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THE MISAPPLICATION OF *LEUNG KWOK HUNG* IN HONG KONG: AUTHORIZING THE RATIONALITY REQUIREMENT FOR TEXTUALLY ABSOLUTE RIGHTS

Albert Connor Buchman[†]

Abstract: The Hong Kong Bill of Rights Ordinance (BORO) guarantees many fundamental rights to Hong Kong's permanent residents. In these constitutionally significant statutes, two types of rights exist: 1) textually qualified rights, which contain qualifying language indicating for what purposes a legislated restriction is permissible, such as when necessary for national security, public order, public health or morals, and 2) textually absolute rights, which contain no language indicating when a legislated restriction on that right is permissible. In *Leung Kwok Hung & Others v. HKSAR*, the Hong Kong Court of Final Appeal formulated a rationality requirement for when restrictions are constitutionally valid. The Court held that the rationality requirement is derived from the word "necessary" in qualifying language in the BORO Article considered by the Court. First, this comment argues that subsequent courts have misapplied *Leung Kwok Hung*'s formulation of the rationality requirement when considering textually absolute BORO rights that do not contain the word "necessary." Second, this comment analyzes two possible approaches to correcting this misapplication by constitutionally authorizing the rationality requirement for textually absolute rights in a manner not reliant on the word "necessary." This comment ultimately argues that the second approach, implying the rationality requirement into the BORO, should be followed.

I. INTRODUCTION

In 2002, political activist Leung Kwok Hung and his assistants led between forty and ninety-six people down Hong Kong's Queensway, a public highway.¹ Arriving at the Hong Kong Police Headquarters, the peaceful assembly protested the conviction of an activist for the assault and obstruction of a police officer.² The assembly leaders had previously refused to follow a statutory notification procedure that allows the Police Commissioner discretion to object to peaceful processions on the grounds of public order.³ Police arrested the assembly leaders who were later convicted of holding an unauthorized assembly in violation of this statute.⁴ They ultimately appealed to Hong Kong's Court of Final Appeal,⁵ arguing that the

[†] The author would like to thank Professor Theodore Myhre and the editorial staff of the *Pacific Rim Law & Policy Journal*, especially Dr. George Radics, Lindsey Grieve, and Megan Winder.

¹ *Leung Kwok Hung & Others v. HKSAR*, [2005] 3 H.K.L.R.D. 164, 176 (C.F.A.).

² *Id.* at 176-77.

³ Public Order Ordinance, (1997) Cap. 245, § 13A. (H.K.).

⁴ *Id.*

⁵ For an account of Leung Kwok Hung's and the assembly's case through the various levels of Hong Kong's courts, see Janice Brabyn, *Leung Kwok Hung and Others through the Hong Kong Courts*, 36 HONG KONG L. J. 83 (2006).

statutory notification procedure unconstitutionally infringed on their fundamental right to peaceful assembly guaranteed by Article 17 of the Hong Kong Bill of Rights Ordinance (“BORO”).⁶ In its final decision, *Leung Kwok Hung & Others v. HKSAR*, the Court formulated the basis for the rationality requirement.⁷ This requirement requires that restrictions on BORO rights “be rationally connected with one or more of the legitimate purposes [of the restriction].”⁸ According to the Court’s formulation, the requirement is derived from the word “necessary” in BORO articles that contain the word.⁹ Subsequent Hong Kong courts, however, have misapplied this formulation when determining the constitutionality of restrictions on BORO rights that do not contain the word “necessary.”¹⁰

The BORO incorporates fundamental rights found in the International Covenant on Civil and Political Rights (“ICCPR”)¹¹ into Hong Kong’s domestic law.¹² Although enacted as ordinary legislation,¹³ the BORO gains constitutional significance through Article 39 of Hong Kong’s constitution, the Basic Law,¹⁴ mandating that the ICCPR is to be applied to the region.¹⁵ Part II of the BORO states most fundamental rights in *textually absolute* form, meaning that BORO articles provide no qualifying language indicating when that right may be restricted.¹⁶ For example, the right to freedom of opinion contained in Article 16 of the BORO simply states: “[e]veryone shall have the right to hold opinions without interference.”¹⁷ In contrast to textually absolute form, five BORO articles state rights in *textually qualified*

⁶ Hong Kong Bill of Rights Ordinance, (1991) Cap. 383, Part II, art. 17. (H.K.) [hereinafter BORO]; see *Leung Kwok Hung*, 3 H.K.L.R.D. at 177-79.

⁷ See *Leung Kwok Hung*, 3 H.K.L.R.D. at 184.

⁸ *Id.*

⁹ See *id.*; see *infra* Part III.A. This comment refers to rights provided by articles containing the word “necessary” as “textually qualified rights.” See *infra* note 15.

¹⁰ See *infra* Part II.B. This comment refers to rights contained in articles not containing the word “necessary” as “textually absolute rights.” See *infra* note 15.

¹¹ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16 at 52, U.N. Doc. A/6316 (Dec. 16 1966) [hereinafter ICCPR].

¹² See XIANGGANG JI BEN FA, art. 39 (1990) (H.K.), available at http://www.basiclaw.gov.hk/en/basiclawtext/images/Basic_Law.pdf. [hereinafter BASIC LAW]. Furthermore, provisions of the BORO mandate that any legislation enacted in Hong Kong cannot be inconsistent with rights supplied by the BORO. See BORO, *supra* note 6, Part I, §§ 3, 4.

¹³ See Simon N. M. Young, *Restricting Basic Rights in Hong Kong*, 34 HONG KONG L. J. 109, 115 (2004).

¹⁴ See *id.* at 115-16.

¹⁵ See BASIC LAW, *supra* note 12.

¹⁶ See YASH GHAI, *HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW* 443-44 (2d ed. 1999) (noting that BORO rights are formulated in “absolute” or “qualified” terms). The author has developed the terms “textually qualified” and “textually absolute” in this comment for ease of reference. The term “textually” is used to maintain the distinction rights may be formulated in their BORO *text* in absolute or qualified terms.

¹⁷ BORO, *supra* note 6, art. 16(1).

form, meaning that the articles provide language indicating on what grounds that right may be restricted.¹⁸ For example, Article 8, providing the right of liberty of movement, allows restrictions when “necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others.”¹⁹

Hong Kong courts have consistently upheld restrictions imposed by Hong Kong’s local legislature, the Legislative Council, on both textually absolute and textually qualified BORO rights.²⁰ Generally, in doing so, courts require that any restriction on a BORO right be rationally connected with the pursuit of one or more legitimate societal aims (“rationality requirement”).²¹ The Court of Final Appeal set out the standard formulation for the rationality requirement in *Leung Kwok Hung*. In this case, the Court considered the textually qualified right of peaceful assembly contained in Article 17 of the BORO. The text of this right states that restrictions are allowed when “imposed in conformity with the law and which are *necessary* in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”²² Interpreting this Article, the Court asserted that the rationality requirement is derived from the word “necessary.”²³

Subsequently, courts have cited *Leung Kwok Hung* as primary authority for the rationality requirement when considering the constitutionality of restrictions on both textually absolute and textually qualified fundamental rights.²⁴ However, these courts have misapplied the *Leung Kwok Hung* formulation by utilizing the rationality requirement for textually absolute rights that do not contain the word “necessary.”²⁵

This comment argues that Hong Kong courts have misapplied the *Leung Kwok Hung*’s rationality requirement formulation to textually absolute BORO rights. Furthermore, this comment argues that courts should

¹⁸ See generally BORO, *supra* note 6. Article 8 guarantees the right of liberty of movement, Article 16 guarantees the right of freedom of opinion and expression, Article 17 guarantees the right of freedom of peaceful assembly, and Article 18 guarantees freedom of association.

¹⁹ BORO, *supra* note 6, art. 8. There are variations of this language in the five articles. See *infra* Part II.B. for a complete description.

²⁰ See *infra* Part III.

²¹ See *Leung Kwok Hung*, 3 H.K.L.R.D. at 184. In addition to the rationality requirement, any restriction on a BORO right must also be 1) prescribed by law and 2) the means employed to restrict the fundamental right must be no more than is necessary to achieve that legitimate aim (“proportionality requirement”). *Id.* at 179, 184.

²² BORO, *supra* note 6, art. 17 (emphasis added).

²³ *Leung Kwok Hung*, 3 H.K.L.R.D. at 184.

²⁴ See *infra* Part III.

²⁵ See *infra* Part III.B.

imply the requirement into the BORO to correct this misapplication. Part II reviews Hong Kong's legal system, the legal sources of fundamental rights, and the difference between textually absolute and textually qualified BORO rights. Part III discusses *Leung Kwok Hung* and highlights how Hong Kong courts have misapplied its formulation of the rationality requirement. Part IV analyzes two possible approaches for correcting this misapplication by authorizing the rationality requirement without reliance on the word "necessary" in BORO text: 1) rooting the requirement in Article 39 of the Basic Law or 2) implying the requirement into the BORO. Additionally, Part IV argues that courts should adopt the latter approach because it bears little risk of being overturned.

II. BACKGROUND

Hong Kong is a Special Administrative Region ("SAR")²⁶ of the People's Republic of China ("PRC"). The PRC exercises sovereignty over the region but leaves Hong Kong to exercise a high degree of autonomy, including management of its legal system.²⁷ After transfer to the PRC in 1997, Hong Kong retained the common law legal system left by its previous sovereign, the United Kingdom.²⁸ In this system, many fundamental rights are derived out of the constitutionally significant BORO, which enacts the ICCPR.²⁹ The BORO provides two types of rights: 1) textually qualified rights that contain language indicating when the right can be restricted and 2) textually absolute rights that do not indicate when the right can be restricted.³⁰

This part of the comment provides an overview of the structure of fundamental rights in Hong Kong's legal system. First, Section A describes Hong Kong's transfer in sovereignty and current legal system. Section B describes how fundamental rights are derived out of BORO, highlighting the difference between textually absolute and textually qualified BORO rights.

²⁶ See XIAN FA, art. 31 (1982) (P.R.C.); see also BASIC LAW, *supra* note 12, arts. 2, 4.

²⁷ Judith R. Krebs, Comment, *One Country, Three Systems? Judicial Review in Macau After Ng King Ling*, 10 PAC. RIM L. & POL'Y J. 111 (2000); see Basic Law, *supra* note 12, arts. 4, 8; see *infra* Part II.A.

²⁸ See *infra* Part II.A.

²⁹ See *infra* Part II.B.

³⁰ See *infra* Part II.B.

A. *Hong Kong's Common Law Legal System Was Established by the United Kingdom and Has Survived After the Region's Transfer to the PRC*

Prior to the establishment of the PRC's sovereignty in 1997, Hong Kong was a British colony.³¹ During this time, the United Kingdom established a common law legal system with a complex hierarchy of courts and tribunals.³² The Privy Council in London held jurisdiction as the final court of appeal for the colony.³³ The courts applied British law to all people living in the colony, adapting it to local conditions.³⁴ Importantly, the legal system in Hong Kong acquired the British common law principles of equality of all parties before the law,³⁵ judicial review over executive and legislative acts,³⁶ the "rule of law,"³⁷ and an independent judiciary.³⁸

In 1984, the PRC and Britain signed the *Sino-British Joint Declaration of 1984*, creating the mechanism for future transfer of sovereignty between the two States and defining the relationship Hong Kong would enjoy under Chinese sovereignty.³⁹ Subsequently, a committee appointed by the PRC's legislative body, the National People's Congress,⁴⁰ drafted the Basic Law, codifying the relationship between Hong Kong and the PRC after transfer.⁴¹ In 1997, the United Kingdom formally transferred sovereignty and physical possession of the region to the PRC, and Hong Kong became a SAR under Article 31 of the PRC's Constitution.⁴² Pursuant to Article 11 of the Basic Law, the Basic Law itself became Hong Kong's constitutional authority because "[n]o law of the legislature . . . may contravene this law."⁴³ The Basic Law continues to govern the relationship between the PRC and Hong Kong.⁴⁴

³¹ YASH GHAI, *supra* note 16, at 1.

³² *Id.* at 24.

³³ *Id.*

³⁴ *Id.* at 23.

³⁵ *Id.* at 266-68; BASIC LAW, *supra* note 12, art. 25; BORO, *supra* note 6, art. 22.

³⁶ YASH GHAI, *supra* note 16, at 266-68.

³⁷ Steve Tsang, *Commitment of the Rule of Law and Judicial Independence*, in JUDICIAL INDEPENDENCE AND THE RULE OF LAW IN HONG KONG 1 (Steve Tsang ed., 2001).

³⁸ *Id.*; *see, e.g.*, BASIC LAW, *supra* note 12, arts. 2, 19.

³⁹ Albert H.Y. Chen, *Constitutional Adjudication in Post-1997 Hong Kong*, 15 PAC. RIM. L. & POL'Y J. 627, 628 (2006).

⁴⁰ *See* YASH GHAI, *supra* note 16, at 101-02.

⁴¹ *Id.* at 35; Byron S.J. Weng, *Judicial Independence Under the Basic Law*, in JUDICIAL INDEPENDENCE AND THE RULE OF LAW IN HONG KONG 48 (Steve Tsang ed., 2001).

⁴² *See* XIAN FA, art. 31 (1982) (P.R.C.).

⁴³ BASIC LAW, *supra* note 12, art. 11. There is considerable controversy on whether the Basic Law is truly a constitution, a "mini-constitution," or an ordinary statute. *See* YASH GHAI, *supra* note 16, at 137;

Through the Basic Law, the National People's Congress authorizes Hong Kong to exercise a "high degree of autonomy."⁴⁵ For example, the region is authorized to use its own regional flag;⁴⁶ use a capitalist economic system for 50 years after transfer;⁴⁷ and use English as an official language.⁴⁸ Chapter IV, Section 4 of the Basic Law specifically authorizes Hong Kong to operate its own legal system,⁴⁹ and Article 80 authorizes Hong Kong to establish courts.⁵⁰ Article 81 lays out the basic structure of Hong Kong's judiciary. The Court of Final Appeal is the highest appellate court, and the Court of Appeal is the intermediate appellate court.⁵¹ At the trial level are the Court of First Instance, district courts, magistrates' courts, and administrative courts.⁵²

The Basic Law limits the courts' power of interpretation of the Basic Law.⁵³ Article 158 vests all interpretation of the Basic Law in the PRC's Standing Committee of the National People's Congress ("NPCSC"), a permanent body of the PRC's primary legislature.⁵⁴ Under this Article, the NPCSC can issue an interpretation of the Basic Law at any time, whether during adjudication or not.⁵⁵ Hong Kong courts are authorized with limited ability to interpret the Basic Law.⁵⁶ Pursuant to Article 158(2), courts can interpret the Basic Law only during adjudication that involves subject matter relating to regional autonomy.⁵⁷ If the subject matter, however, concerns the

Weng, *supra* note 41, at 70 n.2. For purposes of this comment, the Basic Law will be considered Hong Kong's constitution.

⁴⁴ See BASIC LAW, *supra* note 12, ch. II.

⁴⁵ *Id.* art. 2.

⁴⁶ *Id.* art. 10.

⁴⁷ *Id.* art. 5.

⁴⁸ *Id.* art. 9.

⁴⁹ See *id.* ch. IV, § 4.

⁵⁰ See BASIC LAW, *supra* note 12, art. 80.

⁵¹ See *id.* art. 81.

⁵² See *id.*

⁵³ See *id.* art. 158; Ng Ka Ling v. Director of Immigration, [1999] 1 H.K.L.R.D. 577 (C.F.A.); INTERPRETATION BY THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF ARTICLES 22(4) AND 24(2)(3) OF THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION (adopted by the Standing Comm. Nat'l People's Cong.), June 26, 1999, <http://www.hkii.org/hk/legis/en/ord/2106/longtitle.html> (last visited May 22, 2010) [hereinafter NPCSC Interpretation].

⁵⁴ XIAN FA, art. 57 (1982) (P.R.C.).

⁵⁵ Director of Immigration v. Chong Fung Yuen, [2001] 2 H.K.L.R.D. 533, 545 (C.F.A.); see Ling Bing, *Subject Matter Limitation on the NPCSC's Power to Interpret the Basic Law*, 37 HONG KONG L. J. 619, 623 (2007).

⁵⁶ See BASIC LAW, *supra* note 12, art. 158(2).

⁵⁷ *Id.* By way of this authorization, Hong Kong's Court of Final Appeal has ultimate power to review matters falling in the autonomy of the region, including the constitutionality of domestic laws that infringe on fundamental BORO rights. See *id.* art. 82 (vesting final adjudication in the Court of Final Appeal). Article 158(2) in conjunction with Articles 11, 81, 158(3) of the Basic Law give Hong Kong courts limited powers of constitutional review over domestic matters. Richard Gordon, *The Rise and Risks*

“affairs which are the responsibility of the Central People’s Government, or [concerns] the relationship between the Central Authorities and the Region,” courts must seek a final interpretation from the NPCSC.⁵⁸

As sources of law, Hong Kong courts utilize the Basic Law, common law, and regional ordinances enacted by the Legislative Council.⁵⁹ Also, per Annex III of the Basic Law, a number of national laws enacted by the PRC apply in Hong Kong.⁶⁰ However, national laws do not apply directly—Article 18 requires the Legislative Council to enact them as regional ordinances.⁶¹ In Hong Kong’s complex legal system, fundamental rights are derived out of a number of legal sources. The next section highlights how many of these rights are derived out of the BORO.⁶²

B. The BORO Provides ICCPR Rights to Hong Kong Residents, Stating Those Rights in Textually Absolute or Textually Qualified Form

Fundamental rights are derived from the ICCPR as applied to Hong Kong by the BORO.⁶³ Article 39 of the Basic Law, Hong Kong’s constitutional authority, mandates that the ICCPR be enacted into Hong Kong law.⁶⁴ The ICCPR is a multilateral treaty that requires party States⁶⁵ to provide for a range of substantive civil and political rights.⁶⁶ The ICCPR does not, however, provide enforceable legal rights among its parties.⁶⁷ Rather, party states must implement the treaty into their domestic laws.⁶⁸ In 1991, the United Kingdom enacted the BORO in Hong Kong, giving legal

of Constitutional Judicial Review in Hong Kong, HONG KONG LAWYER, Dec. 2009, http://www.hk-lawyer.com/InnerPages_features/0/1512/2009/12 (last visited Apr. 22, 2010); Weng, *supra* note 41, at 60.

⁵⁸ YASH GHAI, *supra* note 16, at 103-05. The existence and utilization of Article 158 raises the question of whether the Hong Kong judiciary is truly independent.

⁵⁹ *Id.* at 279, 361-00. Also, some British legislation and common law survived transfer and is still applied by Hong Kong courts.

⁶⁰ See BASIC LAW, *supra* note 12, Annex III.

⁶¹ There are two exceptions to this rule. Article 14 and 18 of the Basic Law allow national laws relating to the national military station in Hong Kong or laws of war and emergency to apply directly. They do not require enactment by the Legislative Council to take force in the region. See BASIC LAW, *supra* note 12, arts. 14, 18.

⁶² See *infra* Part II.B.

⁶³ Chapter III of the Basic Law provides for a number of express fundamental rights that are not dependent on the BORO for implementation in the region. Additionally, many fundamental rights are expressly provided for in *both* the Basic Law and BORO. This comment limits its focus to restrictions on rights derived out of the BORO and not the Basic Law.

⁶⁴ See BASIC LAW, *supra* note 12, art. 39.

⁶⁵ There are currently 165 parties to the ICCPR. See ICCPR, *supra* note 11, ch. IV, § 4

⁶⁶ SCOTT N. CARLSON & GREGORY GRISVOLD, PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 1-2 (2003).

⁶⁷ Young, *supra* note 13, at 115.

⁶⁸ *Id.*

effect to ICCPR rights in the region.⁶⁹ The BORO survived the transfer of sovereignty when the Basic Law came into force and mandated that the ICCPR continue to be applied in Hong Kong.⁷⁰ Part II of the BORO contains the ICCPR rights applied to Hong Kong.⁷¹

The BORO contains rights stated in either absolute terms or qualified terms. In total, the BORO contains twenty-three Articles protecting fundamental rights.⁷² Nineteen of these rights are stated in absolute terms, with no language stating when and how the right can be restricted.⁷³ This comment refers to these rights as “textually absolute rights” for ease of reference.⁷⁴ In contrast, the remaining five articles are stated in qualified terms, containing language that states when and for what purposes the right may be restricted.⁷⁵ For example, four⁷⁶ of these articles use the language that restrictions are only permissible when “necessary to protect national security, public order (ordre public), public health or morals” or the “rights and freedoms of others”⁷⁷ The remaining article, Article 21, providing the right to participate in public life, permits restrictions that are not “unreasonable.”⁷⁸ This comment refers to rights containing qualifying language as “textually qualified rights” because they provide for permissible qualifications on rights in their text.⁷⁹ Confusingly, there is no general scheme for limitations on rights provided in the BORO.⁸⁰ It is unclear why the drafters of both documents chose certain rights to have language providing for limitations but did not for others.⁸¹ The next section describes

⁶⁹ Johannes Chan & Yash Ghai, *A Comparative Perspective on the Bill of Rights, in THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH 1* (Yohannes Chan & Yash Ghai eds., 1993)

⁷⁰ See Young, *supra* note 13, at 110; Chan & Ghai, *supra* note 69, at 1.

⁷¹ See BORO, *supra* note 6, Part II.

⁷² See *id.*

⁷³ This comment refers to these rights as “textually absolute” rights.

⁷⁴ See *supra* text accompanying note 16.

⁷⁵ These articles are: Article 8 guaranteeing the right of liberty of movement, Article 16 guaranteeing the right of freedom of opinion and expression, Article 17 guaranteeing the right of freedom of peaceful assembly, and Article 18 guaranteeing freedom of association. The language in these articles matches the ICCPR verbatim.

⁷⁶ Article 5 provides the fifth right, liberty and security of persons, that contains limiting language. This article states that “No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

⁷⁷ Article 16(3)(a) has a slight variation on this language: “for respect of the rights or reputations of others.” Many of the rights also require that the restriction be provided by law. Because Article 39 of the Basic Law already requires restrictions to be prescribed by law, this language does not need to be examined here.

⁷⁸ This language was interpreted by the Court of First Instance in *Chan Kin Sum v. Secretary for Justice*, [2009] 2 H.K.L.R.D. 166, 192-195 (C.F.I.). This language has not been examined by Hong Kong’s appellate courts to date. Thus, this comment will not focus on this BORO right.

⁷⁹ See *supra* text accompanying n.16.

⁸⁰ YASH GHAI, *supra* note 16, at 424.

⁸¹ *Id.* (“it is hard to understand why [these rights] have been so singled out”).

how courts have utilized a rationality requirement when considering the validity of restrictions on both textually absolute and textually qualified BORO rights.

III. *LEUNG KWOK HUNG* FORMULATED THE RATIONALITY REQUIREMENT, WHICH SUBSEQUENT COURTS HAVE MISAPPLIED

For restrictions on BORO rights to be constitutional, they must meet the rationality requirement, mandating that restrictions be rationally connected with the pursuit of one or more legitimate societal aims.⁸² In 2005, the Court of Final Appeal formulated the standard for the rationality requirement in *Leung Kwok Hung & Others v. HKSAR*.⁸³ In its decision, the Court asserted that the rationality requirement is authorized by the word “necessary” in the constitutional text of the textually qualified article before the Court.⁸⁴ Since then, all levels of courts have consistently applied the *Leung Kwok Hung* formulation.⁸⁵ Rather than limit *Leung Kwok Hung* to textually qualified BORO rights, however, later courts have misapplied the rationality requirement.⁸⁶ These courts have cited *Leung Kwok Hung* when applying the rationality requirement to restrictions on textually absolute BORO rights where there is no language from which to derive the rationality requirement.⁸⁷

This part of the comment provides an overview of the *Leung Kwok Hung* decision and its later application arguing that courts have misapplied

⁸² *Leung Kwok Hung*, 3 H.K.L.R.D. at 184.

⁸³ *Id.* The rationality requirement was first articulated by the Court of Appeal in *R v. Sing Yau Ming*, [1991] H.K.L.Y. 134 (C.A.). With later cases, the Court of Appeal has implicitly rejected Sing Yau Ming’s approach. See *Hung Chan Wa & Another v. HKSAR*, [2005] 3 H.K.L.R.D. 291, [81] (C.A.). Furthermore, the relationship of the BORO with the Letters Patent, Hong Kong’s pre-1997 constitutionality authority, is different than the relationship with the Basic Law. For these reasons, this comment focuses on jurisprudence post-1997 Hong Kong. For an account of the requirements in pre-1997 Hong Kong, see Yash Ghai, *Sentinels of Liberty or Sheep in Woolf’s Clothing? Judicial Politics and the Hong Kong Bill of Rights*, 60 MODERN L. REV. 459, 467-71 (1997), <http://www.jstor.org/stable/pdfplus/1097209.pdf> (last visited May 22, 2010).

⁸⁴ *Leung Kwok Hung*, 3 H.K.L.R.D. at 184.

⁸⁵ To the author’s knowledge, courts have cited *Leung Kwok Hung* as precedent for the rationality requirement in 10 cases. These include: *HKSAR v. Ng Po On*, [2008] 4 H.K.L.R.D. 176, 191-92 (C.F.A.), *Mo Yuk Ping v. HKSAR*, [2007] 3 H.K.L.R.D. 750, 78 (C.F.A.); *HKSAR v. Lam Kwong Wai*, [2006] 3 H.K.L.R.D. 808, 825 (C.F.A.); *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing & Another v. Chan Wing Hing & Another & Secretary for Justice (Intervener)*, [2006] 3 H.K.L.R.D. 687, 699 (C.F.A.); *Chan Hei Ling Helen v. Medical Council of Hong Kong*, [2009] 4 H.K.L.R.D. 174, 51 (C.A.); *Kwok Hay Kwong v. Medical Council of Hong Kong*, [2008] 3 H.K.L.R.D. 524, 536 (C.A.); *Chan Hau Man Christina v. Commissioner of Police*, [2009] 4 H.K.L.R.D. 797, 811 (C.F.I.); *Wong Tze Yam v. Commissioner of Police*, [2009] 5 H.K.L.R.D. 836, 846-47 (C.F.I.); *Chan Kin Sum*, 2 H.K.L.R.D. at 194; *Democratic Party v. Secretary for Justice*, [2007] 2 H.K.L.R.D. 804, 818-19 (C.F.I.).

⁸⁶ See *infra* Part III.B.

⁸⁷ See *id.*

the rationality requirement to textually absolute rights. Section A discusses the Court of Final Appeal's decision in *Leung Kwok Hung*. Section B highlights how courts have misapplied *Leung Kwok Hung*'s rationality requirement formulation to textually absolute rights.

A. *In Leung Kwok Hung, the Court of Final Appeal Formulated the Rationality Requirement, Deriving It from the Word Necessary in BORO Text*

In *Leung Kwok Hung & Others v. HKSAR*,⁸⁸ the Court of Final Appeal formulated the rationality requirement. In this case, assembly leaders led a procession involving between forty and ninety-six people without giving mandatory notice to the police pursuant to Section 13A of the Public Order Ordinance.⁸⁹ Section 13A requires that all assembly organizers give written notice to the police of all processions involving more than thirty people, with descriptions of the purpose, time, route, and estimated number of people.⁹⁰ Section 14(1) of the same ordinance gives the Commissioner of Police discretion to object to the procession if the Commissioner reasonably considers objection "necessary in the interests of national security or public safety, or public order (ordre public) or the protection of the rights and freedom of others."⁹¹ A magistrate convicted the assembly leaders, and the Court of Appeal affirmed the conviction. The assembly leaders appealed to the Court of Final Appeal.⁹²

At issue before the Court was whether Section 14(1) of the ordinance violated the assembly leaders' right to peaceful assembly under Article 17 of the BORO, a textually qualified right. Article 17 states:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the

⁸⁸ *Leung Kwok Hung*, 3 H.K.L.R.D. at 164.

⁸⁹ Public Order Ordinance, (1997) Cap. 245, § 13A. (H.K.); *Leung Kwok Hung*, 3 H.K.L.R.D. at 176. The Public Order Ordinance is "concerned with regulation of public assemblies." HONG KONG POLICE, GUIDELINES ON THE APPROACH TO THE PUBLIC ORDER ORDINANCE IN RELATION TO PUBLIC MEETINGS AND PUBLIC PROCESSIONS 1 (2008), http://www.police.gov.hk/ppp_en/08_forms/doc/poop08.pdf (last visited May 10, 2010).

⁹⁰ *Leung Kwok Hung*, 3 H.K.L.R.D. at 164.

⁹¹ Public Order Ordinance, (1997) Cap. 245, § 14(1). (H.K.)

⁹² *Leung Kwok Hung*, 3 H.K.L.R.D. at 177.

protection of public health or morals or the protection of the rights and freedoms of others.

From its text, Article 17 provides both the right to peacefully assemble as well as permissible grounds in which to restrict the right.

Turning to the question of the constitutionality of the restriction, the Court stated that “the restriction must be necessary in a democratic society⁹³ in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”⁹⁴ In this way, the Court asserted that the rationality requirement was necessary for a restriction to be to be constitutional.

From there, the Court formulated the rationality requirement from the word “necessary.” First, the Court inferred a “proportionality test” from the word “necessary” in the Article 17 text by asserting that “the constitutional requirement of necessity involves the application of a proportionality test.”⁹⁵ Second, the Court defined the proportionality test to include the rationality requirement. Specifically, the Court asserted “the proportionality test should be formulated in these terms . . . the restriction *must be rationally connected with one or more of the legitimate purposes . . .*”⁹⁶ This statement establishes the rationality requirement by requiring a rational connection between a restriction on a BORO right and a legitimate state aim.⁹⁷

Attempting to support its adoption of the rationality requirement, the Court cited two cases.⁹⁸ Unfortunately, the Court’s opinion did not explain how these cases actually supported the adoption of the rationality requirement.⁹⁹ Furthermore, the opinion did not explain how these cases

⁹³ *Id.* at 183. Although Hong Kong is not a democracy, the Court interpreted this text as following the Siracusa Principles on the Limitations and Derogation Provisions in the ICCPR, where a group of experts state that a society which recognizes the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting the definition of a democratic society. The Court also noted that this interpretation is consistent with that of the European Court of Human Rights.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 184 (emphasis added). The Court also defined the proportionality test as including a “proportionality requirement,” requiring that “the means used to impair the right of peacefully assembly must be no more than is necessary to accomplish the legitimate purpose in question.”

⁹⁷ *Id.*

⁹⁸ See *Leung Kwok Hung*, 3 H.K.L.R.D. at 183 (citing *HKSAR v. Ng Kung Siu & Another*, [1999] 3 H.K.L.R.D. 907 (C.F.A.)) (holding that the aims of a flag desecration law were within permissible restrictions provided by the BORO text); *Ming Pao Newspapers Ltd. & Others v. A-G of Hong Kong*, [1996] 2 H.K.L.R. 239, 248 (P.C.) (appeal taken from H.K.) (pre-transfer Privy Council case citing British precedent as authorizing the rationality requirement)).

⁹⁹ See *Leung Kwok Hung*, 3 H.K.L.R.D. at 183

supported the formulation that the requirement is derived out of the word “necessary.”¹⁰⁰

Turning to the application of the newly established rationality requirement formulation, the Court held that the Commissioner’s discretion to restrict the assembly leaders’ right to peaceful assembly, authorized by the ordinance in question, was within public order.¹⁰¹ In making this holding, the Court reasoned that the restriction on peaceful assembly satisfied the rationality requirement: “The discretion is of assistance in enabling Government to fulfill its positive duty. It is a limited discretion, constrained by the proportionality test.”¹⁰²

Overall, the *Leung Kwok Hung* Court formulated a basis for the rationality requirement for textually qualified rights, such as the right of peaceful assembly at issue before the Court. It held that the word “necessary” in the BORO text involved the application of a proportionality test, which includes the rationality requirement. The Court, however, did not state or indicate whether this holding should extend to textually absolute rights. *Leung Kwok Hung* is now the primary case authorizing the rationality requirement for textually qualified rights—courts have cited *Leung Kwok Hung* in all but one case considering textually qualified rights.¹⁰³

B. Courts Have Misapplied the Leung Kwok Hung Formulation when Considering Restrictions on Textually Absolute Rights

Several cases have cited *Leung Kwok Hung* as authority for the rationality requirement when considering the constitutionality of restrictions on the textually absolute BORO rights of the right to equality before the law¹⁰⁴ and the right to be presumed innocent.¹⁰⁵ These rights do not contain the word “necessary” or any other words in which to derive the rationality requirement, as was formulated by *Leung Kwok Hung*.¹⁰⁶ Thus, this

¹⁰⁰ See *id.*

¹⁰¹ *Id.* at 197.

¹⁰² Again, this use of the term “proportionality test” includes the rationality requirement.

¹⁰³ See, e.g., *Chan Hei Ling Helen v. Medical Council of Hong Kong*, 4 H.K.L.R.D. at 51; *Chan Kin Sum*, 2 H.K.L.R.D. at 194; *Chan Hau Man Christina*, 4 H.K.L.R.D. at 811. The one case that did not cite *Leung Kwok Hung* is *Kong Yun Kim v. Director of Welfare*, [2009] 4 H.K.L.R.D. 382 (C.F.I.). In this case, the Court of First Instance merely applied the rationality requirement but did not cite any authority for its use or explain how it was derived. See *Kong Yun Kim*, 4 H.K.L.R.D. at 415-17.

¹⁰⁴ See *Leung v. Secretary for Justice*, [2006] 4 H.K.L.R.D. 211 (C.F.A.).

¹⁰⁵ See *Lam Kwong Wai*, 3 H.K.L.R.D. at 825; *Ng Po On*, 4 H.K.L.R.D. at 191-92.

¹⁰⁶ BORO rights provide for rights in the ICCPR, and ICCPR rights reflect the scheme of providing textually absolute and textually qualified rights. YASH GHAI, *supra* note 16, at 424. Interestingly, Dr. Nihal Jayawickrama has suggested that textually absolute rights in the ICCPR “may not be restricted on

comment argues that these cases have misapplied *Leung Kwok Hung*'s rationality requirement formulation.

One court has misapplied the *Leung Kwok Hung* formulation when considering the textually absolute right of equality before the law. In *Leung v. Secretary for Justice*,¹⁰⁷ the Court of Final Appeal considered a restriction on Article 22 of the BORO.¹⁰⁸ This textually absolute Article provides that “[a]ll people are equal before the law and are entitled without any discrimination to the equal protection of the law”¹⁰⁹ There is no further language expressly stating for what legitimate purposes a restriction is authorized.¹¹⁰ Before the Court, a 20-year-old homosexual petitioner argued that Section 118C of the Crimes Ordinance¹¹¹ was contrary to his right to equality before the law guaranteed by Article 22 of the BORO.¹¹² Section 118c makes “homosexual buggery”¹¹³ with or by [a] man under 21” an offense.¹¹⁴ Specifically, the plaintiff argued that the law resulted in unequal treatment because a 16-year-old heterosexual person could legally engage in sexual intercourse, but a 16-year-old homosexual person could not engage in buggery.¹¹⁵ In considering the constitutionality of Section 118C, the Court cited *Leung Kwok Hung* as authorizing the rationality requirement.¹¹⁶ The Court, however, did not discuss how the rationality requirement was derived out of the textually absolute right BORO right.¹¹⁷ Applying the rationality requirement, the Court held that the restriction was unconstitutional because there was no rational justification for the restriction.¹¹⁸ Thus, overall, the Court misapplied the *Leung Kwok Hung* formulation in this case because the BORO article before the Court did not contain the word “necessary” in which to derive the requirement.

Several courts have misapplied *Leung Kwok Hung*'s rationality requirement formulation to the textually absolute right to be presumed

any grounds whatsoever.” See NIHAL JAYAWICKRAMA, *THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL, AND INTERNATIONAL JURISPRUDENCE* 182-83 (2002). This raises the question of whether Hong Kong courts should allow any restrictions on textually absolute BORO rights. This question is beyond the scope of this comment.

¹⁰⁷ *Leung v. Secretary for Justice*, [2006] 4 H.K.L.R.D. 211 (C.F.A).

¹⁰⁸ *See id.* at 234-41.

¹⁰⁹ BORO, *supra* note 6, art. 22.

¹¹⁰ *See id.*

¹¹¹ Crimes Ordinance, (1991) Cap. 200, § 118C (H.K.).

¹¹² *See* BORO, *supra* note 6, art. 22.

¹¹³ Buggery is defined as sodomy. BLACK'S LAW DICTIONARY 207 (8th ed. 2004).

¹¹⁴ Crimes Ordinance, (1991) Cap. 200, § 118C (H.K.).

¹¹⁵ *See Leung v. Secretary for Justice*, 4 H.K.L.R.D. at 235.

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *See Leung v. Secretary for Justice*, 4 H.K.L.R.D. at 239-40.

innocent contained in Article 11(1) of the BORO.¹¹⁹ This Article provides that “[e]veryone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.”¹²⁰ There is no language stating for what legitimate purposes a restriction is authorized.¹²¹ Because this article does not contain the word “necessary,” these courts have misapplied the *Leung Kwok Hung* formulation. Two cases are illustrative.

The first case is *HKSAR v. Lam Kwong Wai*.¹²² The government, respondents, charged petitioners with possessing imitation firearms, which was prohibited by Section 20(3) of the Firearms and Ammunition Ordinance.¹²³ This statute provides that a person who is in possession of an imitation firearm is presumed to have committed an offense, unless he or she proves to the magistrate that he or she was not in possession of the imitation firearm for a purpose dangerous to the public peace or of committing an offense.¹²⁴ Petitioners argued to the Court of Final Appeal that the persuasive onus imposed by the Ordinance was contrary to their right to be presumed innocent, which is guaranteed by Article 11(1) of the BORO.¹²⁵ The Court cited *Leung Kwok Hung* as authority for applying the rationality requirement for the textually absolute Article 22.¹²⁶ The Court, however, did not discuss how the rationality requirement was derived out of a BORO article that did not contain the word “necessary.”¹²⁷ Applying the rationality requirement, the Court reasoned that Section 20(3) fulfilled the rationality requirement because its legislative purpose was the “prevention, suppression and punishment of serious crime,” especially since imitation firearms were hard to distinguish from real firearms.¹²⁸ Because Article 11(1) does not contain the word “necessary” in which to derive the rationality requirement, this Court misapplied the *Leung Kwok Hung* formulation.

The second illustrative case is *HKSAR v. Hung Chan Wa & Another*.¹²⁹ Before the Court of Final Appeal, respondents argued that Section 47 of the Dangerous Drug Ordinance, under which they were

¹¹⁹ See *Lam Kwong Wai*, 3 H.K.L.R.D. at 825; *HKSAR v. Hung Chan Wa & Another*, [2006] 3 H.K.L.R.D. at [75]; *Ng Po On*, 4 H.K.L.R.D. at 191-92.

¹²⁰ BORO, *supra* note 6, art. 11(1).

¹²¹ See *id.*

¹²² *Lam Kwong Wai*, 3 H.K.L.R.D. 808

¹²³ *Id.* at 817; Firearms and Ammunition Ordinance, (1997) Cap. 238, § 20(3). (H.K.).

¹²⁴ See Firearms and Ammunition Ordinance, (1997) Cap. 238, § 20(3). (H.K.).

¹²⁵ *Lam Kwong Wai*, 3 H.K.L.R.D. at 815.

¹²⁶ See *id.* at 825.

¹²⁷ See *id.*

¹²⁸ *Id.* at 826.

¹²⁹ *HKSAR v. Hung Chan Wa & Another*, [2006] 3 H.K.L.R.D. 841 (C.F.A.).

originally convicted,¹³⁰ encroached on their right to be presumed innocent pursuant to Article 11(1) of the BORO.¹³¹ Specifically, Section 47 provides that “any person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug.”¹³² The Court did not expressly cite *Leung Kwok Hung* as authority for the rationality requirement.¹³³ Rather, the Court implicitly cited *Leung Kwok Hung* by citing *Lam Kwong Wai*, a case that directly cited *Leung Kwok Hung*.¹³⁴ To emphasize its implicit adoption of *Leung Kwok Hung*, the Court in *Hung Chan Wa* stated “[a]s this Court discusses the relevant principles governing these matters in . . . *Lam Kwong Wai* . . . there is no occasion to repeat what is said there.”¹³⁵ Applying the rationality requirement, the Court reasoned that the presumptions were rationally connected with the legitimate objectives of preventing trade and use of dangerous drugs, especially as prosecutors often had difficulty proving possession.¹³⁶ Again, because Article 11(1) does not contain the word “necessary” in which to derive the rationality requirement, the Court misapplied the *Leung Kwok Hung* formulation.

Overall, courts have applied *Leung Kwok Hung*'s formulation of the rationality requirement to the textually absolute right to be equal before the law and the right to be presumed innocent. Because *Leung Kwok Hung* asserted that the rationality requirement is rooted in qualifying language in the BORO text, these courts have misapplied the formulation, as textually absolute rights do not contain any qualifying language.

IV. COURTS SHOULD CONSIDER ALTERNATIVE APPROACHES FOR AUTHORIZING THE RATIONALITY REQUIREMENT

Hong Kong courts' extensive citation of *Leung Kwok Hung* suggests that the case's rationality requirement formulation is now entrenched as authority for courts considering the constitutionality of restrictions on BORO rights.¹³⁷ As discussed *infra*, courts have misapplied the formulation

¹³⁰ Respondents were originally convicted by a magistrate of possessing a container containing a dangerous drug, but the Court of Appeal reversed. *Hung Chan Wa*, 3 H.K.L.R.D. at [37]. The government, as petitioners, appealed to the Court of Final Appeal. *Id.*

¹³¹ Dangerous Drugs Ordinance, (1992) Cap. 134, § 47. (H.K.); see *Hung Chan Wa*, 3 H.K.L.R.D. at [38].

¹³² Dangerous Drugs Ordinance, (1992) Cap. 134, § 47.

¹³³ See *Hung Chan Wa*, 3 H.K.L.R.D. at [75].

¹³⁴ *Id.* (citing *Lam Kwong Wai*, 3 H.K.L.R.D. 808).

¹³⁵ *Id.* (citing *Lam Kwong Wai*, 3 H.K.L.R.D. 808). *Lam Kwong Wai* is discussed in Part III.B.

¹³⁶ *Id.* at [76].

¹³⁷ See *supra* text accompanying note 85.

to textually absolute rights that do not contain qualifying language in which to derive the rationality requirement according to *Leung Kwok Hung's* formulation.¹³⁸ This part of the comment examines two possible approaches for correcting courts' misapplication of *Leung Kwok Hung*. Both approaches would allow courts to authorize the rationality requirement for both textually absolute and textually qualified BORO rights without reliance on the word "necessary." Section A examines the possible approach of rooting the rationality requirement in Article 39 of the Basic Law. Section B examines the possible approach of implying the rationality requirement into the BORO. Furthermore, Section B argues that courts should follow the latter approach of implying the rationality requirement into the BORO.

A. *Courts Could Interpret the Words "Prescribed by Law" of Article 39 of the Basic Law as Authorizing the Rationality Requirement*

The first possible approach is for Hong Kong courts to interpret Article 39 of the Basic Law as authorizing the rationality requirement. Deriving the rationality requirement from the Basic Law would serve to make the requirement applicable to all rights enjoyed by Hong Kong residents.¹³⁹ However, courts may be reluctant to interpret the Basic Law beyond its text. Courts may also be reluctant to develop an interpretation that could be overturned by the NPCSC.

Article 39 of the Basic Law mandates that the ICCPR be applied to Hong Kong, providing the constitutional basis for the entire BORO.¹⁴⁰ Accordingly, deriving the rationality requirement from language in Article 39 would serve to authorize the requirement for the entire BORO, including both textually absolute and textually qualified BORO rights. In *Ng Ka Ling & Others v. Director of Immigration*, the Court of Final Appeal set out the basic approach to interpreting the Basic Law.¹⁴¹ The Court asserted that a "purposive approach" is to be used when interpreting the Basic Law:

The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise, and in resolving them, the courts are bound to give effect to the principles and

¹³⁸ See *supra* Part III.B.

¹³⁹ See BASIC LAW, *supra* note 12, art. 39.

¹⁴⁰ *Id.*

¹⁴¹ *Ng Ka Ling v. Director of Immigration*, [1999] 1 H.K.L.R.D. 577 (C.F.A.); Yash Ghai, *The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?* 37 HONG KONG L. J. 363, 385 (2007).

purposes declared in, and to be ascertained from the constitutional and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the court must consider the purpose of the instrument and its relevant provisions as well as the language of the text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.¹⁴²

In this way, the Court of Final Appeal stated that courts should interpret the Basic Law according to its legislative purpose. When doing so, Hong Kong courts primarily look to text when determining legislative intent.¹⁴³

Following these principles of statutory interpretation, courts could interpret language in Article 39 of the Basic Law to derive the rationality requirement.¹⁴⁴ Article 39 specifically states:

The provisions of the International Covenant on Civil and Political Rights . . . as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.¹⁴⁵

In its text, Article 39 mandates that the ICCPR is to be applied to Hong Kong, which is achieved by the BORO. The Article also states that rights can only be restricted by law.

The words “prescribed by law” in Article 39 are a potential source for interpretation because they already note a basis for restriction of rights—that they be imposed through law. A court could interpret these words as requiring that restrictions imposed by the Legislative Council also meet the rationality requirement. In a sense, this interpretation would serve as a limitation on the extent that the Legislative Council could restrict a BORO right by law.

¹⁴² *Ng Ka Ling*, 1 H.K.L.R.D. at 339-40.

¹⁴³ *Chong Fung Yuen*, 2 H.K.L.R.D. at 546 (“The courts’ role under the common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain the legislative intent as expressed in the language. Their task is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain what was meant by the language used and to give effect to the legislative intent as expressed in the language. It is the text of the enactment which is the law and it is regarded as important both that the law should be certain and that it should be ascertainable by the citizen.”).

¹⁴⁴ See Ghai, *supra* note 141, at 386.

¹⁴⁵ BASIC LAW, *supra* note 12, art. 39.

Interpreting Article 39 in this manner would have two strengths. The first strength would be that the rationality requirement would not depend on *Leung Kwok Hung*'s formulation that the rationality requirement be derived from the word "necessary" contained in BORO rights. Rather, the rationality requirement would have a constitutional basis in the Basic Law. The second strength would be that the rationality requirement would be mandated for all rights contained in Hong Kong's legal system. Article 39 covers "[t]he rights and freedoms enjoyed by Hong Kong residents."¹⁴⁶ This language presumably covers not only textually absolute and textually qualified BORO rights but also all rights contained in the Basic Law, domestic legislation, and common law. Thus, interpreting Article 39 as authorizing the rationality requirement would serve to mandate that all restrictions imposed by the Legislative Council be rationally connected to legitimate state aims.

Despite this approach's strengths, courts are unlikely to interpret the Basic Law in this manner. Courts are resistant to adopting an interpretation that is weakly supported by the text.¹⁴⁷ Illustrating this point, the Court of Final Appeal in *Director of Immigration v. Chong Fung Yuen* stated that "the courts must avoid a literal, technical, narrow or rigid approach [of the Basic Law], they cannot give the language a meaning which it cannot bear."¹⁴⁸ The plain meaning of the words "prescribed by law" may merely dictate that restrictions be imposed by law.¹⁴⁹ The words may simply not support a broad interpretation authorizing the rationality requirement. Accordingly, courts may be unwilling to broadly interpret Article 39 as supporting the rationality requirement.¹⁵⁰

Courts may be unwilling to adopt a broad interpretation of Article 39 because their interpretation could be overturned by a contrary NPCSC interpretation.¹⁵¹ Pursuant to Article 158 of the Basic Law, the NPCSC has power of interpretation over the Basic Law in all cases.¹⁵² Through this power, the NPCSC can overturn any Hong Kong courts' interpretation of the Basic Law. This threat is not merely theoretical.¹⁵³ In *Ng Ka Ling*, the NPCSC rejected a Court of Final Appeal interpretation of the Basic Law by

¹⁴⁶ *See id.*

¹⁴⁷ *See Chong Fung Yuen*, 2 H.K.L.R.D. at 546.

¹⁴⁸ *Id.*

¹⁴⁹ *See Leung Kwok Hung*, 3 H.K.L.R.D. at 181-82.

¹⁵⁰ *See also Yang Xiaonan, Legislative Interpretations by the Standing Committee of the National People's Congress in China*, 38 HONG KONG L. J. 255, 268 (2008).

¹⁵¹ *See Chen*, *supra* note 39, at 662; Po Jen Yap, *Constitutional Review under the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong*, 37 HONG KONG L. J. 449, 473 (2007).

¹⁵² *See Basic Law*, *supra* note 12, art. 158.

¹⁵³ *See Ng Ka Ling*, 1 H.K.L.R.D. 577; NPCSC Interpretation, *supra* note 53.

issuing a contrary interpretation that trumped the Court's.¹⁵⁴ In order to avoid a similar situation to *Ng Ka Ling*, courts may interpret the Basic Law in a politically sensitive matter that does not provoke a response from the NPCSC.¹⁵⁵ Thus, courts may be reluctant to interpret Article 39 as authorizing the rationality requirement.

Overall, courts could broadly interpret Article 39 of the BORO as authorizing the rationality requirement. However, courts may be unwilling to interpret the Basic Law beyond its text. Furthermore, courts may be unwilling to risk a contrary NPCSC interpretation.

B. *Courts Should Imply the Rationality Requirement into the BORO*

Rather than root the rationality requirement in the Basic Law, Hong Kong courts should follow a second possible approach: Implying the rationality requirement into the BORO. Doing so would authorize the rationality requirement for both textually absolute and textually qualified rights.¹⁵⁶ Furthermore, this approach would lead to little risk of the courts' interpretations being overturned by the Legislative Council or NPCSC.¹⁵⁷ Courts could utilize two potential methods to implying the rationality requirement into the BORO: 1) courts could liberally construe BORO articles or 2) courts could interpret Article 2(4) of the BORO as incorporating the rationality requirement.

1. *Courts Could Liberally Construe BORO Articles*

The first method courts could use to imply the rationality requirement¹⁵⁸ is to liberally construe BORO articles. "A statute is liberally construed when its letter is extended to include matters within the spirit or purpose of the statute."¹⁵⁹ Following this principle, courts construe the BORO according to its purpose. The stated purpose is provided in the preamble of the BORO: "to provide for incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political

¹⁵⁴ See *Ng Ka Ling*, 1 H.K.L.R.D. 577; NPCSC Interpretation, *supra* note 53.

¹⁵⁵ See Chen, *supra* note 39, at 662; Yap, *supra* note 151, at 473.

¹⁵⁶ See *infra* Part IV.B.i.

¹⁵⁷ See *infra* Part IV.B.ii.

¹⁵⁸ In *Lam Kwong Wai*, the Court of Final Appeal stated that "[i]n Hong Kong, it has been accepted that a justification provision is to be implied in the BOR[O]." 3 H.K.L.R.D. at 819. The Court used the justification provision as including the rationality requirement. Unfortunately, the Court did not elucidate on what grounds the rationality requirement is implied in the BORO. Furthermore, the Court's ultimate decision in this case to adopt the rationality requirement was based on *Leung Kwok Hung*. The basis of the Court's statement is uncertain.

¹⁵⁹ NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 58.6 (6th ed. 2000).

Rights as applied to Hong Kong.”¹⁶⁰ Furthermore, a general rule of statutory construction in Hong Kong is that the legislature intended the legislation to conform to public international law.¹⁶¹ Applying this rule to the preamble suggests that the legislature, when enacting the ordinance, intended the BORO to conform to foreign interpretations of the ICCPR. Accordingly, courts could consider foreign jurisprudence that implies the rationality requirement into the ICCPR.

For example, courts could imply the rationality requirement into Article 22 of the BORO by referring to Canadian jurisprudence that implies the requirement into the ICCPR. Article 22 of the BORO provides the right to equality before the law and is verbatim of Article 26 of the ICCPR.¹⁶² Neither the ICCPR nor the BORO articles contain qualifying language.¹⁶³ The Supreme Court of Canada has authorized the rationality requirement when considering restrictions on the ICCPR right to equality, “accept[ing] the constitutionality of legislation providing for differential treatment if reasonable classifications were made, rationally connected with the legitimate object of the statute.”¹⁶⁴ Thus, looking to foreign jurisdictions, Hong Kong courts could follow Canada’s interpretation of Article 26 of the ICCPR and thereby imply the rationality requirement Article 22 of the BORO.

2. *Courts Could Imply the Rationality Requirement into Article 2(4) of the BORO*

The second method courts could use to imply the rationality requirement is to interpret Article 2(4) of the BORO as including the rationality requirement. This Article provides: “Nothing in this Ordinance shall be interpreted as implying for the Government . . . any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the Bill of Rights”¹⁶⁵ In a sense, all restrictions on BORO rights imposed by the Legislative Council are “aimed at the destruction” because the restrictions prevent the full enjoyment of the BORO right. Article 2(4) seems to prohibit the government from excessive restriction of BORO rights. Courts could reason that the rationality

¹⁶⁰ BORO, *supra* note 6, at pmb1.

¹⁶¹ Carole J. Petersen, *The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong*, 32 HONG KONG L. J. 103, 125 (2002) (citing *R v Sin Yau Ming*, 1 H.K.P.L.R. at 105).

¹⁶² Compare BORO, *supra* note 6, art. 22, with ICCPR, *supra* note 11, art. 26.

¹⁶³ Compare BORO, *supra* note 6, art. 22, with ICCPR, *supra* note 11, art. 26.

¹⁶⁴ JAYAWICKRAMA, *supra* note 106, at 822 (citing *Mckay v. The Queen*, [1980] 2 S.C.R. 370 (Can.)).

¹⁶⁵ BORO, *supra* note 6, art. 2(4).

requirement is implied in Article 2(4) because it reduces the Legislative Council's ability to "destroy" BORO rights. Because this provision applies to all rights contained in the BORO, authorizing the rationality requirement in this provision would cover both textually absolute and textually qualified rights.

Both of these approaches would serve to overturn *Leung Kwok Hung's* prescription that the rationality requirement be rooted in the word "necessary." Rather, these approaches would derive the rationality requirement from foreign interpretations of the ICCPR or the all-rights encompassing Article 2(4) of the BORO. Therefore, the rationality requirement would not be reliant on qualifying language in BORO text as prescribed by *Leung Kwok Hung*, but rather become a doctrine rooted in statutory interpretation of the BORO.

3. *Implying the Rationality Requirement into the BORO Runs Little Risk of Being Overturned by the Legislative Council or NPCSC*

Implying the rationality requirement into the BORO is unlikely to be overturned by the Legislative Council or NPCSC. If the courts were to imply the rationality requirement into the BORO, the Legislative Council could attempt to negate the courts by amending or supplementing the BORO in a manner that expressly eliminates the courts' interpretations of the BORO. This situation, however, would be unlikely for three reasons. First, the Council has rarely modified the BORO.¹⁶⁶ Since 1991, only several small modifications have been made.¹⁶⁷ Second, Hong Kong is heavily reliant on its image as an international finance center.¹⁶⁸ The Council is unlikely to risk damage to this image by degrading Hong Kong's compliance with international human rights standards.¹⁶⁹ Because the BORO applies the ICCPR to Hong Kong, any major modification to the BORO would lead to international scrutiny by human rights groups and monitoring by the United Nations Human Rights Committee.¹⁷⁰ Third, the Council is unlikely to risk provoking strong opposition and protest from Hong Kong's politically motivated residents. They are unlikely to repeat the situation in 2003, when "vehement protests, culminating in a half-million strong protest march,

¹⁶⁶ See Young, *supra* note 13, at 110.

¹⁶⁷ *Id.*

¹⁶⁸ 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, 302 (2007).

¹⁶⁹ *Id.*

¹⁷⁰ See CARLSON & GRISVOLD, *supra* note 66, at 4-13. Amnesty International monitors human rights in Hong Kong. See also Amnesty International USA, Hong Kong Human Rights. <http://www.amnestyusa.org/all-countries/hong-kong/page.do?id=1011168> (last visited Apr. 23, 2010).

forced the government to drop the [introduction of national security legislation].”¹⁷¹ Fourth, the Council is unlikely to risk invalidation of modifications to the BORO. If modifications were enacted, courts would be able to engage in constitutional review of the modifications, reviewing whether they are contrary to Article 39’s mandate of applying the ICCPR to Hong Kong.¹⁷²

Implying the rationality requirement into the BORO would also remain outside NPCSC jurisdiction. Under Article 158 of the Basic Law, the NPCSC jurisdiction limited to interpretation of the Basic Law, not domestic legislation. Courts’ interpretation of domestic legislation, such as the BORO, cannot be overturned by the NPCSC. Accordingly, if the rationality requirement is rooted in BORO interpretation, the NPCSC cannot issue a contrary interpretation of the BORO.

Overall, courts should imply the rationality requirement into the BORO because doing so would authorize the requirement for textually absolute and textually qualified rights. Furthermore, there would be little risk of the courts’ being overturned by the Legislative Council or NPCSC.

V. CONCLUSION

Hong Kong Courts have misapplied *Leung Kwok Hung*’s formulation by applying the rationality requirement when considering restrictions on textually absolute BORO rights. This is contrary to the Court of Final Appeal’s formulation set out in *Leung Kwok Hung* in which the rationality requirement is derived from the word “necessary” in qualifying language in the BORO article. In order to correct this misapplication, courts should consider two potential approaches to authorizing the rationality requirement for BORO rights. First, courts could interpret Article 39 of the Basic Law “purposively” and interpret words in its text to require the rationality requirement. Second, courts could imply the rationality requirement into the BORO. While both of these two approaches would eliminate the rationality requirement’s reliance on the word “necessary” in the BORO as formulated by *Leung Kwok Hung*, courts should adopt second approach because it bears little risk of being overturned by the Legislative Council or Standing Committee of the National People’s Congress.

¹⁷¹ HONG KONG JOURNALISTS ASSOCIATION, MACAU TAKES THE LEAD: DANGERS FOR FREEDOM OF EXPRESSION IN HONG KONG 5 (2009). http://www.hkja.org.hk/site/Host/hkja/UserFiles/File/annualreport/annual_report_2009_lowres.pdf (last visited April 29, 2010).

¹⁷² See BASIC LAW, *supra* note 12, art. 39.