer & Sampford, *supra* note 3, at 268. For a discussion of the Senate role and power in Australian legislative process, *see* PATRICK KEYZER, PRINCIPLES OF AUSTRALIAN CONSTITUTIONAL LAW 52-53 (LexisNexis 3<sup>rd</sup> ed. 2010); Stewart & Walker, *supra* note 8, at 204-207.

<sup>55</sup> Gribnau, *supra* note 31, at 71-72.

<sup>56</sup> *Infra* IV.B.4.

<sup>57</sup> JURATOWITCH, *supra* note 2, at 44-64; GOLDING, *supra* note 5, at 246; SAMPFORD, *supra* note 2, at 77; Prebble, Prebble & Smith, *supra* note 3, at 19; Salembier, *supra* note 3, at 106-107; Fisch, *supra* note 3, at 1084-1085.

<sup>58</sup> For a discussion about relationship between rule of law and retrospective law, *see* Gribnau, *supra* note 31, at 53; GOLDING, *supra* note 5, at 240-252; SAMPFORD, *supra* note 2, at 77-98.

possibly be “guided” by laws that do not yet exist.<sup>59</sup> This situation also gives rise to possible injustice when the individuals’ expectations in relation to the legal consequences of their actions are disrupted.<sup>60</sup>

Other ancillary objections to retrospective laws include arguments based on democracy and certainty. The democracy objection charges that a government exceeds the temporal limits on the government mandate when it enacts retrospective laws overriding decisions of a previous government.<sup>61</sup> Nonetheless, the objection would apply neither to situations in which the prior government is not democratic nor to retrospective legislation whose backdating effects still fall within the tenure of the enacting the government<sup>62</sup>—as is typical of legislation by press release. The certainty objection is related both to the rule of law considerations regarding reliance on laws for guidance and to the economic considerations regarding the distortion of incentives to invest.<sup>63</sup> Under this argument, the permissible use of retrospective laws generates uncertainty for individuals attempting to plan their activities, leading to the dilution of the guidance function of the existing laws and underinvestment on account of these uncertainties. On the economic considerations front, U.S. scholars employing economic analysis have argued that the uncertainty generated by expressly retrospective laws is no less than that of nominally prospective laws that affect activities of a substantial time horizon,<sup>64</sup> whereas Louis Kaplow further argued that there is no real difference between uncertainties due to legal change and uncertainties due to ordinary market fluctuation.<sup>65</sup>

### ***C. Legislation by Press Release***

The BSD, notwithstanding the undeniably explicit retrospective effect, is distinct from conventional retrospective laws. The effective date of the implementation, while being set at a date prior to the enactment, is only backdated to the date in which there was an express public announcement by the government declaring its implementation. This practice of “legislation by press release” mitigates the reservations of retrospective laws while introducing new concerns.

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<sup>59</sup> Pauwels, *supra* note 7, at 268; JURATOWITCH, *supra* note 2, at 44-64; GOLDING, *supra* note 5, at 250; SAMPFORD, *supra* note 2, at 77; Prebble, Prebble & Smith, *supra* note 3, at 19; Salembier, *supra* note 3, at 106-107; Bernitz, *supra* note 3, at 43.

<sup>60</sup> Gribnau, *supra* note 31, at 70-71; JURATOWITCH, *supra* note 2, at 45; GOLDING, *supra* note 5, at 251; SAMPFORD, *supra* note 2, at 87-95; ROBERTS & STRATTON, *supra* note 52, at 67-68.

<sup>61</sup> SAMPFORD, *supra* note 2, at 68-70; Prebble, Prebble & Smith, *supra* note 3, at 46-47; Fisch, *supra* note 3, at 1121; Palmer & Sampford, *supra* note 3, at 225-226.

<sup>62</sup> SAMPFORD, *supra* note 2, at 71-72; Palmer & Sampford, *supra* note 3, at 225-226.

<sup>63</sup> Gribnau, *supra* note 31, at 70-71; JURATOWITCH, *supra* note 2, at 48-49; ROBERTS & STRATTON, *supra* note 52, at 75-76; Kaplow, *supra* note 28, at 522-532.

<sup>64</sup> Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L. J. 1015, 1016 & 1022-1023 (2006); DANIEL SHAVIRO, *WHEN RULE CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY* 16-32 (University of Chicago Press 2000); Fisch, *supra* note 3, at 1089-1091.

<sup>65</sup> Kaplow, *supra* note 28, at 533-536. For critical analysis of this view, see SAMPFORD, *supra* note 2, at 238-240.

Given the central theme of protecting the rational and legitimate expectations underpinning the objections to retrospective laws, the public statement by the government announcing—prospectively, no less—changes to the law ensures that private individuals will not be caught off guard by the subsequent legal changes that will be retrospectively applied to the date of the announcement.<sup>66</sup> As Charles Sampford stated, “no reasonable person would rely on a law remaining the same when the Minister has specifically said that it will be changed.”<sup>67</sup>

However, this advance notice comes at a price. There are two new objections that apply specifically to legislation by press release that are not applicable to other retrospective laws. The first is uncertainty in relation to the government announcement.<sup>68</sup> Given the typical scenario in which the draft bill will not be ready for presentation at the time of announcement, there is likely going to be uncertainty as to the precise details of the final legislation.<sup>69</sup> Moreover, excessive delay<sup>70</sup> and the possibility of subsequent amendments to the draft bill will further complicate any attempted prediction. This situation may not always be undesirable, especially in the context of tax legislation for which legislation by press release is most commonly used. Seeking out loopholes through a literalist interpretation of the tax law is neither a legitimate expectation to be protected nor a desirable behavior to be encouraged.<sup>71</sup> This objection is also resolved if the announcement is made sufficiently clear.<sup>72</sup>

The other concern with legislation by press release is the de facto exercise of legislative power by the executive branch in light of how the announcement substantially shapes the behaviors of private individuals as if it were a duly enacted law.<sup>73</sup> Although the legislature still technically has the final say as to whether the law should be enacted, such practice “places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning arrangements which many people may have made in reliance on the Ministerial announcement.”<sup>74</sup>

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<sup>66</sup> Pauwels, *supra* note 7, at 278; SAMPFORD, *supra* note 2, at 157; Palmer & Sampford, *supra* note 3, at 263.

<sup>67</sup> SAMPFORD, *supra* note 2, at 157.

<sup>68</sup> Hayes & Wilson, *supra* note 8, at 52; SAMPFORD, *supra* note 2, at 158-159.

<sup>69</sup> Hayes & Wilson, *supra* note 8, at 53; SAMPFORD, *supra* note 2, at 158.

<sup>70</sup> SAMPFORD, *supra* note 2, at 161-162; Palmer & Sampford, *supra* note 3, at 268.

<sup>71</sup> SAMPFORD, *supra* note 2, at 159; Palmer & Sampford, *supra* note 3, at 267-268. *See also* Ji Lian Yap, *De Facto Directors and Corporate Directorships*, 2012 J. BUSINESS L. 579, 586-587 (2012) (observing how the ambiguity in the current legal definition of de facto director under U.K. company law is arguably necessary and inevitable to preserve the doctrine usefulness in imposing the liability of director on those who acted as such while avoiding formal title). *C.f.*, Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty*, 64 TAX L. REV. 489 (2011) (discussing the perverse incentive under strategic tax law uncertainty that can thwart the objective of reducing tax evasion).

<sup>72</sup> Pauwels, *supra* note 7, at 278.

<sup>73</sup> SAMPFORD, *supra* note 2, at 160-161; Palmer & Sampford, *supra* note 3, at 264-265.

<sup>74</sup> SAMPFORD, *supra* note 2, at 160 (quoting the Senate Standing Committee for the Scrutiny of Bills).

Commentators in various jurisdictions have observed the increasingly prevalent use of such a legislative “mechanism.”<sup>75</sup> One key reason is the ability of legislation by press release to effect de facto legal changes immediately, which is especially necessary in situations in which private entities can circumvent the policy objective by shifting forward activities that would otherwise be affected by the announced change in law.<sup>76</sup> Another likely reason is that, when retrospective legislation is expedient or necessary,<sup>77</sup> the provision of an announcement helps mitigate the political pressure and/or public backlash that might otherwise be generated by the use of retrospective laws. Indeed, in Hong Kong, the government has expressly relied on public notification through policy announcement when defending legislative amendments that are to be backdated.<sup>78</sup> Likewise, in Sweden, an exception to the general prohibition of retroactive tax legislation is carved out for what is essentially legislation by press release.<sup>79</sup>

### III. THE CASE STUDY OF HONG KONG’S BSD

Having examined the relevant theoretical framework, this Part turns to the recent implementation of the BSD in Hong Kong as a case study for examining in detail the legal and normative considerations of legislation by press release.

#### A. *Regulating the Vibrant Property Market*

Property is a source of wealth in Hong Kong, an autonomous jurisdiction under the sovereignty of China since its handover from British colonial rule in 1997.<sup>80</sup> With over seven million people packed into an economically vibrant jurisdiction of a mere 1104 square kilometers,<sup>81</sup> real estate is not regarded merely as places for residential or commercial purposes but as a vehicle for investment and speculation.<sup>82</sup> Property booms and busts have dotted the

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<sup>75</sup> In Australia, the use became prevalent since the late 1970s: Stewart & Walker, *supra* note 8, at 239; SAMPFORD, *supra* note 2, at 156. In Canada, *see* Salembier, *supra* note 3, at 107. In the U.K., *see* Infobank, *supra* note 9, at 176-177. In Sweden, *see* Pålsson, *supra* note 8, at 274.

<sup>76</sup> SAMPFORD, *supra* note 2, at 157; Fisch, *supra* note 3, at 1089; Palmer & Sampford, *supra* note 3, at 264. *See also* Jaconelli, *supra* note 8, at 738-740 (discussing the problem of “forestalling” by private entities in response to knowledge of pending tax). *See infra* V.B.2.

<sup>77</sup> *C.f. infra* V.B.1.

<sup>78</sup> Stamp Duty (Amendment) (No. 2) Bill 2010 Bills Committee, *supra* note 49, at 18.

<sup>79</sup> Tax legislation can be retrospective to the date in which the “government issues a *communication* to Parliament (emphasis original)”: Pålsson, *supra* note 8, at 272; Bernitz, *supra* note 3, at 47.

<sup>80</sup> Johannes Chan, *From Colony to Special Administrative Region*, in *LAW OF THE HONG KONG CONSTITUTION* 3, 28-29 (Johannes Chan & C.L. Lim eds., Sweet & Maxwell 2011).

<sup>81</sup> Hong Kong 2012: The Facts, available at <http://www.yearbook.gov.hk/2012/en/pdf/Facts.pdf> (last visited Jan. 1, 2014).

<sup>82</sup> Indeed, local academic Lawrence Law opined that rights to land is treated as mere commodity in Hong Kong, subjected to compensation for the sake of building of more new urban space, but without due regards to the

recent history of Hong Kong.<sup>83</sup> Although the government is not oblivious to the threat posed by property speculation on the stability of financial institutions and the affordability of housing,<sup>84</sup> past measures to regulate excessive property speculation have typically focused on restrictions on financing<sup>85</sup> and the direct provision of subsidized public housing.<sup>86</sup> The Hong Kong government has previously avoided the use of direct taxation on property and property transactions as a regulatory tool (as opposed to revenue generation), reflecting the low-tax policies rooted in colonial times and later enshrined in the Basic Law<sup>87</sup> as well as the “free market” ideology ostensibly advocated by the Hong Kong Government.<sup>88</sup> The high prices and high transaction volume driven by speculation also arguably create a perverse incentive for the government to acquiesce to such a practice in the context where land sales and other land-associated revenues are dominant sources of government revenue.<sup>89</sup>

The first use of property tax to regulate the property market occurred in 2010. The property market, after a temporary setback due to the 2008 financial crisis, had begun a rapid ascent due to a potent mix of external factors that included the low interest rate supported by U.S. quantitative easing, the flood of foreign capital seeking safe haven and the involuntary depreciation of the HK currency, which remains pegged to the U.S. dollar.<sup>90</sup> In November 2010, the government implemented the Special Stamp Duty [“SSD”], a transaction tax of up to 15% of the property value if a residential property is sold within a stipulated period after acquisition.<sup>91</sup>

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landowner’s negative right to not use the land for profit or the aspect of land as a genuine public goods: Lawrence W. C. Lai, *A Model of Planning by Contract: Integrating Comprehensive State Planning, Freedom of Contract, Public Participation and Fidelity*, 81(6) THE TOWN PLANNING REVIEW 647, 667 (2010).

<sup>83</sup> Kueh & Ng, *supra* note 20, at 392.

<sup>84</sup> Berry F.C. Hsu, *Asset Quality in HKSAR’s Real Estate Markets: A Public Policy and Legal Analysis*, 19 UCLA PAC. BASIN L.J. 263, 269-270 (2002).

<sup>85</sup> Kueh & Ng, *supra* note 20, at 392.

<sup>86</sup> Lai, *supra* note 82, at 665; Louis Augustin-Jean, *Urban Planning in Hong Kong and Integration with the Pearl River Delta: A Historical Account of Local Development*, 62 GEOJOURNAL 1, 4 (2005).

<sup>87</sup> Richard Cullen et al., *Fiscal Policy and Financial System*, in LAW OF THE HONG KONG CONSTITUTION 321, 340 (Johannes Chan & C.L. Lim eds., Sweet & Maxwell 2011); Hsu, *supra* note 84, at 268.

<sup>88</sup> ELIZA W.Y. LEE ET AL., PUBLIC POLICYMAKING IN HONG KONG: CIVIC ENGAGEMENT AND STATE-SOCIETY RELATIONS IN A SEMI-DEMOCRACY 77-78 (Routledge 2013); Augustin-Jean, *supra* note 86, at 4; Hsu, *supra* note 84, at 264.

<sup>89</sup> Lai, *supra* note 82, at 665; C. Y. Jim, *Planning Strategies to Overcome Constraints on Greenspace Provision in Urban Hong Kong*, 73(2) THE TOWN PLANNING REVIEW 127, 146 (2002); Hsu, *supra* note 84, at 269.

<sup>90</sup> Official Reports of Proceedings (Legislative Council of Hong Kong), Dec. 8, 2010, 3442; Official Reports of Proceedings (Legislative Council of Hong Kong), Nov. 24, 2010, 2541-2542. For a general discussion on the impact of the US dollar peg on the different aspects of Hong Kong economy, *see generally* Kueh & Ng, *supra* note 20.

<sup>91</sup> Dennis Eng, Charlotte So & Yvonne Liu, *Property Speculators Slapped with up to 15pc Extra Stamp Duty*, SOUTH CHINA MORNING POST (HK), Nov. 20, 2010, at 1; Official Reports of Proceedings (Legislative Council of Hong Kong), Dec. 8, 2010, 3440-3442. For final version, see §29CA Stamp Duty Ordinance, c. 117 (1997) (HK).

This anti-speculation tax, together with other measures targeting property financing,<sup>92</sup> failed to stem the rapid rise in property prices<sup>93</sup> or to placate the increasingly vocal public discontent over housing affordability.<sup>94</sup> This situation led to the enhancement in the SSD and the imposition of the BSD two years later.

### ***B. The Buyer's Stamp Duty***

At 6 p.m. on October 27, 2012, Financial Secretary John Tsang Chun-wah made a sudden and unexpected announcement regarding the introduction of two tax measures to cool the property market.<sup>95</sup> First, a new BSD of 15% of the property value would be imposed on all residential property purchases by entities that were not Hong Kong permanent residents. Second, the existing SSD would be enhanced in terms of the maximum rate payable (by five percentage points) and the applicable duration (by one year).<sup>96</sup> The measures would be effective from midnight on the date of the announcement, leaving a mere window of six hours between the announcement and the measures' implementation.<sup>97</sup>

The BSD is a potent form of taxation that is regarded by market watchers as tough.<sup>98</sup> The Financial Secretary described the taxes as “extraordinary measures under exceptional circumstances”<sup>99</sup> to “prevent even further exuberance in the housing market” and to “accord priority to [Hong Kong permanent resident] buyers over [non-Hong Kong permanent resident] buyers.”<sup>100</sup> Indeed, property purchases by non-permanent residents had increased from 5.7% of

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<sup>92</sup> For example, the Monetary Authority reduced the maximum allowable loan-to-value ratio and required banks to conduct more stringent stress tests: Eng, So & Liu, *supra* note 91; Official Reports of Proceedings (Legislative Council of Hong Kong), Apr. 13 2011, 9157-9158.

<sup>93</sup> The SSD helped reduced speculative activities (measured in terms of confirmor transactions) without significantly reducing the property price: Official Reports of Proceedings (Legislative Council of Hong Kong), Apr. 13 2011, 9158.

<sup>94</sup> *Thousands Join in Property Price Protest in Hong Kong*, WESTERN MORNING NEWS (U.K.), July 2, 2011, at 14.

<sup>95</sup> Ng, Nip & But, *supra* note 15.

<sup>96</sup> Holland, *supra* note 14.

<sup>97</sup> Ng, Nip & But, *supra* note 15.

<sup>98</sup> *Id.* Singapore was apparently the first jurisdiction to introduce such property transactions that specifically targets non-residents in December 2011, with Macau following Hong Kong's implementation just a few days thereafter: *see* 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*, Jan., 2013, LegCo Paper No: CB(1) 511/12-13(02), Annex C (setting out the overseas experiences in relation to the purchase of residential properties by non-locals).

<sup>99</sup> Ng, Nip & But, *supra* note 15.

<sup>100</sup> Transport and Housing Bureau, *Legislative Council Brief: Further Measures to Address the Overheated Property Market*, Oct., 2012.



new-home purchases in 2008 to 19.5% in 2011.<sup>101</sup> There was also arguably a political motivation to pander to the anti-mainland sentiment,<sup>102</sup> with the increasing presence of mainlanders in the Hong Kong property market, who accounted for 42.3% of the purchases of new homes worth HKD12 million or more in the preceding quarter.<sup>103</sup>

The announcement of these tax measures sparked a frantic flurry of activity by developers and purchasers seeking to avoid the tax before midnight. The launch of a major residential project was swiftly brought forward in one day to meet the onrushing scramble of purchasers, with 100 flats sold by 10 p.m.—a mere four hours after the announcement.<sup>104</sup> Similar moves were made by other developers as well.<sup>105</sup> Mainland purchasers were also reportedly rushing from the neighboring Chinese city of Shenzhen to beat the deadline.<sup>106</sup> This surge in last-minute property purchases was followed by a subsequent plunge in transactions arising from the decrease in buyers' interest (especially non-residents) and the withdrawal of units by sellers in anticipation of a fall in price.<sup>107</sup>

### C. *The Protracted Legislative Process*

After the initial excitement (or agitation) subsided, the focus of the inquiry shifted to the details of the measures. This curious outcome was the result of not only the absence of effective legislation to accompany the announcement of the tax measures on October 27, 2012, but also the lack of a draft bill. Indeed, the preparation of the draft bill—the Stamp Duty (Amendment) Bill 2012 [the “Bill”]—only began after the announcement and was completed two months thereafter.<sup>108</sup> The government did upload, in conjunction with the initial announcement, an admirably detailed FAQ outlining the specifics and illustrative examples of the pending legislation on the Inland Revenue Department website.<sup>109</sup> Nevertheless, the FAQ attracted a fair amount of scrutiny on the purported ambiguity of certain provisions.<sup>110</sup>

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<sup>101</sup> Joyce Ng, Amy Nip & Joshua But, *Non-locals Hit with New Property Tax*, SOUTH CHINA MORNING POST (HK), Oct. 27, 2012, at 1. Companies accounted for 9.7% of home sales in the first three quarters of 2012: Sandy Li & Peggy Sito, *New Levy will Reduce Sales and Prices*, SOUTH CHINA MORNING POST (HK), Oct. 27, 2012, at 3.

<sup>102</sup> Johnny Tam & Tony Cheung, *Levy May Hit Genuine Residents Too*, SOUTH CHINA MORNING POST (HK), Oct. 28, 2012, at 3 (noting the opinion of political analyst James Sung Lap-kung).

<sup>103</sup> Li & Sito, *supra* note 101.

<sup>104</sup> Yvonne Lou, Sandy Li & Amy Nip, *Buyers in Midnight Dash for Yuen Long Flats*, SOUTH CHINA MORNING POST (HK), Oct. 27, 2012, at 3.

<sup>105</sup> *Id.*

<sup>106</sup> Ng, Nip & But, *supra* note 15.

<sup>107</sup> Leung, *supra* note 18; Sito, *supra* note 18.

<sup>108</sup> Ng & Li, *supra* note 16; Ng, *supra* note 16.

<sup>109</sup> See <http://www.ird.gov.hk/eng/faq/bsd.htm> (last visited Dec. 1, 2013).

<sup>110</sup> For example, the Hong Kong Associations Banks suggested that the FAQ provision in relation to the conveyance to a financial institution pursuant to a mortgage is consistent with the provision on the bill: Transport and Housing

In light of the ongoing legislative process, it is not surprising that interest groups and their corresponding legislators were actively lobbying for all sorts of variations. Many of the efforts were directed at diluting the effect of the BSD through the creation of additional exemptions. From the outset, there was a push for an exemption for companies that were owned by permanent residents.<sup>111</sup> The Real Estate Developers Association, a powerful interest group that represents the interests of developers, sent an open letter to the government requesting an exemption of luxury flats of more than HKD30 million<sup>112</sup> and later requested an exemption for local companies<sup>113</sup> and then for small local companies with no more than five shareholders.<sup>114</sup> Abraham Razack, a functional group legislator representing the real estate and construction sectors,<sup>115</sup> similarly expressed vocal opposition to the measure in its entirety<sup>116</sup> before insisting on a local company exemption.<sup>117</sup> There was also lobbying for the exemption of purchases by charitable organizations.<sup>118</sup> The real-estate sector even sought support from populist legislators known for their anti-government rhetoric.<sup>119</sup> The government persistently resisted all such amendments on account of the potential for circumvention and exploitation of the loopholes.<sup>120</sup>

There was lobbying in the opposite direction as well. A lawmaker, Kenneth Leung, introduced proposed amendments to impose a requirement of domicile—in addition to the

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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 18 February 2013*, Apr., 2013, LegCo Paper No: CB(1) 893/12-13(02).

<sup>111</sup> Ng & Li, *supra* note 16; Simpson Cheung, *Developer Calls for New Look at Property Taxes*, SOUTH CHINA MORNING POST (HK), Nov. 9, 2012, at 5.

<sup>112</sup> Peggy Sito & Ng Kang-chung, *Developers Want Luxury Flats to be Exempt from Tax*, SOUTH CHINA MORNING POST (HK), Nov. 24, 2012, at 3 (the purported reasons was “unhealthy” government intervention in the property market and the harm of reputation among international investors).

<sup>113</sup> Ng & Li, *supra* note 16.

<sup>114</sup> Joyce Ng, *Call to Leave Local-owned Companies out of 15pc Tax*, SOUTH CHINA MORNING POST (HK), Feb. 1, 2013, at 1.

<sup>115</sup> Under the institutional design of the Hong Kong legislature, there are group of members who are elected from a defined electorate that is typically based on profession or industry: Lam Wai-man, *Hong Kong: The Hong Kong Legislative Council – Where Politics Matters More than Size*, in LEGISLATURES OF SMALL STATES: A COMPARATIVE STUDY 137, 141-142 (Nicholas D. J. Baldwin ed., Routledge 2013); Albert Chen, *Development of Representative Government*, in LAW OF THE HONG KONG CONSTITUTION 215, 243 (Johannes Chan & C.L. Lim eds., Sweet & Maxwell 2011). For more analysis on the political infrastructure and dynamic in Hong Kong, *see infra* V.C.2.

<sup>116</sup> Luisa Tam, *Home Truth*, SOUTH CHINA MORNING POST (HK), Dec. 5, 2012, at 48 (Supplements).

<sup>117</sup> Sandy Li, *New Property Taxes Still in Limbo*, SOUTH CHINA MORNING POST (HK), Oct. 9, 2013, at 1 (Property).

<sup>118</sup> Transport and Housing Bureau, *The Government's Response to the Issues Raised at the Meetings of the Bills Committee on the Stamp Duty (Amendment) Bill 2012 Held on 8 July 2013*, July, 2013, LegCo Paper No: CB(1) 1618/12-13(02); Li, *supra* note 117; Ng Kang-chung, *Cooling Measures 'Unfair to Locals'*, SOUTH CHINA MORNING POST (HK), Sep. 17, 2013, at 5.

<sup>119</sup> Ng Kang-chung, *Property Sector Turns to Radicals in Tax Fight*, SOUTH CHINA MORNING POST (HK), Sep. 16, 2013, at 4.

<sup>120</sup> *See* Transport and Housing Bureau, *The Government's Response to the Issues Raised at the Meetings of the Bills Committee on the Stamp Duty (Amendment) Bill 2012 Held on 16 September 2013*, Sep., 2013, LegCo Paper No: CB(1) 1843/12-13(02); Transport and Housing Bureau, *supra* note 118.

existing requirement of permanent resident status—for exemption from the BSD.<sup>121</sup> The administration rejected such a requirement based on the administrative difficulties in evaluating the context-sensitive issues of domicile.<sup>122</sup> Some lawmakers also suggested excluding from the BSD exemption Hong Kong permanent residents who were minors but whose parents were not Hong Kong permanent residents.<sup>123</sup> This proposal was again rejected due to concerns of discriminatory effects against the targeted Hong Kong permanent residents that might infringe on the right to equality.<sup>124</sup> Nonetheless, a follow-up recommendation to exclude all permanent residents who were minors was eventually taken up by the government in January 2014.<sup>125</sup> This proposal did raise concerns about whether this withdrawal of the exemption should be retrospectively applied to the date of announcement given the substantial departure from the initial announcement.<sup>126</sup> The government insisted on full retrospective effect based on the purported concerns of circumvention and narrowly survived an attempted amendment by that would have rendered this withdrawal prospective.<sup>127</sup>

Two other significant but politically less salient changes were made to the final legislation as a result of the legislative process. The first change related to the exemption for redevelopment, wherein the government indicated in its announcement that purchases of property by developers for the purpose of redevelopment would be exempted from the BSD.<sup>128</sup> The proposed six-year limitation under the Bill was dropped in favor of requiring demonstrable evidence of redevelopment for a refund of the BSD—a change that would potentially allow for a speedier refund process.<sup>129</sup> The second change concerned the scope of exemptions for a non-

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<sup>121</sup> Transport and Housing Bureau, *The Government's Response to the Draft Committee Stage Amendments Proposed by the Hon Kenneth Leung*, Nov., 2013, LegCo Paper No: CB(1) 337/13-14(01).

<sup>122</sup> *Id.*

<sup>123</sup> Transport and Housing Bureau, *The Administration's Response to the Issues Raised at the Meetings of the Bills Committee on the Stamp Duty (Amendment) Bill 2012 Held on 15 October 2013*, Oct., 2013, LegCo Paper No: CB(1) 133/13-14(2).

<sup>124</sup> *Id.*

<sup>125</sup> Transport and Housing Bureau, *The Government's Response to the Committee Stage Amendment Proposed by the Hon Regina IP*, Jan., 2014, LegCo Paper No: CB(1) 623/13-14(04). This is achieved by changing the exemptions dealing with non-permanent residents acting as trustee or guardian of Hong Kong permanent resident from “the other person is a Hong Kong permanent resident and is either a minor or a mentally incapacitated person” to “the other person is a Hong Kong permanent resident and is a mentally incapacitated person”: see §29CB(8)(b), 29CB(9)(b), 29DB(9)(b) & 29DB(10)(b), Stamp Duty Ordinance, *supra* note 91; §10 & 13, Stamp Duty (Amendment) Ordinance 2014, Ord. No. 2 of 2014 (HK) & §9 & 12, Stamp Duty (Amendment) Bill 2012 (HK).

<sup>126</sup> Official Reports of Proceedings (Legislative Council of Hong Kong), Feb. 19, 2014, 7302.

<sup>127</sup> Stamp Duty (Amendment) Bill 2012 – Committee Stage – Hon Dennis Kwok's 2<sup>nd</sup> Amendment to Clause 17, Feb. 21, 2014, Vote 13 (a margin of one vote among the 27 Functional LegCo members and 24 Geographical LegCo members).

<sup>128</sup> Ng & Li, *supra* note 16; Yvonne Liu, *Sino Land Plans Unaffected by Cooling Measures*, SOUTH CHINA MORNING POST (HK), Nov. 1, 2012, at 1 (Business).

<sup>129</sup> See §29DD, Stamp Duty Ordinance, *supra* note 91; §13, Stamp Duty (Amendment) Ordinance 2014, *supra* note 125; §12, Stamp Duty (Amendment) Bill 2012 (HK).

Hong Kong permanent resident who purchased a replacement property after the resident's initial residential property was involuntarily sold.<sup>130</sup> The exemption was expanded to cover a broader spectrum of circumstances after the government accepted the submissions of the Law Society of Hong Kong.<sup>131</sup>

Delay in the legislative process, partly due to the unrelated filibuster by opposition lawmakers but mainly due to the lack of agreement among the legislators on the substantive rules, resulted in the Bill being stuck in the legislative process for fifteen months following the announcement of the tax measures.<sup>132</sup> The government's intense lobbying and political jostling among the political parties in the legislature culminated in extended three-day marathon sessions for the second and third readings of the relevant bill that had commentators raving with speculation about the prospect of the Bill's passage.<sup>133</sup> Indeed, as the scheduled date for the second and third readings of the Bill drew closer, a final issue emerged as the dominant political talking point—namely, the provision that would empower the Financial Secretary to make any future changes to the rates of the BSD and SSD by unilateral announcement in the Gazette without the need for additional legislative authorization.<sup>134</sup> This empowerment provision attracted allegations of “administrative tyranny” and threats to veto the entire Bill by certain political parties.<sup>135</sup> The government attempted to placate the objections with a last minute “oral undertaking” to still consult the legislature for upward revisions of rates,<sup>136</sup> which only served to

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<sup>130</sup> 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 20 May 2013 and the Submission from the Law Society of Hong Kong of 28 May 2013*, June, 2013, LegCo Paper No: CB(1) 1288/12-13(01).

<sup>131</sup> *Id.* The initial version only provides for compulsory acquisitions pursuant to the Urban Renewal Authority Ordinance, Lands Resumption Ordinance and Land (Compulsory Sale for Redevelopment) Ordinance, and was expanded in the final version to further includes the Mass Transit Railway (Land Resumption and Related Provisions) Ordinance, Roads (Works, Use and Compensation) Ordinance, Railways Ordinance, Land Acquisition (Possessory Title) Ordinance and Land Drainage Ordinance: *see* §29CB(4) & 29(DB)(5), Stamp Duty Ordinance, *supra* note 91 (HK); §10 & 13, Stamp Duty (Amendment) Ordinance 2014, *supra* note 125 & §9 & 12, Stamp Duty (Amendment) Bill 2012 (HK).

<sup>132</sup> Yongsu, *supra* note 17; *Filibuster of Property Cooling Measures Causes Backlog of Several Hundred Millions of Tax*, *supra* note 20; Li, *supra* note 117.

<sup>133</sup> Zhang Weiwei, “Shuangla” erdu, gangfu jianjue “chuangguan” [Second Reading of “Double Cooling Measures” – Government Insistence to Push Ahead], SINGTAO DAILY, Feb. 19, 2014, at A8; Shuanglazhao xiuding nan guoguan [Amendment of Double Cooling Measures Unlikely to Pass], HONG KONG ECONOMIC JOURNAL, Feb. 11, 2014, at A1.

<sup>134</sup> §16, Stamp Duty (Amendment) Bill 2012 (HK). Under the current administrative law framework, the LegCo will be presented with the subsidiary legislation (the definition which includes the notice to change the rates) in the earliest opportunity and may by resolution amend or repeal the subsidiary legislation: §34, Interpretation and General Clauses Ordinance, c. 1 (1997) (HK).

<sup>135</sup> *Amendment of Double Cooling Measures Unlikely to Pass*, *supra* note 133; Yinhua shui xiuding yiyuan chang xian shenyi hou dingli [Amendment to Stamp Duty – LegCo Member Urges Legislative Review Before Implementation], HONG KONG ECONOMIC JOURNAL, Feb. 5, 2014, at A10.

<sup>136</sup> Zhang, *supra* note 133.

generate even more controversies.<sup>137</sup> Ultimately, the Bill, with the three changes to the exemptions of redevelopment, replacement and Hong Kong permanent residents minors discussed above, was finally passed on February 22, 2014, and was registered in the Gazette (thus becoming law) on February 28, 2014.<sup>138</sup>

#### ***D. The Aftermath: Real Effect of the Yet Effective Law***

Despite the BSD amendment's languishing in the legislative process for more than a year after the announcement, the impact of the measures was keenly and immediately felt by all relevant parties from the announcement date. First, lawyers handling property transactions began collecting these pending taxes for eventual possible payment to the government.<sup>139</sup> This move resulted in funds amounting to several billion HKD being held up in the client accounts of these law firms.<sup>140</sup>

Other private actors similarly modified their behavior in response to the pending law. Some developers offered discounts designed to partially or completely offset the pending increase in the tax burden.<sup>141</sup> Other developers increased the commission to property agents to help push the inventory.<sup>142</sup> New land sales understandably saw more conservative bids.<sup>143</sup> Developers also changed the design of new projects—such as reducing the number of “super luxury” features—in anticipation of the dampened interest by cash-rich foreign buyers.<sup>144</sup>

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<sup>137</sup> The real controversy surrounding the “oral undertaking” is more political than the purported concerns for rule of law and/or separation of power. The oral undertaking was given in response to the legislators from the pro-establishment political parties, which infuriated the rival pan-democrats political parties over the perceived preferential treatment by the government to the pro-establishment camp. The pan-democrats threatened to block the Bill in its entirety, but ultimately chose to boycott the vote (which effectively facilitate the passage) given the strong popular support for the Bill: *Fanmin lichang cucheng yian guoguan zhengfu chanshen [Bill Passed With Absence of Pan-Democrats – A Pyrrhic Victory for the Government]*, HONG KONG ECONOMIC JOURNAL, Feb. 24, 2014, at A4; Liang, *supra* note 17. For discussion of the antagonistic political landscape in Hong Kong, *see infra* IV.C.2.

<sup>138</sup> *Stamp Duty (Amendment) Ordinance 2014*, *supra* note 17; Liang, *supra* note 17.

<sup>139</sup> *Filibuster of Property Cooling Measures Causes Backlog of Several Hundred Millions of Tax*, *supra* note 20; Li, *supra* note 117.

<sup>140</sup> *Financial Secretary Warning: Vetoing Cooling Measures Would Result in Tumor in Property and Stock Market*, *supra* note 20; *Filibuster of Property Cooling Measures Causes Backlog of Several Hundred Millions of Tax*, *supra* note 20.

<sup>141</sup> Kenneth Ko, *Sweet Deals*, SOUTH CHINA MORNING POST (HK), Nov. 1, 2013, at 1 (Supplements); Sandy Li, *Rivalry Fuels Fears over Price Cuts*, SOUTH CHINA MORNING POST (HK), Oct. 12, 2013, at 1 (Business) (50% of BSD for Yoo Residence); Paggie Leung, *supra* note 18 (15% discount by Cheung Kong (Holdings) for remaining flats at Uptown in Yuen Long).

<sup>142</sup> Peggy Sito, *Tax Takes Huge Toll on Sales*, SOUTH CHINA MORNING POST (HK), Dec. 21, 2012, at 1 (Business) (5% from the previous 1% to 2.5%).

<sup>143</sup> Liu, *supra* note 19; Li, *supra* note 19.

<sup>144</sup> Li, *supra* note 18.

Redevelopment plans by private developers were derailed by the increase in upfront costs of acquisition and the reduction in demand of the output.<sup>145</sup>

Foreign buyers explored measures for avoiding the taxes, such as purchasing property via share transfers (if the property was owned by a company), although there were additional transaction costs to verify the account and liability of the property-holding company.<sup>146</sup> This practice was also adopted by some developers for their remaining unsold apartments.<sup>147</sup> There was also a shift in investment to industrial and commercial properties, which were not affected by the BSD and SSD.<sup>148</sup>

Overall, the “yet to be implemented” BSD and SSD were effective in cooling the property market. The previous trend of rising prices on secondary homes was halted amidst a substantial decline in transaction volume.<sup>149</sup>

#### **IV. LEGALITY OF LEGISLATION BY PRESS RELEASE**

One interesting observation from the case study is the absence of any qualms about the legality of how the measures were implemented.<sup>150</sup> There was some discussion about the legality of the substantive content of the BSD: Tom Holland opined that the BSD might be discriminatory and infringed on the Basic Law article 105’s right of the freedom to acquire, use and dispose of property;<sup>151</sup> Abraham Razack suggested a possible violation of equality protection;<sup>152</sup> and the Hong Kong Conveyancing & Property Law Association Limited argued that the BSD restricted the policy of free trade and contravened articles 105, 106 and 115 of the

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<sup>145</sup> Jimmy Chow, *Chang of Pace*, SOUTH CHINA MORNING POST (HK), Jan. 18, 2013, at 14 (Business) (while an exemption would be granted for redevelopment that is completed within 6 years upon acquisition, it is in the form of a refund, meaning that a substantial amount of capital will be locked up).

<sup>146</sup> Joyce Ng & Sandy Li, *Curb on Avoiding New Flat Still Leaves Tax Dodges*, SOUTH CHINA MORNING POST (HK), Nov. 1, 2012, at 3.

<sup>147</sup> *Yishou haozai chaizhao bi qianwan yinghua sui* [Avoidance of Tens of Millions of Stamp Duty Via Countermeasures In First Hand Sales of Luxury Property], MINGPAO (HK), Oct. 30, 2012.

<sup>148</sup> Peggy Sito, *Boom in Factory Space Investors*, SOUTH CHINA MORNING POST (HK), Jan. 30, 2013, at 1 (Property); Shu-ching Jean Chen, *Leung Firm on Reining in HK Property Prices*, BUSINESS TIMES (Sing.), Dec. 7, 2012.

<sup>149</sup> Li, *supra* note 21; Sito & Ng, *supra* note 21. Property agents were particularly hard-hit by the substantial fall in property transactions, with several organized public protests by the affected property agents: Peggy Sito, *Realty Strikes*, SOUTH CHINA MORNING POST (HK), July 5, 2013, at 4 (Business).

<sup>150</sup> During the 2011 legislative debate over SSD, Dr Margaret Ng did mount a substantial objection over the retrospective nature of the SSD implementation. Nonetheless, the objections was based on normative policy considerations (delay and uncertainty) rather than on legal grounds: Official Reports of Proceedings (Legislative Council of Hong Kong), June 22, 2011, 12561-12564.

<sup>151</sup> Tom Holland, *Four More Ways Officials Break the Spirit of HK’s Basic Law*, SOUTH CHINA MORNING POST (HK), Nov. 23, 2012, at 12 (Business).

<sup>152</sup> Ng, *supra* note 118.

Basic Law.<sup>153</sup> Beyond the legality of the substantive aspects,<sup>154</sup> the issue of retrospectivity has largely been ignored in the discussion of the BSD. Interestingly, the Law Society did raise the “question of the constitutionality of making the SSD legislation retrospective” during the SSD debate in 2011, but there was no further elaboration or argument beyond that passing comment.<sup>155</sup>

This Part critically examines the legality of the manner in which the BSD was implemented as follows: first, by setting out the constitutional framework in Hong Kong; second, by analyzing the issue of retrospectivity, including a discussion of previous examples of retrospective laws in Hong Kong; and third, by examining the ancillary issue of the power to tax. The conclusion is that legislation by press release is legally permissible in Hong Kong.

### **A. *Constitutional Framework in Hong Kong***

The starting point for assessing legality is naturally the constitutional document of a jurisdiction that sets forth fundamental rights. In Hong Kong, there are actually three possible instruments that are relevant. The first is the Basic Law, Hong Kong’s de facto constitution after the handover from British colonial rule to China in 1997.<sup>156</sup> The second is the Hong Kong Bill of Rights Ordinance, enacted in 1991 to incorporate the International Covenant on Civil and Political Rights [“ICCPR”] into Hong Kong<sup>157</sup> after the Tiananmen Square “incident” in China sparked concerns about future human rights protections after the handover.<sup>158</sup> The third instrument is the ICCPR itself, which “as applied to Hong Kong shall remain in force” under article 39 of the Basic Law.<sup>159</sup> The precise relationship between these three instruments is a complicated and, at times, controversial issue for courts determining the substantive content of the constitutional rights or assessing the legality of restrictions on rights.<sup>160</sup> As a general matter, either the Basic Law or the Hong Kong Bill of Rights Ordinance will suffice in providing

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<sup>153</sup> Transport and Housing Bureau, *supra* note 110.

<sup>154</sup> It is worth noting that, notwithstanding the alleged severity of legal critique, there has been no indication or suggestion of any prospective litigation by anyone.

<sup>155</sup> Law Society of Hong Kong, *Preliminary Submissions by the Law Society’s Property Committee on the Stamp Duty (Amendment) (No. 2) Bill 2010*, Jan. 4, 2011, LegCo Paper No: CB(1) 983/10-11(01), at 9.

<sup>156</sup> Chan, *supra* note 80, at 28-29.

<sup>157</sup> Long Title, Hong Kong Bill of Rights Ordinance, *supra* note 22.

<sup>158</sup> Carole J. Petersen, *Sexual Orientation and Gender Identity in Hong Kong: A Case for the Strategic Use of Human Rights Treaties and the International Reporting Process*, 14 ASIAN-PAC. L. & POL’Y J. 28, 42-46 (2013); Dinusha Panditaratne, *Basic Law, Hong Kong Bill of Rights and the ICCPR*, in LAW OF THE HONG KONG CONSTITUTION 425, 431-432 (Johannes Chan & C.L. Lim eds., Sweet & Maxwell 2011).

<sup>159</sup> Art. 39, Basic Law (1997) (HK).

<sup>160</sup> For a concise overview and analysis of this issue, see Panditaratne, *supra* note 158, at 436-460; PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 319-327 (Longman Asia Limited 2<sup>nd</sup> ed. 1994).

grounds for a constitutional challenge,<sup>161</sup> whereas the ICCPR may serve as a constraint against repeal or amendment of the Hong Kong Bill of Rights Ordinance without providing an independent source of enforceable rights itself.<sup>162</sup>

## ***B. Retrospectivity***

### **1. Per Se Prohibition of Retrospective Criminal Law**

The relevant provision on retrospective law is contained in article 12 of the Hong Kong Bill of Rights Ordinance. A direct replica of article 15 of the ICCPR, the provision is titled “No retrospective criminal offences or penalties” and stipulates that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under Hong Kong or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.” This right against retrospective criminal offenses or penalties has no counterpart in the Basic Law,<sup>163</sup> although, as noted in the preceding section, this fact provides no obstacle for the courts in striking down retrospective punitive legislative provisions.<sup>164</sup>

The protection from retrospective laws is, however, limited only to criminal sanctions, as is clear from a plain reading of article 12 of the Hong Kong Bill of Rights Ordinance (or, for that matter, the international human right standards set forth in ICCPR). Inevitably, there are ambiguity and uncertainty on the margin as to what constitutes a “criminal offense” or “penalty.” In Hong Kong, the higher appellate courts have not had the opportunity to pass judgment on this issue,<sup>165</sup> and only two somewhat inconsistent lower court decisions have done so. The first is a High Court decision that found the disqualification of a driver’s license upon the accumulation of certain traffic demerit points to be mere civil consequences of a criminal offence and thus did not constitute punishment for double jeopardy purposes (i.e., article 11(6) Hong Kong Bill of Rights

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<sup>161</sup> Panditaratne, *supra* note 158, at 441-444; Johannes Chan & C.L. Lim, *Interpreting Constitutional Rights and Permissible Restrictions*, in *LAW OF THE HONG KONG CONSTITUTION* 465, 470-471 (Johannes Chan & C.L. Lim eds., Sweet & Maxwell 2011); Simon N. M. Young, *Restricting Basic Law Rights in Hong Kong*, 34 *HONG KONG L. J.* 109, 115-117 (2004).

<sup>162</sup> Panditaratne, *supra* note 158, at 441-442 & 456-460; Young, *supra* note 161, at 115-117.

<sup>163</sup> *See* art. 24-42, Basic Law (1997) (HK).

<sup>164</sup> *E.g.*, *Ng Ka Ling v Director of Immigration*, [1999] HKEC 315, 350-352 (C.F.A.) (The offending statute is an amendment to the Immigration Ordinance that impose a new requirement of an administrative certificate for the exercise of the right of abode by certain class of permanent residence, thereby rendering persons without such certificate liable for immigration – i.e. criminal – offences. The amendment was enacted on July 10, 1997 but deemed to be effective on July 1, 1997, the date of the handover). *See also* *R v Chan Suen Hay*, [1995] HKLY 205 (D.C.) (relying on article 12(1) of the Bills of Rights Ordinance to disallow an application for disqualification order under a Companies Ordinance provision that was enacted six years after the commission of the offense).

<sup>165</sup> The *Ng Ka Ling* case is the major case turns up in the Westlaw search on cases which rules on the retrospective criminal law issues. In that case, both parties did not dispute that immigration offences would fall under the ambit of the prohibition, and the main contention is simply whether the offending provision will be struck down or that the provision stands but retrospective prosecution prohibited: *Ng Ka Ling*, *supra* note 164, at 350-352.



Ordinance).<sup>166</sup> The other is a subsequent District Court decision, which held that a director disqualification order under the Companies Ordinance is a penalty that cannot be imposed if the triggering criminal offense was committed before the enactment of the relevant Companies Ordinance provision.<sup>167</sup> Similarly, the European Court of Human Rights and U.S. courts have grappled with difficult cases such as whether confiscation of property from convicted drug traffickers, mandatory sex offender registration, indefinite civil confinement for “dangerous” sex offenders and other legal sanctions violate the ban on retrospective criminal laws.<sup>168</sup> Nonetheless, the general consensus among various jurisdictions is that taxation per se does not fall under the ambit of such a ban.<sup>169</sup>

## 2. Expanded Notion of “Law” and Proportionality

Notwithstanding the lack of per se prohibition against retrospective civil legislation, such legislation may still be scrutinized by the courts under judicial review of general constitutionality. In Hong Kong,<sup>170</sup> as with the jurisprudence of the European Court of Human Rights<sup>171</sup> and Canada,<sup>172</sup> legislation must conform to both the principles of legality and the requirement of proportionality. The principle of legality arose from “prescribed by law” and similar phrases that commonly precondition any imposition of legal burdens (including taxes) on private entities. Courts have increasingly infused a qualitative requirement in interpreting what constitutes “law” beyond the formality of a duly enacted piece of legislation or regulation. The European Court of Human Rights construed the term “law” to require “qualitative requirements, including those of

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<sup>166</sup> *The Queen v Wan Kit-man*, [1992] 1 HKCLR 225 (H.C.).

<sup>167</sup> *R*, *supra* note 164. In reaching the conclusion, HH Judge Britton distinguished the *Wan Kit-man* case on the basis that the director disqualification order is discretionary, unlike the automatic disqualification of driver license in *Wan Kit-man*. This is notwithstanding the absence of any suggestion in the *Wan Kit-man* case that the “automatic” nature of the disqualification has any bearings in the court’s finding.

<sup>168</sup> Short answer, respectively, yes (European Court of Human Rights); no (European Court of Human Rights and U.S. Supreme Court); no (U.S. Supreme Court): *see* SAMPFORD, *supra* note 2, at 135-141. For a detailed exposition on EU jurisprudence on article 7 of the European Convention of Human Rights, which is similar to article 15 of the ICCPR, *see* ROBIN C A WHITE & CLARE OVERY, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 296-304 (Oxford University Press 5<sup>th</sup> ed. 2010); DAVID HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 331-339 (Oxford University Press 2<sup>nd</sup> ed. 2009).

<sup>169</sup> SAMPFORD, *supra* note 2, at 151-156 (discussing the cases from various jurisdictions); Pauwels, *supra* note 7, at 272-273; Fisch, *supra* note 3, at 1066; Palmer & Sampford, *supra* note 3, at 261 (“Tax 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.”).

<sup>170</sup> *Chan & Lim*, *supra* note 161, at 487-495.

<sup>171</sup> A W BRADLEY & K D EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 681-682 (Pearson Education 15<sup>th</sup> ed. 2011); WHITE & OVERY, *supra* note 168, at 312-315, 325-332 & 478; ALEX CARROLL, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 398-400 (Pearson 5<sup>th</sup> ed. 2009); STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 201-213 (Cambridge University Press 2006). For a critical discussion of the legal theory imbedded in these two concepts, *see* GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 17-36 & 99-119 (Oxford University Press 2007).

<sup>172</sup> Barb Billingsley, *Justification*, in *CONSTITUTIONAL LAW: CASES, COMMENTARY AND PRINCIPLES* 837, 837-860 (Leonard I. Rotman ed., Thomson 2008); PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 797-803 & 828-829 (Thomson 5<sup>th</sup> ed. Student ed. 2007).

accessibility and foreseeability.”<sup>173</sup> A similar approach has been adopted in Hong Kong as well.<sup>174</sup> While more typically used to critically evaluate regulatory/legislative schemes that accord broad discretionary power to government officials,<sup>175</sup> this requirement of accessibility and foreseeability provides a potential avenue for courts to examine retrospective civil legislation in the absence of an express constitutional prohibition. Sir Anthony Mason, a non-permanent Judge of the Hong Kong Court of Final Appeal and former Chief Justice of the High Court of Australia, opined in his academic writing on the possibility of a greater operation of the general principle of legality under the ICCPR in challenges to retrospective laws.<sup>176</sup> Indeed, the European Court of Human Rights occasionally scrutinizes retroactive tax legislation with respect to whether it is a “lawful” interference.<sup>177</sup>

Alternatively, the use of retrospectivity may be a factor that weighs against the principle of proportionality. This view is similarly reflected in certain decisions by the European Court of Human Rights involving retrospective tax legislation.<sup>178</sup> For example, in *M.A. v Finland*, the court held that the key issue is whether “the retrospective application of the law imposed an unreasonable burden on [the applicants] and thereby failed to strike a fair balance between the various interests involved.”<sup>179</sup> Significantly, in *R.Sz. v Hungary*, the hardship caused to private individuals who are likely to exhaust monies that are subsequently subjected to retrospective taxation was an aggravating factor, in addition to the magnitude of the tax, in the court’s finding that the tax was not reasonably proportionate.<sup>180</sup>

Nonetheless, the prospective notice setting out the specifics of the pending retrospective laws under legislation by press release is likely to substantially meet these two legal requirements. Although private individuals may not be able to access laws that have yet to be passed and thus are unable to foresee the legal consequences imposed by future retrospective

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<sup>173</sup> WHITE & OVERY, *supra* note 168, at 312-315; HARRIS ET AL., *supra* note 168, at 334; Bernitz, *supra* note 3, at 51-52.

<sup>174</sup> Chan & Lim, *supra* note 161, at 488-489. For cases applying this approach, see *Winnie Lo v HKSAR*, (2012) 15 HKCFAR 16, 42-44 (C.F.A.); *Shum Kwok Sher v HKSAR*, [2002] 2 HKLRD 793, 810-812 (C.F.A.).

<sup>175</sup> Chan & Lim, *supra* note 161, at 488-489; WHITE & OVERY, *supra* note 168, at 314-315; HOGG, *supra* note 172, at 799-801.

<sup>176</sup> Mason, *supra* note 23, at 314-315. Earlier, he has entrenched this expanded notion of “law” in a Court of Final Appeal case: *Shum Kwok Sher v HKSAR*, *supra* note 174, 810-812.

<sup>177</sup> Pauwels, *supra* note 7, at 272; Pålsson, *supra* note 8, at 273; Bernitz, *supra* note 3, at 50-52. See also Nolte & Radler, *supra* note 45, at 495 (noting how under German constitutional court jurisprudence, laws which affects transactions that have been concluded “are usually impermissible because they violate the principle of legal certainty, which is an aspect ... of the general principle of the rule of law”).

<sup>178</sup> For a discussion of the relevant cases, see Pauwels, *supra* note 7, at 276-279. See Nolte & Radler, *supra* note 45, at 495 (discussing the treatment of retrospectivity in assessing proportionality by the German Constitutional Court). See also Gribnau, *supra* note 31, at 71 (arguing that retrospectivity, while generally undesirable, can be countervailed by competing interests).

<sup>179</sup> *M.A. v Finland*, No. 27793/95, June 10, 2003, 11 (ECtHR).

<sup>180</sup> *R.Sz. v Hungary*, No. 41838/11, July 2, 2013, ¶59 (ECtHR).

legislation, the same cannot be said when the private individuals are forewarned by the initial announcement. For the BSD, private individuals were able to refer to the detailed implementation guidelines uploaded on the government website<sup>181</sup> and could not claim surprise at the eventual tax bill, especially given that they would have been amply informed of the pending tax by property agents and the lawyer handling the conveyance. Similarly, by minimizing the disruption of the reliance interests of private individuals, the announcement served as an effective counterweight to the adverse effect of retrospectivity on the proportionality balancing test.<sup>182</sup> In this regard, it is worth noting that, in *M.A. v Finland*, where the retrospective application of the tax legislation had no difficulty passing the proportionality assessment, the court found it significant that the retrospective effect was only backdated to the introduction of the bill.<sup>183</sup>

### 3. Presumption Against Retrospectivity

Although the presumption against retrospectivity is not strictly a legal prohibition capable of striking down the law, it is worth mentioning for completeness that civil legislation will nevertheless be subjected to this well-established common law principle in statutory interpretation.<sup>184</sup> The presumption has been invoked several times in Hong Kong courts<sup>185</sup> and is also reflected in the statutory provision on the interpretation of statutory repeal.<sup>186</sup> Nonetheless, it is not strictly applicable to legislation by press release because its retrospective effects will typically be expressly and clearly stipulated. Indeed, the preamble<sup>187</sup> and the first clause<sup>188</sup> of the bill implementing the BSD could not have been more explicit about the intended retrospective operation of the amendment.

### 4. Previous Examples of Retrospective Laws

Given the general legality of retrospective non-criminal laws in Hong Kong, it is not surprising that there has not been any systematic study of the quantity and characteristics of

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<sup>181</sup> The policy announcement of the BSD was accompanied by a detailed FAQ posted online on the website of the Inland Revenue Department that sets out the specifics of the legislation: *see* <http://www.ird.gov.hk/eng/faq/bsd.htm> (last visited Dec. 1, 2013).

<sup>182</sup> Pauwels, *supra* note 7, at 278.

<sup>183</sup> *M.A.*, *supra* note 179, at 12.

<sup>184</sup> JURATOWITCH, *supra* note 2, at 68-71; Salembier, *supra* note 3, at 112-118.

<sup>185</sup> *E.g.*, *Lee Bing Chueng v Secretary for Justice*, [2013] HKEC 255, para 145-146 & 155 (C.F.I.); *The Queen v Lam Wan-kow and Yuen Chun-kong*, [1992] 1 HKCLR 272, 277 (C.A.); *Commissioner of Inland Revenue v Chan Tin-chu*, [1965] District Court Law Reports 289, 301 (District Court).

<sup>186</sup> §23, Interpretation and General Clauses Ordinance, *supra* note 134.

<sup>187</sup> Preamble, Stamp Duty (Amendment) Bill 2012 (HK) (“to impose buyer’s stamp duty on certain agreements for sale and conveyances on sale of residential property executed on or after 27 October 2012”)

<sup>188</sup> Clause 1(2), Stamp Duty (Amendment) Bill 2012 (HK) (“This Ordinance is deemed to have come into operation on 27 October 2012”).

retrospective laws in Hong Kong.<sup>189</sup> This section provides a brief descriptive overview of some previous examples of retrospective laws in Hong Kong. These examples are not meant to be comprehensive, although they are significant, given that all of these examples were provided by the government in response to recent queries by legislators on the issue of retrospectivity. The examination of these examples not only provides a more circumspect context in which to examine Hong Kong's utilization of legislation by press release in particular and retrospective laws in general but also helps us appreciate the significant departure posed by the BSD that will be discussed in the V.B.

Although retrospectivity was not raised in the BSD, the issue was raised in the initial implementation of the SSD in 2010. The Law Society of Hong Kong and the Hong Kong Association of Banks opposed the retrospective effect of the amendment.<sup>190</sup> Pursuant to a meeting on February 9, 2011, in which the question of “existing ordinances other than revenue ordinances which had retrospective effect” was raised, the Bills Committee responsible for the stamp duty amendment responded with two examples: the Societies Ordinance in 1988 and the Bankruptcy Ordinance in 2005.<sup>191</sup> The latter is uncontroversial—a mere example of adaptive amendments to update the reference of government officials and procedure to account for the handover in 1997.<sup>192</sup> The former, despite being deemed to have come into operation approximately ten years earlier, is also relatively routine because it merely gave effect to a legislative amendment of a different piece of legislation (Companies Ordinance) from ten years earlier, which, due to a drafting oversight, had not been correspondingly reflected in the Societies Ordinance.<sup>193</sup>

The examples of the Societies Ordinance and the Bankruptcy Ordinance were in addition to the prior list of existing revenue ordinances that had retrospective effects.<sup>194</sup> Essentially, there were the amendments to the Inland Revenue Ordinance in 1987 and 1992. The 1987 amendment concerned the inclusion of consideration in exchange for the right to receive income from property as a taxable trading receipt<sup>195</sup> but did not attract any discussion of retrospectivity,

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<sup>189</sup> *C.f.*, SAMPFORD, *supra* note 2, at 104-164 (a study that focuses on Australia, but also include U.S. and U.K.); Palmer & Sampford, *supra* note 3 (Australia).

<sup>190</sup> Stamp Duty (Amendment) (No. 2) Bill 2010 Bills Committee, *supra* note 49, at 18. See also Dr Margaret Ng's speech in the LegCo debate that focused on the criticizing the retrospective aspects of the SSD: Official Reports of Proceedings (Legislative Council of Hong Kong), June 22, 2011, 12561-12564.

<sup>191</sup> Stamp Duty (Amendment) (No. 2) Bill 2010 Bills Committee, *supra* note 47.

<sup>192</sup> *Id.* See §§ 1, 12, 19 & 32, Bankruptcy Ordinance, c. 6 (1997) (HK).

<sup>193</sup> The Companies Ordinance was amended to permitted large partnership to engage in professional services such as lawyers and accountants, but without the corresponding amendment to the Societies Ordinance, those would be still illegal: Official Reports of Proceedings (Legislative Council of Hong Kong), July 6, 1988, 1783-1785. See also Official Reports of Proceedings (Legislative Council of Hong Kong), July 20, 1988, 1982-1983 (discussing the implication of how the “legalization,” while retrospectively applied to ten years ago, did not affect litigation that has already commenced).

<sup>194</sup> Stamp Duty (Amendment) (No. 2) Bill 2010 Bills Committee, *supra* note 48, at 2.

<sup>195</sup> §15A, Inland Revenue Ordinance, c. 112 (2012) (HK).

notwithstanding the three-month lapse between the policy announcement and its eventual enactment.<sup>196</sup> The 1992 amendment involved the closing of two tax-avoidance mechanisms—namely, expenditures on intellectual property rights and leveraged leasing of ships and aircraft.<sup>197</sup> It did give rise to a discussion of retrospectivity, wherein the government agreed to exempt “small ticket leasing” from retrospective application of the law because the earlier announcement statement did not clearly spell out its application to “small ticket leasing.”<sup>198</sup>

Interestingly, a more extensive list was provided in the course of the debate about the retrospective nature of the Family Status Discrimination (Amendment) Bill in 2000, in which the amendment designed to clarify the original legislative intent (i.e., that the selective offering of benefits to immediate family members of employees is not illegal, contrary to some legal opinions) was made to be retrospective to the date of the original legislation, though without affecting existing litigation.<sup>199</sup> In addition to the Societies Ordinance amendment in 1988 and the Inland Revenue Ordinance amendment in 1992, the list also included the Immigration Ordinance amendment in 1991, the Land Tribunal Ordinance amendment in 1995 and the Employees’ Compensation Ordinance amendment in 2000.<sup>200</sup>

The Lands Tribunal Ordinance amendment resembles the Family Status (Discrimination) Ordinance insofar as the amendment was made to clarify a clause—here being the jurisdiction of the Lands Tribunal over orders for vacant possession on termination of tenancies—and passed without any concern about its retrospective application.<sup>201</sup> Similarly, the new provision s13D(5) in the Immigration Ordinance amendment was made to remove any doubt as to the legal authority of the Director of Immigration to transfer Vietnamese detainees between detention centers, though without affecting legal proceedings that had already begun.<sup>202</sup>

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<sup>196</sup> Official Reports of Proceedings (Legislative Council of Hong Kong), May, 27, 1987, 1659 & 1675-1676.

<sup>197</sup> §16E, 22B & 39E, Inland Revenue Ordinance, *supra* note 195.

<sup>198</sup> Official Reports of Proceedings (Legislative Council of Hong Kong), Mar. 11, 1992. Leasing of planes and ships are considered “big ticket leasing”, while “small ticket leasing” typically involves machineries and equipment that are of considerably less monetary value.

<sup>199</sup> Official Reports of Proceedings (Legislative Council of Hong Kong), June 14, 2010, 7550-7553. *See generally* Family Status Discrimination Ordinance, c. 527 (2013) (HK).

<sup>200</sup> C M Wong, *Family Status Discrimination (Amendment) Bill 2000*, May 16, 2000, LegCo Paper No: CB(2) 2015/99-00(01).

<sup>201</sup> Official Reports of Proceedings (Legislative Council of Hong Kong), Nov. 29, 1995; Official Reports of Proceedings (Legislative Council of Hong Kong), Nov. 2, 1995 (the amendment was meant to reverse a 1993 Court of Appeal decision). *See* §8(8), Lands Tribunal Ordinance, c. 17 (1997) (HK).

<sup>202</sup> There was no objection based on the retrospective effect: Official Reports of Proceedings (Legislative Council of Hong Kong), May 29, 1991. *See* §13D(5), Immigration Ordinance, c. 115 (1997) (HK) (“For the avoidance of doubt, it is hereby declared that any person detained under subsection (1) in any place may, under the authority of the Director of Immigration, be transferred from that place and detained in any other place or places specified by the Director of Immigration.”).

The Employees' Compensation Ordinance is uncontroversial. Resembling the drafting oversight that drove the amendment to the Societies Ordinance in 1988, the definition of "gale warning" and "rainstorm warning" under section 5(4)(f) was restored to its original meaning (to include red warning) in line with the previous definition, which was based on another statute that had been inadvertently altered when the latter, referencing the statute, was amended for a different policy consideration.<sup>203</sup>

### ***C. Taxing Power***

As is typical with the constitutional structure of other nations,<sup>204</sup> article 73 of the Basic Law provides that the power to "approve taxation" and "enact, amend or repeal laws" is vested in the legislative branch (i.e., the Legislative Council),<sup>205</sup> though laws relating to government policies are primarily introduced by the executive branch.<sup>206</sup> Prior written approval of the Chief Executive<sup>207</sup> is required before members of the Legislative Council can introduce such bills.<sup>208</sup>

The vesting of the taxing powers and general legislative powers in the legislative branch means that the executive branch did not have any legal basis to collect the tax before the amendments were actually passed. Indeed, this is what happened in practice. As explained by the Secretary for Transport and Housing in the first reading of the 2010 amendment implementing the SSD, "[b]efore the new law comes into effect, the Inland Revenue Department (IRD) will record the residential property transactions between 20 November 2010 and the date of coming into effect of the new law to identify the cases liable for SSD. Demand notes on SSD will then be issued after the new legislation is enacted. And during this period, the IRD will continue to allow and approve applications for deferring stamp duty payment on agreements made in accordance

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<sup>203</sup> The referencing statute, the Judicial Proceedings (Adjournment During Gale Warnings) Ordinance (c. 62), was amended to minimize disruption to the judicial process without intending to affect general employment. The amendment of Employee's Compensation Ordinance was retrospectively made effective on the date the referencing statute was amended: Official Reports of Proceedings (Legislative Council of Hong Kong), Apr. 5, 2000, 5749-5750; Official Reports of Proceedings (Legislative Council of Hong Kong), Feb. 16, 2010, 3899-3900.

<sup>204</sup> See Jaconelli, *supra* note 8, at 738 (observing the legal and political foundation of the doctrine); BRADLEY & EWING, *supra* note 171, at 347-348 (discussing the authority for taxation in the U.K.); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 280-283 (Aspen Publishers 5<sup>th</sup> ed., 2005) (discussing the extent of U.S. Congress's taxing power).

<sup>205</sup> See Cullen et al., *supra* note 87, at 326-328 (discussing the Legislative Council role in budget and fiscal control).

<sup>206</sup> Art. 62, Basic Law (HK).

<sup>207</sup> Under Hong Kong current political institution arrangement, the Chief Executive is the head of government, akin to the Governor of Hong Kong under British colonial rule: see Benny Tai, *The Chief Executive*, in LAW OF THE HONG KONG CONSTITUTION 181 (Johannes Chan & C.L. Lim eds., Sweet & Maxwell 2011) (discussing the appointment and powers of the Chief Executive).

<sup>208</sup> Art. 74, Basic Law (HK).

with the prevailing legislation, until the new law comes into effect.”<sup>209</sup> A similar arrangement was provided for the BSD.<sup>210</sup>

Interestingly, members of the executive branch publicly acknowledged the role of the legislature in authorizing such statutory measures,<sup>211</sup> even if there was a certain irony when the Financial Secretary observed that “[g]iven the *effectiveness* of the Special Stamp Duty, I hope Members will pass the Bill as soon as possible so that the Government *can proceed* with the initiative” (emphasis added).<sup>212</sup> There is a little cognitive dissonance in discussing the demonstrated effectiveness of a measure that is supposedly yet to be enacted.

#### ***D. Summary: Legislation by Press Release is Legal***

In summary, the use of legislation by press release to implement the BSD and other property cooling taxations is legal in Hong Kong. The constitutional prohibition against retrospective laws is only limited to criminal sanctions, and the provision of a detailed announcement would have survived an expansive interpretation of the legality and proportionality principle. As evidenced by the numerous past examples of retrospective laws, including a couple of legislation by press release, there is no legal prohibition of retrospective non-criminal laws in general and legislation by press release in particular. The postponing of the tax collection until legislative enactment, while maintaining a record of taxable transactions in the meantime, also navigates around the formal legislative requirements for tax implementation. Thus, notwithstanding the murmurs about the issue of “constitutionality,”<sup>213</sup> the practice is legal not only in Hong Kong but also in most other jurisdictions that do not have an explicit prohibition on retrospective civil legislation.

In this regard, it is pertinent to observe that the political controversy over the inclusion of the empowering provision to allow the Financial Secretary to make immediate legal changes to the rates of the BSD and SSD<sup>214</sup> is ultimately a red herring. Without the benefit of the empowering section in the Bill or any other laws, the initial October 2012 announcement was a mere government policy announcement that did not have any formal legal effect. However, this lack of formal legal effect posed no obstacle to the announcement’s real and direct effects on the property market. The announced retrospectivity of the pending legal changes was more than

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<sup>209</sup> Official Reports of Proceedings (Legislative Council of Hong Kong), Dec. 8, 2010, 3442-3443.

<sup>210</sup> Transport and Housing Bureau, *supra* note 100 (“ IRD will record all the residential property transactions between 27 October 2012 and the date on which the new law comes into effect, and demand notes for the SSD underpaid / BSD will be issued after the new legislation is enacted.”).

<sup>211</sup> *E.g.*, Secretary for Transport and Housing: “I look forward to the early passage of the Bill by the Council to give legal effect to these stamp duty related proposals”: Official Reports of Proceedings (Legislative Council of Hong Kong), Dec. 8, 2010, 3442-3443.

<sup>212</sup> Official Reports of Proceedings (Legislative Council of Hong Kong), Apr. 13 2011, 9158.

<sup>213</sup> *Supra* note 155 and accompanying text.

<sup>214</sup> *Supra* III.C.

sufficient to achieve immediate de facto legal effects. Concerns about “administrative tyranny” would have to be addressed through reforming the legal status of retrospective laws rather than the mere fixation of a particular empowering provision.

## **V. TOWARDS BETTER LEGISLATION BY PRESS RELEASE**

Although the practice of legislation by press release is generally legal in most jurisdictions, the normative considerations of the practice are more nuanced. As discussed above in Part II.C., there are important merits and shortcomings associated with the practice. This Part identifies and examines the three criteria that are instrumental in assessing whether the use of legislation by press release in a particular circumstance is normatively justified.

### **A. *Certainty and Consistency with an Initial Announcement***

Given that legislation by press release is designed to mitigate the otherwise unjust disruption of individuals’ reliance on the law arising from the retrospectivity of the law, it is relatively obvious that an example of well-executed legislation by press release would require that its initial announcement set out the pending law with sufficient clarity and that any substantial deviations in the eventual legislation should not be retrospectively applied. In the same way that clarity would be a desirable trait of any enacted legislation,<sup>215</sup> clarity of the initial announcement is crucial in light of the announcement’s substantial and intended effect to guide the conduct of private entities.

In terms of changes, the legislative process through which the final legislation is enacted inevitably would introduce some differences vis-à-vis the initial announcement. Some differences may be relatively inconsequential amendments to the wording, while others may be substantive departures. The former is uncontroversial, but material inconsistencies negate the advantages of legislation by press release and reintroduce the harm of conventional retrospective laws. Private individuals who conducted their affairs in accordance with the rules set forth in the initial announcement prior to passage of the final legislation would be caught off-guard by those subsequent changes as with any conventional retrospective laws. Of course, substantive departures from the initial announcement are not per se undesirable. Indeed, such changes are typically the result of deliberation during the legislative process and reflect legislative scrutiny of important policies under a healthy democratic process. The point is simply that those changes not envisaged by the initial announcement should only be prospectively applied.

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<sup>215</sup> E.g., see Ji Lian Yap, *Constructive Notice and Company Charges*, 10 J. CORPORATE L. Stud. 265, 274-277 (2010) (discussing the considerations of certainty of both the statutory provision of the charges registration regime and the consequential information available to third parties); Justin F. Marceau, *Lifting the Haze of Baze: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 162-164 (2009) (discussing the undesirable ambiguity arising from discerning the appropriate legal precedent from plurality court decisions and circuit splits).



In this regard, it is unfortunate that the withdrawal of the exemption for Hong Kong Permanent Resident minors was retrospectively applied until October 2012.<sup>216</sup> Until the government publicly announced its change of heart in January 2014, all public representations from the government had continuously and specifically provided for this exemption.<sup>217</sup> Unlike the other two changes, which expanded the circumstances in which the BSD would be exempted/refunded, this withdrawal was clearly and substantially detrimental to the affected private entities. It is easy to sympathize with the unpleasant shock to buyers who designed their property purchase in reliance on this express exemption during the period between October 2012 and January 2014 only to face a hefty 15% tax with the passage of the law.<sup>218</sup> To aggravate the injury, the government's insistence on retrospectively applying this withdrawal of exemption can be contrasted with the decision of the government in 1992 not to retrospectively apply a similar withdrawal of tax exemption for "small ticket leasing" given the ambiguity of the initial announcement.<sup>219</sup> This withdrawal will pose an interesting legal issue with respect to the expanded notion of "law" and the proportionality principle if litigated in Hong Kong,<sup>220</sup> but in any event, such a withdrawal is clearly undesirable from a normative perspective.

## ***B. The Necessity(?) of Legislation by Press Release***

Beyond certainty and consistency, the next criterion for evaluation focuses on whether the use of legislation by press release is actually necessary. This criterion is independent of whether the substantive aspects of the laws are desirable. Rather, the inquiry proceeds on the assumption that the underlying policy objective is sound and focuses on whether the short-circuiting of the legislative process under legislation by press release is necessary to achieve the policy objective. In this regard, it is worth examining possible justifications for conventional retrospective legislation that might also be applicable to legislation by press release.

### **1. Changing Nature: Beyond Curative Legislation**

Notwithstanding the negative image commonly associated with retrospective laws, there are circumstances in which retrospectivity is justified and desirable. The most common and least

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<sup>216</sup> *Supra* III.C.

<sup>217</sup> As with the other taxes, the Inland Revenue Department posted a detailed FAQ setting out the specifics of the BSD. To question 7 "Whether an agreement for sale signed by a non-HKPR to acquire a residential property and hold it as a trustee for a HKPR is subject to BSD?", the response was given as "An agreement for sale signed by a non-HKPR in the capacity of a trustee on behalf of a HKPR is chargeable with BSD, unless the HKPR is a minor or a mentally incapacitated person." A qualification was only added to this question, without modifying the initial response, in January 2014 ("The Administration has accepted the views of the members of Bills Committee of the Legislative Council and decided to withdraw the proposed BSD exemption for HKPR minors."): *see* <http://www.ird.gov.hk/eng/faq/bsd.htm> (visited on Oct. 1, 2013 & Jan. 10, 2013).

<sup>218</sup> Zhang Weiwei, *Wei chengnian zhiye zhe huobei zhuisu jiaoshui [Minor Property Purchasers May Faced Retrospective Tax Bill]*, SINGTAO DAILY (HK), Feb. 22, 2014, at A4.

<sup>219</sup> *Supra* IV.B.4.

<sup>220</sup> *Supra* IV.B.2. No litigation has been publicly announced thus far.

controversial form of retrospective laws is “curative legislation,” which can be further classified into the different sub-categories: “routine revision,” “restorative legislation,” “validating legislation” and “overturning judicial decisions.”<sup>221</sup> The majority of the Hong Kong examples of retrospective laws discussed in IV.B.4 fit into one of these sub-categories and provide useful contrasts to the retrospectivity involved in implementing the BSD.

Routine revisions are retrospective amendments to relatively minor errors, such as typographical errors or unforeseen changes caused by amendments to other legislation.<sup>222</sup> The 1988 amendment to the Societies Ordinance, the 2000 amendment to the Employee’s Compensation Ordinance amendment in 2000 and the 2005 amendment to the Bankruptcy Ordinance would fall under this category.

Validating legislation addresses more substantive drafting defects in legislation and is usually intended to “validate” erroneous interpretations of the law by the government or private entities.<sup>223</sup> Examples include the 1991 amendment to the Immigration Ordinance that was meant to retrospectively ensure the legality of the transfer of Vietnamese detainees by the Immigration Department and the 2000 amendment to the Family Status Discrimination Ordinance that shielded employers from possible contraventions of the law.

Overturning judicial decisions is self-explanatory and is represented by the 1995 amendment to the Lands Tribunal Ordinance, which explicitly stated its intent to reverse a 1993 Court of Appeal decision.<sup>224</sup> Restorative legislation addresses legislative schemes that have unintentionally been allowed to lapse.<sup>225</sup> None of the Hong Kong examples falls into this last category, possibly due to the uncommon use of a “sunset” clause in Hong Kong.<sup>226</sup>

The focus of this Article, legislation by press release, has been previously employed a couple of times in Hong Kong to tackle tax avoidance. The 1987 and 1992 amendments to the Inland Revenue Ordinance were both designed to close tax loopholes and were both backdated to the date of announcement.<sup>227</sup> This experience echoes that of Australia, where the most frequent

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<sup>221</sup> SAMPFORD, *supra* note 2, at 104-118.

<sup>222</sup> *Id.*, at 104-105; Palmer & Sampford, *supra* note 3, at 237-238.

<sup>223</sup> SAMPFORD, *supra* note 2, at 107-115; Palmer & Sampford, *supra* note 3, at 239-245.

<sup>224</sup> Official Reports of Proceedings (Legislative Council of Hong Kong), Nov. 29, 1995; Official Reports of Proceedings (Legislative Council of Hong Kong), Nov. 2, 1995.

<sup>225</sup> SAMPFORD, *supra* note 2, at 105-107; Palmer & Sampford, *supra* note 3, at 239.

<sup>226</sup> The Government was repeatedly adamant against any sunset clause for the BSD and the SSD: Transport and Housing Bureau, *The Government’s Response to the Draft Committee Stage Amendments Proposed by the Hon Tommy CHEUNG Yu-yan*, Dec., 2013, LegCo Paper No: CB(1) 594/13-14(01). For the earlier rejection of sunset clause for the SSD in 2011, see Legislative Council Secretariat, *Bills Committee on Stamp Duty (Amendment) (No. 2) Bill 2010*, June 16, 2011, LegCo Paper No: CB(1) 2444/10-11. Sunset clause was also rejected for the Interception of Communication and Surveillance Bill: Official Reports of Proceedings (Legislative Council of Hong Kong), June 22, 2011, 12564.

<sup>227</sup> *Supra* IV.B.4.

use of legislation by press release was to combat the then-rampant tax avoidance industry.<sup>228</sup> The fact that these examples of legislation by press release are designed to tackle tax avoidance is significant insofar as they could be classified under the conventional curative legislation category—in particular, the sub-category of validating legislation. An argument could be made that certain tax loopholes are never intended by the legislature in the first place and that retrospective amendment is simply intended to restore the original legislative purpose. In a 2013 case involving retrospective tax, the European Court of Human Rights, in assessing the principle of legality, observed that “retroactive taxation can be applicable essentially to remedy technical deficiencies of the law”.<sup>229</sup> Moreover, because the expectations by tax avoiders are really neither rational nor legitimate, the retrospective closing of loopholes is arguably justified even if the backdating extends beyond the date of the legislative announcement.<sup>230</sup>

By contrast, the BSD represents a significant departure. The BSD is an entirely novel form of taxation that has no equivalence in the existing tax law of Hong Kong, which generally does not impose different transaction taxes based on the identity of the parties.<sup>231</sup> Thus, there could be no arguments about these retrospective amendments being curative in nature. In addition, the BSD, while a form of tax, is not enacted for the purpose of revenue but for the specific goal of curbing the perceived overheated property market.<sup>232</sup> This, again, can be contrasted with the more typical anti-avoidance type of legislation by press release in taxation, whether in Hong Kong or in Australia. Indeed, although legislation by press release is by no means limited to tax avoidance and has in fact been employed on substantive regulatory matters in other jurisdictions,<sup>233</sup> the BSD appears to be part of an emerging practice by the Hong Kong government to utilize legislation by press release for economic regulation. Beginning with the SSD in 2010 and continuing until the 2013 implementation of another property-cooling tax (the Double Stamp Duty [“DSD”]),<sup>234</sup> all three taxes have been driven by non-revenue policy objectives. Indeed, this departure is even more significant given that, although taxation is an important instrument commonly used by other jurisdictions to effect important social and

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<sup>228</sup> SAMPFORD, *supra* note 2, at 157; Palmer & Sampford, *supra* note 3, at 263.

<sup>229</sup> R.Sz., *supra* note 180, at ¶40.

<sup>230</sup> SAMPFORD, *supra* note 2, at 147-151 & 245-246; Palmer & Sampford, *supra* note 3, at 257-259.

<sup>231</sup> Exemptions to the stamp duty are sometime provided for the usual suspects of government, foreign diplomatic institutions and charitable organizations: §41-44, Stamp Duty Ordinance, *supra* note 91. For a general discussion of the transaction tax regime (including the exemptions) in Hong Kong, see DELOITTE, HONG KONG MASTER TAX GUIDE: 2011/12, at 817-884 (CCH 12<sup>th</sup> ed. 2011).

<sup>232</sup> Transport and Housing Bureau, *supra* note 100.

<sup>233</sup> Recent examples include prohibition of severance of common land rights in the U.K. and the change in foreign takeovers regulation in Australia: SAMPFORD, *supra* note 2, at 157; Palmer & Sampford, *supra* note 3, at 262-264.

<sup>234</sup> As a further measure to curb property speculation, the DSD that doubled the stamp duties for all property transactions except first time local buyers was introduced in February 23, 2013 with legislation by press release: Olga Wong et al., *New Duties Trigger Scramble for Sales*, SOUTH CHINA MORNING POST (HK), Feb. 23, 2013, at 1; *Extra Duty “to Hit Speculators Only”*, SOUTH CHINA MORNING POST (HK), Feb. 25, 2013, at 1 (Business).

economic policies,<sup>235</sup> taxation has previously occupied a much smaller policy footprint in Hong Kong.<sup>236</sup>

## 2. Justification: Risk of Circumvention?

Without the ability to resort to a justification based on the curative nature of the retrospective amendments, the justification for backdating the legislation to the date of announcement must rest on preventing circumvention by private entities. Given that the legislative process inevitably takes time, even for non-controversial matters, failure to retrospectively apply the new law to the date of announcement would likely result in a surge of activities that the new law sought to prevent.<sup>237</sup> Moreover, whereas the legislation by press release is designed to tackle tax avoidance, the initial announcement would ironically serve as a public notification of the existence and legality of these tax loopholes if the announcement were not accompanied by intent of retrospective application.<sup>238</sup>

The risk of circumvention that would severely undermine legislative purposes is particularly acute when the activities involved are durable—i.e., the activities will implicate a relatively long-term time horizon. The purchase of real property—the subject matter of the BSD—is the classic example. The purchase of real property by most private entities is usually a substantial investment that is likely to forestall future purchases over an extended period, typically measured in terms of years or even decades. Without legislation by press release, it is entirely possible and foreseeable that there would be an incredible surge of property purchases in the several months between the date of announcement and the eventual enactment<sup>239</sup> that would be likely to exhaust the demand (and supply) for the property for the subsequent year or years. Similar analysis also applies to vehicles—restrictions on vehicle ownership in a bid to reduce traffic congestion must be implemented immediately from the policy announcement to prevent a mere shifting of the future demand for vehicles into the interval between the policy announcement and legislative enactment.<sup>240</sup>

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<sup>235</sup> Gribnau, *supra* note 31, at 53.

<sup>236</sup> See Cullen et al., *supra* note 87, at 331-339 (discussing the low rate, narrow base, and straightforward tax regime in Hong Kong).

<sup>237</sup> SAMPFORD, *supra* note 2, at 157; Fisch, *supra* note 3, at 1089; Palmer & Sampford, *supra* note 3, at 264. See also Jaconelli, *supra* note 8, at 738-740 (discussing the problem of “forestalling” by private entities in response to knowledge of pending tax).

<sup>238</sup> SAMPFORD, *supra* note 2, at 157; Palmer & Sampford, *supra* note 3, at 263-264.

<sup>239</sup> The initial SSD took a whole of eight months to pass: Official Reports of Proceedings (Legislative Council of Hong Kong), June 22, 2010, 12660-12661.

<sup>240</sup> The recent implementations of vehicles quota in the Chinese cities of Guangzhou were preceded by an announcement the evening before implementation, though the ability to “streamline” the legislative and regulatory process under Chinese less than democratic institutional framework meant that this immediate implementation can be achieved via prospective regulations rather than legislation by press release: Zhou An, *Guangzhou: “yaohao + paipai” nengfou cheng zhidu liangfang* [Guangzhou: Can “Lottery + Auction” be Ideal Solution for Congestion?], RENMIN GONGAN BAO – JIATONG ANQUAN ZHOUKAN, July 17, 2012, at 4. For a comparative discussion of these

Nonetheless, it is important to appreciate the nuances of the risk of circumstances posed by the different policy objectives because the mere fact that transactions are shifted into the period between the policy announcement and eventual enactment does not always defeat the legislative purpose. When the objective is the raising of revenue (such as closing tax avoidance loopholes) or the curbing of a particular activity (such as restricting vehicle ownership), the legislative objectives are thwarted because the lack of retrospective application would mean that the shifting would reduce the revenue collected (for the former) or fail to reduce the level of activity (for the later).<sup>241</sup>

The circumstances are more complicated for the BSD, whose primary goal is not revenue raising<sup>242</sup> but the twin economic regulatory goals of cooling the property market and reducing demand from foreign property purchasers.<sup>243</sup> Without retrospective application of the BSD, the common prediction is that there would be a rush of foreign speculators purchasing property before the BSD's implementation,<sup>244</sup> resulting in an increase in demand for property that is likely to inflate prices further prior to the BSD's actual implementation. However, if property prices in Hong Kong are indeed driven up by speculators, then the mere notice that the BSD will become applicable sometime in the foreseeable future is likely to dampen the demand immediately because speculators (including foreign speculators) will not be keen on investing too much in a property that is likely to face increased impediments (i.e., reduced demand by foreigners) in the foreseeable future.<sup>245</sup> Similarly, demand by entities exempted from the BSD (i.e., Hong Kong permanent residents) is likely to be shifted to the period *after* the BSD's implementation on the expectation of price decreases at that time, further diluting the demand during the transitional

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traffic congestion management policies: *See generally* Jianlin Chen & Jiongzhe Cui, *More Market-Oriented Than U.S. And More Socialist Than China: A Comparative Public Property Story of Singapore*, 23 Pac. Rim L. & Pol'y J. 1 (2014).

<sup>241</sup> *See also* Jonathan Remy Nash, *Allocation and Uncertainty: Strategic Responses to Environmental Grandfathering*, 36 ECOLOGY L.Q. 809, 825-826 (2009) (discussing the danger of the preemptive clearing of ecologically valuable habitat by private land owners between the serious proposal of the relevant environmental preservation regulation and the actual implementation of the regulation that typically do not come with retrospective effects).

<sup>242</sup> Transport and Housing Bureau, *supra* note 100, Annex F ("The proposed adjustments to the existing SSD and the introduction of the BSD are not intended to be revenue-generating measures to meet fiscal or budgetary objectives, although they are expected to bring about additional revenue to the Government.").

<sup>243</sup> Transport and Housing Bureau, *supra* note 100.

<sup>244</sup> There was a rush to purchase by foreign buyers during the short interval between policy announcement and actual interval: *supra* III.B. Previously, this issue of circumvention is the common justifications for legislation by press release: Legislative Council Secretariat, *Paper for House Committee Meeting on 10 June 2011*, June 9, 2011, LegCo Paper No: CB(1) 2399/10-11 (implementation of SSD in 2011); Official Reports of Proceedings (Legislative Council of Hong Kong), Nov. 27, 1991 (1992 amendment of the Inland Revenue Ordinance).

<sup>245</sup> NICHOLAS G. PIROUNAKIS, REAL ESTATE ECONOMICS: A POINT-TO-POINT HANDBOOK 211-215 (Routledge 2013); For a discussion of the sources of risks (including legal and taxation risks) and their impact on current property value, *see* DAVID ISAAC & JOHN O'LEARY, PROPERTY VALUATION TECHNIQUES 172-178 (Palgrave 3<sup>rd</sup> ed. 2013). Hong Kong own experience evidenced this trite point. The property and stock market clashes in the earlier 1980s simply on the uncertainty about possible "bad" but non-retrospective Chinese exercise of sovereignty over Hong Kong in 1997: Chan, *supra* note 80, at 16-17.

period. These factors are likely to create a downward pressure on price, allowing the government to achieve some “cooling” of the property market and discouragement of foreign property purchasers by the mere announcement of the legislature’s plan to impose the BSD.

However, other characteristics of the Hong Kong property market do increase the risk of thwarting the legislative objective. First, companies are subjected to the BSD, but unlike the purchase of property by foreign natural persons, the subsequent transfer of the shares of the one-property company (i.e., a commonly used corporate structure in Hong Kong in which a company is set with the sole purpose of holding a property) would not be subjected to the BSD or any real estate transaction stamp duty.<sup>246</sup> Thus, both foreign and local speculators can purchase a property using a company vehicle before the implementation of the BSD with knowledge that the future transfer of the property would not be subjected to any BSD regardless of the identity of the future purchasers. This speculative activity is only partially hindered by the transaction costs involved in the use of company structure and the reluctance of some purchasers concerned with not having direct ownership over the property.<sup>247</sup>

Second, given the inevitably time-consuming process of property development and the issue of land scarcity in Hong Kong, the shifting of property purchase forward into the transitional period may adversely disrupt supply in the foreseeable future. Insofar as there might be a greater proportion of foreign buyers within the transitional period, there would be a lower supply of property for local buyers after the BSD is finally implemented. Indeed, this situation is likely to be aggravated by developers pushing forward the launch of new property in response to the pending implementation of the BSD.<sup>248</sup> As noted above, developers in Hong Kong are able to push forward the property launch by a day with only a few hours’ notice.<sup>249</sup>

### **3. The Proper Focus of Inquiry**

The various aforementioned factors point in different and often opposing directions. On balance, legislation by press release is most likely necessary to achieve the purported policy objectives in the particular context of Hong Kong. Yet, the key takeaway is that this conclusion of necessity is not as straightforward as most assume. Indeed, it is telling that the government’s explanatory document on the BSD presented to the legislature in October 2012 did not even attempt to justify the use of legislation by press release in the section concerning

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<sup>246</sup> Ng & Li, *supra* note 146.

<sup>247</sup> *Id.* Interestingly, the fact that these negative factors are disproportionately more onerous for residential property of a lower value actually meant that they further negate the risks of circumventing the legislative objectives, in so far as the main policy consideration is to make housing affordable to the lower-middle class in Hong Kong.

<sup>248</sup> See TIM HAVARD, FINANCIAL FEASIBILITY STUDIES FOR PROPERTY DEVELOPMENT: THEORY AND PRACTICE 26-30 (Routledge 2014) (discussing the various constraints such as market timing, political environment and planning rules that a developer should consider when planning for a development project); PIROUNAKIS, *supra* note 245, at 215-226 (discussing the calculus of the developer).

<sup>249</sup> *Supra* III.B.

implementation,<sup>250</sup> with only a cursory mention of “[g]iven the price-sensitive nature of the property market, the proposed new measures shall take effect from the day immediately following the announcement” in the final report of the amendment bill.<sup>251</sup> This is unfortunate. Notwithstanding the necessity being more obvious in the most commonly used context of tax avoidance, retrospective applications are not always necessary in other policy contexts. Moreover, even when revenue generation is the primary policy goal, Joseph Jaconelli observed that there may be circumstances in which shifting forward the targeted tax activities might produce sufficient beneficial side benefits (e.g., a short-term stimulus to the economy) that could mitigate the loss in revenue.<sup>252</sup>

Charles Sampford, in his earlier 1993 article with Andrew Palmer, made a similar point, albeit only in passing, when discussing the 1987 enactment of the Broadcasting (Ownership and Control) Act as an illustrative example of how parliament was compelled to enact retrospective legislation for which the presiding policy announcement had been relied on by private entities.<sup>253</sup> In that scenario, a flurry of transactions of media ownership had taken place in response to and in reliance on the Australian government’s announcement to modify ownership restrictions on broadcasters.<sup>254</sup> In addition to noting the harm of undermining the parliament, they correctly observed that the undermining of the parliament was aggravated by the fact that “there was no good reason why the Government had to make the changes effective from the date of announcement. Delaying the introduction of the new rule until it was enacted would simply have delayed the firing of the starting-gun for the mad media scramble from the date of the announcement to the date of enactment.”<sup>255</sup> Indeed, they further articulated that the retrospectivity in legislation by press release “should be restricted to situations where there is a genuine need for immediate action, or where the making of an announcement that the law is to be changed would, unless coupled with a promise to make the change effective from the date of announcement, allow citizens to gain some unwarranted advantage from their foreknowledge of the change.”<sup>256</sup> These valid points were subsequently and surprisingly omitted by Charles

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<sup>250</sup> Transport and Housing Bureau, *supra* note 100.

<sup>251</sup> Legislative Council Secretariat, *Report of the Bills Committee on Stamp Duty (Amendment) Bill 2012*, Feb. 14, 2014, LegCo Paper No: CB(1) 904/13-14.

<sup>252</sup> Jaconelli, *supra* note 8, at 739. *C.f.* Emanuela Carbonara, Francesco Parisi & Georg von Wangenheim, *Unjust Laws and Illegal Norms*, 32 INT’L REV. L. & ECON. 285, 295 (2012) (discussing how such immediate effecting of legal changes may be useful to reduce social opposition to unpopular law).

<sup>253</sup> Palmer & Sampford, *supra* note 3, at 265-266.

<sup>254</sup> *Id.*, at 265-266 (1993). The rule changes from an initial prohibition of any person owning more than 5% in more than two television broadcasting companies, to one which targeted cross-media ownership and prohibiting media owners from having a combined access of 60% of the national population through all the regulated medium of television, radio and daily newspapers. For a discussion on the background context for the legal change, see Jock Given, *Cross-Media Ownership Laws: Refinement or Rejection?*, 30(1) UNSW L. J. 258, 259-261 (2007); David J Brennan, *Printing in England and Broadcasting in Australia: A Comparative Study of Regulatory Impulse*, 22 Adel. L. REV. 63, 79-80 (2000).

<sup>255</sup> Palmer & Sampford, *supra* note 3, at 266.

<sup>256</sup> *Id.*, at 266 (1993).

Sampford in his more comprehensive (and much lengthier) book covering essentially the same ground, including the use of the exact same example when discussing the illustrative example of legislation by press release undermining parliament.<sup>257</sup> This omission is unfortunate because whether retrospectivity is necessary in relation to the policy goals is clearly relevant for assessing the use of legislation by press release.

Moreover, although considerations about the “genuine need for immediate action” and “some unwarranted advantage from their foreknowledge of the [legal] change” are aimed in the right direction, they all stem from the fundamental issue of whether shifting forward the activities targeted by the legal change would derail the legislative objectives. As illustrated by the case study of the BSD, these considerations would first entail identifying what the purported legislative objectives are, followed by examining the incentives created by the policy announcement for private entities, to predict and assess whether the responses to the announcement would undermine the legislative objectives if the legal change is not to have retrospective effects until the announcement.

### ***C. Implications of Political Dynamic***

The case study of the BSD also reveals an interesting nuance to the harm arising from the use of legislation by press release, namely, how the political dynamic of a jurisdiction can either aggravate or mitigate these harms, whether it be undermining the legislature, inherent uncertainty, or excessive delay.<sup>258</sup>

#### **1. Implications of Political Dynamic**

The political dynamic of a jurisdiction is the product of the interplay between the formal constitutional structure and political competition on the ground. In terms of formal constitutional structure, it is important to observe that the use of legislation by press release in Australia and the U.K., the jurisdictions surveyed by Charles Sampford in the relevant section of his book,<sup>259</sup> is not particularly controversial given the institutional designs of these two jurisdictions. The U.K. adopts a Westminster parliamentary system in which the executive branch (consisting of the Prime Minister and the Cabinet, which is appointed by the Prime Minister) is typically of the same political party as that holding the majority of seats in the legislature.<sup>260</sup> The parliamentary system is similar in Australia, where the political composition of the legislature (the House of Representatives) and the executive (the Prime Minister and the Cabinet) are often identical, though there is a slight complication arising from an additional elected Senate that was originally

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<sup>257</sup> See SAMPFORD, *supra* note 2, at 160-161.

<sup>258</sup> *Supra* II.C.

<sup>259</sup> SAMPFORD, *supra* note 2, at 156-164. Australia and U.K. are also the common law jurisdictions where legislation by press release are discussed in the literature: *see* Hayes & Wilson, *supra* note 8; Infobank, *supra* note 9.

<sup>260</sup> PETER LEYLAND & GORDON ANTHONY, ADMINISTRATIVE LAW 20-26 (Oxford University Press 7<sup>th</sup> ed. 2013); BRADLEY & EWING, *supra* note 171, at 84-85; CARROLL, *supra* note 171, at 227-245.



designed to safeguard states' rights (through equal seats per state, regardless of differences in population) and has some significant veto power over legislation (especially when compared to the U.K.'s House of Lords, which has a more advisory-oriented role).<sup>261</sup> Similarly, in Sweden, where the prohibition on retroactive taxation is subject to the exception of what is essentially legislation by press release, the head of the executive is again selected by the legislature.<sup>262</sup> Given the intentional close proximity between the legislature and the executive under the formal institutional arrangements of these jurisdictions, the danger and harm of the perceived executive's usurping of legislative power via legislation by press release are more illusory than real. Uncertainty and delay in the legislative outcome are also likely to be less severe in such circumstances. This situation is unlike the U.S.-style separation of powers, where it is common for the executive and the legislature to be of different political compositions and to be sometimes at severe loggerheads with one another.<sup>263</sup>

The political competition at any given time does shape the relationship between the executive and the legislature and can materially affect the power of the executive. For example, the executive under a Westminster-style parliamentary system will wield considerably less power (including the power to effect legislation by press release) when the parliamentary majority of the corresponding political party is weak or when there is internal division within the majority party.<sup>264</sup> This situation can cause considerable uncertainty and delay in the legislative process and may result in the final legislation departing substantially from the original announcement<sup>265</sup> or in the retrospective effect being removed altogether.<sup>266</sup> On the other hand, the actual dominance of one political party in the elections is likely to transcend whatever formal separation of powers exists and produce consistency between the executive's policy objectives and the legislature's legislative activities.<sup>267</sup> In this latter scenario, especially if coupled with

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<sup>261</sup> KEYZER, *supra* note 54, at 10-13 & 52-53; Stewart & Walker, *supra* note 8, at 194-195.

<sup>262</sup> Pålsson, *supra* note 8, at 271-272; Bernard Michael Ortwein II, *The Swedish Legal System: An Introduction*, 13 I IND. INT'L & COMP. L. REV. 405, 407-411 (2003).

<sup>263</sup> CHARLES A. SHANOR, AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION 119-156 & 170-201 (West 4<sup>th</sup> ed. 2009).

<sup>264</sup> See CARROLL, *supra* note 171, at 227-230 & 235-239 (discussing the power of the executive branch with reference to U.K. political dynamic).

<sup>265</sup> For example, final 60% population reach rule under 1987 enactment of the Broadcasting (Ownership and Control) Act in Australia is a departure from the initially announced 75%: Given, *supra* note 254, at 259-261; Brennan, *supra* note 254, at 79-80.

<sup>266</sup> Palmer & Sampford, *supra* note 3, at 269. See also Pålsson, *supra* note 8, at 274-275 (noting Swedish examples).

<sup>267</sup> Levinson & Pildes, *supra* note 26, at 2315 ("We emphasize that the degree and kind of competition between the legislature and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party."). See also Kammer, *supra* note 26, at 97-106 (discussing how politically influential private parties – such as political party and interest groups – can transcend the formal division of power between state and federal government); Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297, 1329-1300 (2006) ("In the context of one-party dominance of the three branches, however, the rights-protecting effect of separation of powers is reduced. That effect is further diminished regarding matters of national security and war, which trigger partially unreviewable

strong party structure/discipline among the political parties, the use of legislation by press release by the executive—even in a U.S.-style separation-of-power system—would only minimally undermine the legislature and would be unlikely to cause uncertainty and delay.

## 2. Hong Kong's Fragmented and Antagonistic Political Landscape

This insight regarding the implications of the political dynamic on the use of legislation by press release is particularly relevant for Hong Kong, given the ongoing political transition of its fledgling democracy under the “One country Two systems” regime.<sup>268</sup> Prior to the handover to China in 1997, Hong Kong was essentially governed through the British colonial government, a largely executive apparatus with only limited checks from the partially elected legislature.<sup>269</sup> This conspicuous formal lack of separation of powers and any material political competition meant that the use of legislation by press release, such as the 1987 and 1992 amendments to the Inland Revenue Ordinance,<sup>270</sup> could not be any less controversial or problematic.<sup>271</sup>

The situation has changed considerably since the time of the handover. The legislature, Legislative Council [“LegCo”], is now significantly more autonomous vis-à-vis the executive, with all LegCo members now being elected.<sup>272</sup> The Basic Law also codifies the lawmaking and budget-approving powers of the legislature,<sup>273</sup> together with the ability to override the veto of the Chief Executive.<sup>274</sup> The Chief Executive, the head of the Hong Kong government, is also separately elected,<sup>275</sup> though the current arrangement provides for a somewhat limited election by an Election Committee that is not itself either directly elected by the population or accountable in any way to the LegCo.<sup>276</sup> Moreover, the Chief Executive, upon successful

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power in the political branches. Following 9/11, with Republicans dominating all three branches and war ongoing, risks of governmental myopia ran high.”)

<sup>268</sup> For a discussion of the “one country two systems,” see C.L. Lim & Johannes Chan, *Autonomy and Central-Local Relations*, in *LAW OF THE HONG KONG CONSTITUTION* 37 (Johannes Chan & C.L. Lim eds., Sweet & Maxwell 2011).

<sup>269</sup> Bill K.P. Chou, *Election Without Fair Representation: Hong Kong's Legislative Council and its Implications for Non-liberal Regimes*, in *PARLIAMENTS IN ASIA: INSTITUTION BUILDING AND POLITICAL DEVELOPMENT* 228, 229 (Zheng Yongnian, Lye Liang Fook & Wilhelm Hofmeister eds., Routledge 2014). For a discussion of the colonial governance institution in Hong Kong, see Chen, *supra* note 115, at 217-228 & 230; WESLEY-SMITH, *supra* note 160, at 154-168; NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 68-82 (Oxford University Press 5<sup>th</sup> ed. 1991).

<sup>270</sup> *Supra* IV.B.4.

<sup>271</sup> See MINERS, *supra* note 269, at 77-78 (discussing the rare incidents where the LegCo rejected and/or significantly altered the legislative bills put forward by the executive branch).

<sup>272</sup> Art. 68, Basic Law (1997) (HK); Lam, *supra* note 115, at 138; Chen, *supra* note 115, at 230-231.

<sup>273</sup> Art. 73, Basic Law (1997) (HK). See Chou, *supra* note 269, at 236.

<sup>274</sup> If the LegCo can produce a two third majority after the initial veto, then the Chief Executive must either sign the bill or dissolve the legislature. The Chief Executive can only dissolve the legislature once in each term of office: art. 49 & 50, Basic Law (1997) (HK).

<sup>275</sup> Art. 45, Basic Law (1997) (HK).

election, must declare that he or she is not a member of any political party,<sup>277</sup> further diluting any relationship with the dominant political party of the legislature.<sup>278</sup>

This formal separation of power is aggravated by the increasingly intense and antagonistic political competition in Hong Kong. The political participants in Hong Kong can be largely divided into two camps based on their perception and advocacy on the relationship with the Chinese central government.<sup>279</sup> On the one hand, the “pro-establishment” camp favors a closer relationship, or at least the maintenance of the status quo in terms of China’s role in Hong Kong economic and social life. The “pan-democrats,” on the other hand, advocate greater autonomy for Hong Kong, including a more liberal democratic institution that is distinct from the Chinese government’s conceptualization of good governance.<sup>280</sup> The “pan-democrats” have consistently garnered a solid majority of the popular vote in elections by universal suffrage, but they occupy only a minority in the LegCo due to the institutional design of the LegCo—in particular, the use of functional constituencies in which members are elected from a defined electorate, typically based on profession or industry.<sup>281</sup> To say that the two camps dislike each other would be a massive understatement, with the pan-democrats typically voting against government policies,<sup>282</sup> and attempted compromise with the government by the more moderate

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<sup>276</sup> Tai, *supra* note 207, at 187-194; SIMON N. M. YOUNG & RICHARD CULLEN, ELECTING HONG KONG’S CHIEF EXECUTIVE 20-27 (Hong Kong University Press 2010).

<sup>277</sup> §31, Chief Executive Election Ordinance, c. 569 (2012) (HK). The eligibility requirement is set out in sections 13 and 14 of the Chief Executive Election Ordinance, and the typical requirements based on age, nationality/residency, mental capacity, and lack of criminal record. For an academic discussion, see YOUNG & CULLEN, *supra* note 276, at 80-82.

<sup>278</sup> Lam, *supra* note 115, at 141. *C.f.*, Chou, *supra* note 269, at 236 (noting how the co-optation of certain leaders of the political party into “a system of consultative organs with the Executive Council at the apex” allow the Chief Executive to “build up his ‘ruling coalition’”).

<sup>279</sup> Chou, *supra* note 269, at 229-230; Joseph Y.S. Cheng, *Democratization in Hong Kong: A Theoretical Exception*, in DEMOCRACY IN EASTERN ASIA: ISSUES, PROBLEMS AND CHALLENGES IN A REGION OF DIVERSITY 224, 229-230 (Edmund S.K. Fung & Steve Drakeley eds., Routledge 2014); Chen, *supra* note 115, at 242-244.

<sup>280</sup> Lam, *supra* note 115, at 141-142; Ho-fung Hung & Iam-chong Ip, *Hong Kong’s Democratic Movement and the Making of China’s Offshore Civil Society*, 52(3) ASIAN SURVEY 504, 508-511 (2012); Chen, *supra* note 115, at 244-245; Zheng Yongnian & Tok Sow Keat, *Beijing Responds to Hong Kong’s Democratization Movement: From Bureaucratic Control to Political Leadership*, 33(4) ASIAN AFFAIRS 235, 244-245 (2007). For a historical perspective on the evolution, see MINERS, *supra* note 269, at 196-202.

<sup>281</sup> Lam, *supra* note 115, at 141-142; Chen, *supra* note 115, at 243. *C.f.*, Cheng, *supra* note 279, at 243 (observing that the popular support for pro-democracy groups is to further “checks and balances against the soft authoritarianism of the HKSAR government” rather than the notion of “pro-democracy movement would provide a credible alternative government”, or even “a more effective and efficient administration.”). For a critical discussion on the lack of representation due to the functional constituencies, see Chou, *supra* note 269, at 230-233.

<sup>282</sup> Lam, *supra* note 115, at 145; Hung & Ip, *supra* note 280, at 513. See Cheng, *supra* note 279, at 241-242 (discussing the recent rise of radical political actions in Hong Kong).

fraction of the “pan-democrats” has typically been met with derision by other “pan-democrats.”<sup>283</sup>

There are two further complications that aggravate the uncertainty in the legislative process. First, there is an underlying fissure between politicians who are pro-grassroots and those who are pro-business.<sup>284</sup> These differences have largely been overshadowed by the more ideologically charged issue of China and liberal democracy, but they remain a potential issue for major economic policies that involve a substantial wealth-redistribution element.<sup>285</sup> The second complication relates to the functional constituencies in the LegCo. Given the narrowly defined electoral base, it is unsurprising that these functional constituencies of LegCo’s members are more concerned with appealing to their constituents’ interests than the overall performance of the government.<sup>286</sup>

With this combination of formal institutional design and actual political competition, it is no surprise that the “Executive has to conduct ‘government by perpetual intensive lobbying, horse-trading and playing one political party or grouping off another’”<sup>287</sup> and yet still face significant obstacles in obtaining LegCo approval of controversial legislation and appropriations for major infrastructure projects.<sup>288</sup> All of these factors certainly help explain the delay in the legislative approval of the BSD. The amendment bill continued to languish at the legislative-approval stage more than a year after the policy announcement. As examined above in Part III.C, one major cause of the delay was a filibuster by the more radical “pan-democrats” to derail general legislative activities. Similarly, there was intense lobbying by the functional group of legislators representing the real estate and construction sectors to—not surprisingly—repeal or otherwise dilute the tax that negatively impacts the attractiveness of Hong Kong real estate. On the other hand, the pro-grassroots politicians were also busy working to appeal to the populist sentiment against foreigners (in particular mainlanders) by proposing amendments that further extended the reach of the BSD. The controversy over the “oral undertaking” that at one time threatened to derail the entire only highlights the intense hostility among the political parties and the consequential legislative uncertainty.

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<sup>283</sup> Chen, *supra* note 115, at 241-242. See Zheng & Tok, *supra* note 280, at 246-247 (discussing the culture war style labels employed during the 2004 public debate on constitutional reforms).

<sup>284</sup> Chou, *supra* note 269, at 231-232; Lam, *supra* note 115, at 138; Chen, *supra* note 115, at 244.

<sup>285</sup> *E.g.*, see Chou, *supra* note 269, at 241 (on how the enactment of the minimum wage represents a rare departure of the interest of the otherwise dominant business class); LEE ET AL., *supra* note 88, at 74-75 (discussing the political dynamic over the anti-poverty campaign).

<sup>286</sup> Lam, *supra* note 115, at 144-145; Chen, *supra* note 115, at 232-233. Compared to the geographical districts that comprises of 3.37 million voters, the functional constituencies that made up half the LegCo are voted by a mere two hundred thousands odd voters: Chou, *supra* note 269, at 230-231.

<sup>287</sup> Chen, *supra* note 115, at 230.

<sup>288</sup> Chou, *supra* note 269, at 241; Chen, *supra* note 115, at 230. See Lam, *supra* note 115, at 142-144 (evaluating the performance of the LegCo through assessing stats on voting behavior and legislation success rate).

### 3. The Problematic Failed Legislation by Press Release

Such delay and uncertainty in securing legislative approval to give retrospective effect to the legal measures previously announced are certainly not conducive to providing information to private entities who are desperately seeking guidance on the legal consequences of their intended actions. Indeed, this uncertainty negates the main advantage of legislation by press release—namely, the retrospective effect would not unduly unravel the rational and legitimate expectation of private entities in light of the advance warning via the announcement. When private entities cannot rely on the legislature adhering to or even effecting the change proposed in the initial announcement, they are stuck in a quandary of either proceeding on the basis of the proposed new law that may never pass or acting in accordance with the existing law but risking being subjected to the proposed new law if it is ultimately passed. This situation renders the reference to the previous use of legislation by press release by the current government<sup>289</sup> ill-conceived because the political dynamic has been dramatically altered.

Of course, the more interesting issue is the future use of legislation by press release beyond the BSD. One likelihood is that the use of legislation by press release will fade away in Hong Kong. Frequent refusals of the legislature to advance the executive's policy objectives weaken the power and influence of the executive branch.<sup>290</sup> This dynamic aggravates efforts to use legislation by press release because it directly undermines the executive's credibility. Having encountered such difficulties over implementation of the BSD (and also the SSD and DSD), the executive will arguably be hesitant to utilize such measures in the future. Indeed, it is not surprising that the U.S., given its formal separation of power and divided political scene, is conspicuously absent in Charles Sampford's survey of legislation by press release.<sup>291</sup> Such a development is actually welcome because, notwithstanding the controversy surrounding the use of legislation by press release, poorly executed legislation by press release is clearly undesirable and should be avoided.

However, there is another, more disturbing possibility. As observed in IV.B.1, the BSD is a departure from previous uses of legislation by press release in Hong Kong in that the policy objective is economic regulation rather than the more typical objectives of revenue generation or tax avoidance. Moreover, the case study of the BSD demonstrates how the initial announcement, despite any legal authorization, has already produced a dramatic impact on people's behavior that is consistent with the policy objective of cooling the property market and reducing demand by foreign buyers. Thus, even if the BSD had been ultimately rejected by the LegCo, the

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<sup>289</sup> Legislative Council Secretariat, *supra* note 244 (raising the 1987 and 1992 amendments to the Inland Revenue Ordinance).

<sup>290</sup> Chou, *supra* note 269, at ("Whether Legco passes its bills, is of major concern to the government. The defeat of important bills may be regarded as a no-confidence vote on the government.").

<sup>291</sup> In contrast, numerous U.S. examples are discussed with respect to retrospective criminal law and retrospective taxation laws: SAMPFORD, *supra* note 2, at 132-156.

executive has successfully managed to achieve its policy objective, at least for the considerable period of over a year.<sup>292</sup>

The fact that the executive may still achieve some of its policy objectives despite the ultimate rejection by the legislature means that legislation by press release remains a potent tool for the executive. Such a tool is of limited use when revenue is the objective because the government will not be able to collect the revenue until the legislation is passed. However, when the objective is to alter the behaviors and actions of private entities, those behaviors and actions will be affected from the date of announcement. Of course, repeated failures to secure legislature's "ratification" of the legislation by press release will introduce uncertainty among private entities. This situation will dilute the impact but is unlikely to negate the influence of the executive announcement on private entities. In particular, given that the legal advice in the circumstance of uncertain legislation by press release will be a conservative one that makes provision for the proposed laws,<sup>293</sup> the announcement's impact will be substantial for substantial economic activities that typically involve lawyers. Thus, unless it is abundantly clear that the executive has become a lame duck for political or legal reasons, the executive will have the incentive to rely on legislation by press release to out-manuever an obstructionist LegCo, notwithstanding the aggravated concerns over uncertainty and separation of powers.

## VI. THE INCONSISTENT HARM OF RETROSPECTIVITY

Beyond the practice of legislation by press release, this case study also provides a useful reexamination of the conventional understanding of retrospective laws. Echoing the existing literature on legislation by press release, the retrospective effect of the legislative amendment implementing the BSD did not upset the reliance interests of private individuals. The legislative amendment was backdated to the public announcement by the government that included a relatively detailed exposition of the mechanics of the BSD and received extensive press coverage.<sup>294</sup> Potential property purchasers and sellers would also have been amply advised by

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<sup>292</sup> See also Carbonara, Parisi & Wangenheim, *supra* note 252, at 293-295 (analyzing how the social reaction triggered by the announcement of pending legal changes can affect the final receptivity of the law); Joonmo Cho & Iljoong Kim, *An Economic Analysis of Takings in Korea: Endogenous Probability and Announcement Effects*, 22 INT'L REV. L. & ECON. 331, 343-344 (2002) (utilizing the case study of a government eminent domain exercise in Korea to discuss how the government may utilize the resulting drop in property value caused by an announcement of proposed eminent domain to achieve its policy and political objectives even if the proposed eminent domain is ultimately cancelled).

<sup>293</sup> This is also why lawyers have been insisting that the purchaser deposit the BSD right at the of transaction even though the BSD is only due thirty days after the legislation have passed: *supra* III.D. There will be an interesting nuances based on whether the legislation in question is a benefit or a burden. If it is a benefit (e.g., a subsidy for certain activities), there is less concerns about "defensive" lawyering that would otherwise give de facto effect to a law imposing a burden (e.g., tax) notwithstanding uncertainty as to eventual passage. However, there would more political pressure on the legislature to give effect to a benefit, resulting in a corresponding increase in likelihood of legislative passage.

<sup>294</sup> *Supra* III.B.

their property agents and lawyers on the pending BSD. In this regard, it is especially noteworthy that, with the implementation date of the BSD being the day after the policy announcement, the BSD was essentially prospectively implemented vis-à-vis the public announcement. If the objections to retrospective laws are primarily based on private individuals being blindsided by the subsequent alterations of the legal consequences of their past actions, then they are clearly not applicable to the otherwise retrospective BSD.

On the other hand, many academics have correctly noted that formally prospective laws can nevertheless upset the reliance interests of private individuals.<sup>295</sup> When the activity implicated by a prospective law involves a long time horizon or substantial prior preparatory work, planning by private individuals can still be detrimentally affected by prospective changes of laws taking effect during the continuous duration of the activity or after substantial preparatory work has been undertaken.<sup>296</sup> In this regard, given the lengthy duration involved in the search and purchase of a real estate—a non-trivial transaction for most private entities—there would still be major disruptions to private actions even if the initial announcement of the BSD were actually accompanied by effective prospective legislation. Private individuals who had commenced the process of finding a suitable property for purchase or who were already in the process of negotiating the property price might have had to restart the entire process on account of the hefty new taxes thwarting their original financial planning.

This insight about the irrelevance of whether the law is formally retrospective has been well established in the U.S. legal literature on “legal transition,” a discourse that incorporates economic perspectives to examine the broader issue of how changes in legal rules affect the behavior of private entities. Since the major pioneering works of Michael J. Gratz<sup>297</sup> and Louis Kaplow,<sup>298</sup> the concept has enjoyed such wide acceptance and application that a U.S. commenter observed, “[m]odern scholarship generally supports the indulgence toward statutory retroactivity, arguing that all changes in legal rules, whether nominally retrospective or prospective, defeat expectations based on the prior state of the law.”<sup>299</sup> However, such discourse remains conspicuously absent in many other jurisdictions where formal retrospectivity is still capable of inciting public and political agitation and invites special judicial scrutiny not available to formally prospective laws that may otherwise have severe retrospective consequences.<sup>300</sup> Indeed, the strong objection of a Hong Kong LegCo member (Margaret Ng) to the prior 2010 legislation

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<sup>295</sup> *E.g.*, SAMPFORD, *supra* note 2, at 24-25; Prebble, Prebble & Smith, *supra* note 3, at 25-28; Palmer & Sampford, *supra* note 3, at 221-222. *See also* Salembier, *supra* note 3, at 116-118 (arguing for the separate conceptual category of vested rights to deal with such situations).

<sup>296</sup> SAMPFORD, *supra* note 2, at 24-25; Palmer & Sampford, *supra* note 3, at 221-222.

<sup>297</sup> Graetz, *supra* note 28.

<sup>298</sup> Kaplow, *supra* note 28.

<sup>299</sup> Woolhandler, *supra* note 64, at 1016 & 1022-1023. For examples of application, *see e.g.*, Jonathan S. Masur & Jonathan Remy Nash, *The Institutional Dynamics of Transition Relief*, 85 N.Y.U. L. REV. 391 (2010); SHAVIRO, *supra* note 64.

<sup>300</sup> *Supra* II.A & II.B.

by press release implementing the SSD<sup>301</sup> is instructive on misguided criticism based on retrospectivity. The retrospectivity of the amendments is the central theme of her criticism, but many of the harms she identifies are neither related to retrospectivity (e.g., unfairness arising from the substance of the SSD)<sup>302</sup> nor applicable in light of the notice given by the government (e.g., the guidance of the law).<sup>303</sup> This is not to say that the SSD is above criticism but simply that retrospectivity is not at issue despite its attractiveness as a rhetorical tool.

In this regard, Charles Sampford is spot on in critiquing the blanket aversion towards retrospective laws while advocating for a contextual analysis that focuses on the affected expectations of the private individuals.<sup>304</sup> Indeed, if protection of expectations is the rationale, then Charles Sampford and others are correct to highlight that the key issue is whether the expectation is indeed rational and legitimate,<sup>305</sup> with the implication that retrospective laws that counteract irrational or illegitimate expectations (e.g., laws targeting tax evasion by exploiting unintended legislative loopholes)<sup>306</sup> or that seek to protect rational and legitimate expectations (e.g., curative legislation to restore previous widespread, reasonable understanding that is subsequently judicially adjudicated to be wrong) are consistent and justified under the reliance reasoning.<sup>307</sup>

Moreover, the analysis of retrospective laws must be sensitive toward the underlying political infrastructure of the jurisdiction. The concerns about retrospectivity in particular and legal transition in general are premised on both the existence and the desirability of a stable legal regime.<sup>308</sup> This situation might arguably be true for stable democracies that have not witnessed any major changes to their governing institutions for a considerable period, such as the U.K. and the U.S. However, this state of affairs is certainly not common around the globe, where ongoing

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<sup>301</sup> Official Reports of Proceedings (Legislative Council of Hong Kong), June 22, 2011, 12561-12564.

<sup>302</sup> The highlighted problems relating to the uncertainty surrounding the definition of “acquired” and “disposed of” or unfairness due to the lack of exemption for transactions between close relatives remained in the final version of the bill that was ultimately passed, and would not be remedied by the removal of retrospectivity: *c.f.* Official Reports of Proceedings (Legislative Council of Hong Kong), June 22, 2011, 12562-12563; §29CA, Stamp Duty Ordinance, *supra* note 91.

<sup>303</sup> Official Reports of Proceedings (Legislative Council of Hong Kong), June 22, 2011, 12561-12562.

<sup>304</sup> SAMPFORD, *supra* note 2, at 247-256. *See also* GOLDING, *supra* note 5, at 247-252 (discussing the criteria of whether reasonable expectations are unfairly frustrated that was advanced by Lon L. Fuller).

<sup>305</sup> SAMPFORD, *supra* note 2, at 88-95; Fisch, *supra* note 3, at 1085-1086. *See* Pålsson, *supra* note 8, at 273 (noting EU jurisprudence that seeks to protect legitimate expectations). *See also* GOLDING, *supra* note 5, at 246-247 (observing how the passage of time may affect the analysis – where individuals may have reasonable expectations about the continuation of laws that are otherwise promulgated by a dubious regime and morally suspect if that dubious regime enjoys considerable longevity).

<sup>306</sup> SAMPFORD, *supra* note 2, at 147-151 (discussing Australian retrospective laws against blatant tax evasion).

<sup>307</sup> *Id.*, at 104-118 (discussing the various sub-categories of curative legislation).

<sup>308</sup> *C.f.* Fisch, *supra* note 3, at 1105-1108 (observing how the conventional fairness arguments – as opposed to the efficiency arguments that favors retrospectivity – are most applicable in the situation where the law/regulation is in a stable equilibrium).



political and democratic transitions remain the current norm. In Hong Kong, for example, vigorous public debate and political maneuvering have been ongoing with respect to constitutional reforms to transition the current “partial democracy”<sup>309</sup> into one in which the Chief Executive and LegCo are truly democratically elected by universal suffrage.<sup>310</sup>

Where a jurisdiction is undergoing substantial changes in the very foundation of its constitutional structure, both of the premises that underpin the objections towards retrospectivity are absent. The existence of a stable legal regime is by definition absent during institutional transition. The desirability of stability is also questionable in a context where the shortcomings of the prior regime typically serve as the impetus for change. Martin P. Golding argued that retrospective legislation may be “the best way of dealing with a messy situation” arising from the transition of a despotic regime to a democratic government given the need to express moral judgment of the past.<sup>311</sup> Indeed, even in the context of stable democracies, there may be selected areas where legal changes are frequent at certain times such that retrospectivity is desirable<sup>312</sup> or where retrospective laws are necessary to remedy the underlying regime suffering from systemic deficiencies in need of change.<sup>313</sup>

Thus, this case study of legislation by press release reaffirms the fallacy of adopting a special approach when dealing with formal retrospectivity. A proper appreciation of the rationales against retrospectivity reveals that the importance of protecting the reliance interests of private individuals is neither universal among nor unique to formally retrospective laws. It is more fruitful to be sensitive to the expectations that will be altered under any laws and to appreciate that there will be many instances in which the alteration of such expectations, whether by retrospective or prospective laws, will be normatively justified. These considerations are especially important for regimes undergoing transition, where there is likely to be a greater scope of circumstances in which retrospective laws are normatively justified.

## VII. CONCLUSION

The implementation of the BSD provides an illustrative case study to critically reexamine legislation by press release in particular and retrospective laws in general. The prospective announcement of pending retrospective changes to law not only enhances the legality of

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<sup>309</sup> Lam, *supra* note 115, at 137. Bill Chou regards Hong Kong system as an “non-liberal” regime: Chou, *supra* note 269, at 228.

<sup>310</sup> Cheng, *supra* note 279, at 242; Albert H.Y. Chen, *Hong Kong’s Constitutional Moment of 2014*, 43 HONG KONG L. J. 791, 791-792 (2013).

<sup>311</sup> GOLDING, *supra* note 5, at 258-261.

<sup>312</sup> Fisch, *supra* note 3, at 1108-1111.

<sup>313</sup> For example, rampant tax avoidance in Australia during the 1970s due to a combination of legal and political factors: SAMPFORD, *supra* note 2, at 147-151.

legislation by press but also defuses the objections to retrospective laws that are premised on protecting the reliance interests of private individuals. Notwithstanding qualms about the increased use of this mechanism to effect speedy legal changes, legislation by press release may be normatively justified—but only after circumspect examination of whether the use is really necessary to prevent circumvention of policy objectives and whether the underlying political dynamic will aggravate the harm of uncertainty and the executive’s usurpation of legislative powers. On a broader note, legislation by press release confirms that the conventional aversion towards retrospective laws can misleadingly distract from the crux issue of legal transition in both retrospective and prospective laws.

The awareness of these issues is critical. Given the general legality of both legislation by press release and retrospective law under the current laws of most jurisdictions, a well-informed public discourse and political process are ultimately the best check to ensure that the usage of the practice is confined to situations in which it is truly warranted. After all, the use of legislation by press release—to effect potentially far-reaching economic regulation no less—is not going away anytime soon.