

COMMENT

PROHIBITING THE HONG KONG NATIONAL PARTY: HAS HONG KONG VIOLATED THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS?



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1. Introduction

In past publications, I have referred to the International Covenant on Civil and Political Rights (ICCPR) as Hong Kong’s “gold standard” because of its special place in the constitutional order.¹ The treaty has been incorporated into the domestic legal system through the Hong Kong Bill of Rights Ordinance (Cap 383) (BORO)² and art 39 of the Basic Law, Hong Kong’s constitutional instrument.³ Although the Basic Law contains other provisions protecting human rights, art 39 is arguably the most important provision because it links Hong Kong to international norms. Local judges have regularly referred to international and foreign jurisprudence when applying the ICCPR to specific disputes and have declined to enforce local legislation that could not be interpreted so as to comply with the ICCPR.⁴ Equally important, the Hong Kong government has acknowledged that it must abide by the ICCPR, even in the context of acts taken in the name of national security and public order.⁵ This commitment to enforce the

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¹ Carole J Petersen, “Embracing Universal Standards? The Role of International Human Rights Treaties in Hong Kong’s Constitutional Jurisprudence” in Fu Hualing, Lison Harris and Simon Young (eds), *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (New York: Palgrave Macmillan, 2008) pp 34–39.

² The BORO repealed pre-existing legislation that could not be interpreted so as to comply with it. The colonial constitution was also simultaneously amended to provide that subsequent legislation would also comply with the ICCPR. See Hong Kong Letters Patent art VII(5).

³ Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China art 39. The Court of Final Appeal has consistently held that the ICCPR is incorporated into the Basic Law. *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425, [12]–[15].

⁴ For examples of legislation struck down as a result of strategic litigation by members of the LGBT community, see Carole J Petersen, “International Law and the Rights of Gay Men in Former British Colonies: Comparing Hong Kong and Singapore” (2016) 46 *HKLJ* 109, 116, 117.

⁵ For examples, see Petersen (n 1 above) p 36 and *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, [39]–[40].

ICCPR within the region has helped Hong Kong to maintain a reasonably high degree of civil liberties since 1997, although China itself has never ratified the treaty and has become increasingly totalitarian under the rule of Xi Jinping.⁶

Yet in the past three years, considerable damage has been done to Hong Kong's reputation as the freest city in China.⁷ Some of the worst examples (such as the disappearance of Le Po from Hong Kong in December 2015) are likely attributable to Beijing's clandestine actions in the territory.⁸ However, the decision by Hong Kong's Secretary for Security to prohibit the operation of the Hong Kong National Party⁹ (HKNP) is an action by the Hong Kong government, which could eventually be reviewed by the judiciary.¹⁰ Until July 2018, the HKNP was a fairly obscure party — with only two known members and no elected legislators.¹¹ However, the government's decision to prohibit this tiny group has made the HKNP famous, not only locally¹² but also internationally.¹³ If challenged in court, the Secretary's order will present a new test of the region's commitment to the ICCPR because it represents a content-based restriction on the fundamental freedoms of expression and association. The situation is thus qualitatively different from *HKSAR v Ng Kung Siu*, in which the Court of Final Appeal upheld local laws prohibiting flag desecration, largely because the laws restricted only the form of expression rather than the content.¹⁴

⁶ Associated Press, "Human Rights in China under Xi Jinping 'Worst since Tiananmen Crackdown': Amnesty" *South China Morning Post* (17 November 2017).

⁷ Carole J Petersen and Alvin YH Cheung, "Academic Freedom and Critical Speech in Hong Kong: China's Response to Occupy Central and the Future of 'One Country, Two Systems'" (2017) 42 *North Carolina Journal of International Law* 665–727.

⁸ Oliver Chou and Phila Siu, "One Year On: Hong Kong Bookseller Saga Leaves Too Many Questions Unanswered" *South China Morning Post* (29 December 2016).

⁹ Societies Ordinance (Cap 151), Order under s 8(2), GN(E) 52 of 2018 (24 September 2018).

¹⁰ Despite speculation that the government was pressured by Beijing to ban the HKNP, Hong Kong's Secretary for Security has insisted that his decision was "a matter strictly within the autonomy of the HKSAR and has been dealt with in accordance with laws applicable to Hong Kong without any interference or pressure from anyone." See letter dated 24 September 2018 from the Secretary for Security to Daly & Associates, at Enclosure 2 (stating the reasons for the Secretary's order) p 19 (Enclosure 2).

¹¹ Apart from Chan Ho Tin, only one other person (spokesperson Jason Chow Ho-fai) has publicly associated himself with the party. At one point, however, Chan claimed that the party had between 30 and 50 members.

¹² Jason Wordie, "Outrage over Hong Kong Independence Leader Andy Chan's Speech Only Reinforces His Message: Pro-Establishment Indignation Has Catapulted Andy Chan from the Fringes onto a Political Pedestal" *South China Morning Post Magazine* (16 August 2018).

¹³ Austin Ramzy, "Hong Kong Bans Pro-Independence Party" *The New York Times* (24 September 2018), available at <https://www.nytimes.com/2018/09/24/world/asia/hong-kong-party-ban-andy-chan.html> (visited 28 September 2018); Claire Huang, "Pro-Independence National Party Banned in Hong Kong, Stoking Fears of Clampdown on Freedom" *The Straits Times* (24 September 2018), available at <https://www.straitstimes.com/asia/east-asia/hong-kong-government-bans-pro-independence-national-party-citing-security-risks> (visited 28 September 2018).

¹⁴ *Ng Kung Siu* (n 5 above), [42]–[44].

After a brief review of the factual background, this article analyses the Secretary for Security's stated reasons and considers whether the ban on the HKNP can be reconciled with the ICCPR and the Basic Law.

2. The Background to the Prohibition of the HKNP

Disillusioned by the lack of democratic reform and increased interference from Beijing, a small number of Hong Kong residents have embraced the political ideology known as "localism". In March 2016, Andy Chan Ho Tin took this ideology a step further and formed the HKNP, with the stated goal of advocating for an independent Hong Kong. Chan, a recent university graduate, believes that secession is the only way that Hong Kong citizens can stop the erosion of their way of life. He sought to spread that message through a variety of speech acts, including messages on Facebook, speeches and radio interviews. Although he concedes that he used "provocative political rhetoric" in the early stages of his advocacy, Chan insists that the HKNP made, as early as July 2016, an express commitment to nonviolence.¹⁵ In an affirmation submitted when he attempted to stand for election to the Legislative Council, Chan further stated that the HKNP accepted that Hong Kong is a part of China and did not propose a unilateral declaration of independence; rather, the party advocated for "political engagement with the PRC authorities to discuss changes to Hong Kong's future constitutional arrangement", which Chan believed could occur in 2047, 50 years after China resumed sovereignty over Hong Kong.¹⁶

HKNP's stated goal is widely viewed as a mere pipedream and Chan has few resources at his disposal. Nonetheless, the very existence of this small party provoked a strong reaction — not only from Beijing itself but also from certain local politicians who were eager to show their loyalty to the Central Government.¹⁷ As Chan was not committing any obvious

¹⁵ Written Submissions dated 14 September 2018 from Chan Ho Tin to the Secretary for Security Re: Recommendation on Prohibiting the Operation of the Hong Kong National Party under s 8 of the Societies Ordinance, paras 69–73 (submitted under cover of letter dated 14 September 2018 from Daly, Ho & Associates to the Secretary for Security) (Written Submissions).

¹⁶ *Ibid.*, para 87 (quoting from Chan's second affirmation for his election petition). Chan's reference to 2047 stems from art 5 of the Basic Law which states that "the previous capitalist system and way of life shall remain unchanged for 50 years". Similar language appears in art 3(12) of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (1984).

¹⁷ An official from the Central Government was quoted as suggesting that Chan should be prosecuted for "seditious speech" under s 9 of the Crimes Ordinance (Cap 200) and some local politicians also supported this idea; however, a criminal prosecution would have been very difficult because the Crimes Ordinance must be interpreted so as to comply with the BORO and the ICCPR. See Alvin Lum, "Separatist Leader Andy Chan Cannot Be Charged under Current Hong Kong Law, City Lawyers Say" *South China Morning Post* (17 August 2018).

criminal offences, the government has instead relied upon its considerable administrative powers to quash its advocacy. For example, Chan's efforts to register the HKNP were blocked¹⁸ and his nomination to stand for election to the Legislative Council was invalidated by a Returning Officer.¹⁹ However, the decision by the Secretary for Security to prohibit the very operation of the HKNP is a far more dramatic step.²⁰ By declaring it an "unlawful society", the government has exposed anyone who joins or gives aid to the party to the possibility of criminal prosecution.²¹ The order took effect immediately and the government wasted no time using it to discourage pro-independence advocacy. For example, the Education Bureau wrote to local universities and to more than 500 secondary schools, reminding them that students should not promote independence or offer assistance to "illegal societies" if they wished to avoid criminal liability.²² The Organised Crime and Triad Bureau is now monitoring protest marches for any sign of public support for the HKNP.²³ The government also appears to have used its considerable discretion over immigration matters to punish the Hong Kong Foreign Correspondents' Club (FCC) for hosting a talk by Chan, even before the HKNP was banned.²⁴

There is no doubt that the order prohibiting the HKNP constitutes a restriction on the fundamental freedoms of association and expression, which includes the right to "seek, receive and impart information and ideas" of all kinds.²⁵ The order also restricts the right to political

¹⁸ Political parties in Hong Kong can only be registered as companies or societies. Chan attempted to incorporate the HKNP as a company but has been prevented from doing so. Written Submissions (n 15 above) para 81.

¹⁹ Returning Officers are civil servants appointed to vet the formal qualifications of candidates. The High Court subsequently dismissed Chan's election petition against the Returning Officer's decision. *Chan Ho Tin v Lo Ying Ki Alan* [2018] 2 HKLRD 7. Chan abandoned his appeal because he was not granted legal aid. Alvin Lum, "Hong Kong National Party's Andy Chan Drops Appeal against Election Ban after Failing to Get Legal Aid for Court Fight" *South China Morning Post* (13 September 2018).

²⁰ The Secretary acted under s 8(2) of the Societies Ordinance.

²¹ *Ibid.*, ss 19–23 (defining numerous criminal offenses, including acting as a member, attending a meeting or giving aid to an unlawful society).

²² Tony Cheung and Su Xinqi, "Students Who Associate with Outlawed Hong Kong National Party Can Face Criminal Sanctions, Government Tells Schools as Top Beijing Official Welcomes Ban" *South China Morning Post* (26 September 2018).

²³ Alvin Lum and Clifford Lo, "Hong Kong Protesters Channel Catalan Spirit as They March for Independence While Testing Limits of Ban That Saw Separatist Party in the City Outlawed" *South China Morning Post* (1 October 2018).

²⁴ The work visa of the Vice-President of the FCC (who served as host for the speech and declined to cancel the event, despite pressure from local and government officials) was not renewed; the local government has refused to comment on the matter. See Jeffie Lam, Tony Cheung and Su Xinqi, "Backlash as Hong Kong Denies Visa Renewal for Financial Times Journalist Victor Mallet" *South China Morning Post* (5 October 2018).

²⁵ ICCPR arts 19 and 22; see also Basic Law art 27. While the Basic Law does not expressly allow for limitations, the judiciary has looked to the ICCPR when assessing the extent to which the local government may lawfully limit the exercise of these rights.

participation and may constitute discrimination on the ground of political opinion.²⁶ The question is whether the government would be able to justify these restrictions if the order is challenged in court. The ICCPR and the BORO expressly allow restrictions on the freedoms of association and expression if they are “provided by law” and “necessary in a democratic society” for certain legitimate purposes, including national security, public order and the rights and freedoms of others.²⁷ The provision cited by the Secretary for Security sets a very similar standard, providing that the process for banning a society may only be initiated when the Societies Officer “reasonably believes that the prohibition of the operation or continued operation of a society or a branch is necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others”.²⁸ Moreover, like all local ordinances, the Societies Ordinance must be interpreted so as to comply with the ICCPR.

The remainder of this article thus assesses the Secretary for Security’s reasoning and certain procedural concerns, in light of judgments by the Court of Final Appeal and decisions by the United Nations Human Rights Committee (the treaty-monitoring body for the ICCPR). Judgments by the European Court of Human Rights are also considered because Hong Kong courts frequently rely upon them as persuasive authority.

3. Procedural Deficiencies Alleged by Chan

If the order banning the HKNP is challenged in court, one of the first considerations will be whether the Secretary for Security afforded the HKNP an opportunity to be heard and respond to the allegations against it. Pursuant to art 14 of the ICCPR (which was copied, *verbatim* into the BORO), everyone shall be entitled to a fair and public hearing in *any* determination of a person’s legal rights and obligations.²⁹ Given that the ban on the HKNP exposes members to the possibility of criminal prosecution, any process relating to its prohibition should have been treated as quasi-criminal and included a particularly high level of procedural justice.

Chan has alleged that his ability to refute the allegations made by the Assistant Societies Officer was hindered by numerous procedural

²⁶ ICCPR arts 2, 25 and 26.

²⁷ ICCPR arts 19, 21 and 22; BORO s 8 arts 16 and 18.

²⁸ Societies Ordinance s 8 (1)(a).

²⁹ BORO s 8 art 10; ICCPR art 14. The UN Human Rights Committee has emphasised that this obligation applies to civil actions as well as criminal prosecutions. See UN Human Rights Committee, General Comment 13: art 14 (Administration of Justice), adopted in the 21st Session (1984), para 2.

deficiencies, including that: (1) he was not provided with publicly funded legal assistance; (2) he was not provided with all of the materials that he requested from the government; (3) his request to make oral submissions before the Secretary reached a decision was denied; (4) he was given insufficient time to prepare his written submissions to the Secretary; and (5) nine members of the Executive Council made comments in the public domain regarding the HKNP and therefore should have recused themselves from the discussion and decision-making of his appeal.³⁰

The extent to which these factors have prejudiced Chan is unclear at this time. It is, however, very possible that he was adversely affected by the tight timetable set by the Secretary for Security. Although the police were apparently monitoring the HKNP for two years (and constructed an enormous dossier), Chan did not receive the Assistant Societies Officer's recommendation that the party should be banned until July 2018. Chan was initially given only three weeks to make written representations as to why the Secretary for Security should not accept the recommendation and ban the party. The deadline was extended to approximately eight weeks; subsequent requests for extensions were denied. This is surprising, especially given the enormous volume of material that Chan needed to review (more than 1,000 pages of documents plus numerous audio and video recordings made by the police during their surveillance of the HKNP). It is not difficult to imagine how this rigid schedule, combined with the government's refusal to provide publicly funded legal assistance, could have prejudiced Chan's ability to refute the allegations made by the Assistant Societies Officer.³¹ This is particularly important because, as demonstrated in the next section, the Secretary for Security's reasons for the order draw heavily upon certain factual inferences, which Chan disputes.

4. Assessing the Legitimacy of Restrictions on ICCPR-Protected Rights

The Court of Final Appeal has established that a restriction on rights protected by the ICCPR and Basic Law is only lawful if the restriction is no more than necessary to accomplish legitimate aims and if a "fair

³⁰ Written Submissions (n 15 above) paras 4–27 and letter dated 24 October 2018 from Daly & Associates to the Office of the Chief Executive. As of 7 December 2018, no decision on the appeal had been announced.

³¹ Chan has stated that he has limited financial means and has only been able to obtain "limited assistance provided on a *pro bono* basis". Written Submissions (n 15 above) para 23.

balance” has been struck between the demands of the community and the requirements of the protection of the individual’s fundamental rights.³² The “cogency of the justification required” increases with the extent of the interference and the importance of the right.³³ Thus, the wider the restriction the more difficult it would be to justify.³⁴

As this is the first time that the Hong Kong government has attempted to ban a political party, a court reviewing the order would almost certainly look to international jurisprudence for guidance. The UN Human Rights Committee has observed that an order banning the operation of a political party constitutes a severe restriction on fundamental rights because “the existence and functioning of a plurality of associations, including those which peacefully promote ideas not favourably received by the government or the majority of the population, is one of the foundations of a democratic society.”³⁵ Thus, an order banning a political party would require a particularly high showing of necessity by the government. The European Court of Human Rights has also held that only “convincing and compelling reasons” can justify restrictions on political parties’ freedom of association.³⁶ This is particularly true when a government forces a political party to dissolve, which the HKNP must do to avoid criminal liability. Such a “drastic measure” requires very serious reasons before it can be considered proportionate to the legitimate aim pursued and will be warranted only in the most serious of cases.³⁷

The Secretary for Security is clearly aware of the high standard and has attempted to rely upon virtually all of the grounds allowed by the ICCPR: national security; public safety and public order; and the rights and freedoms of others.³⁸ Although there is some overlap in the Secretary’s reasoning, it is important to analyse each ground separately because the Secretary claims that the order can be justified on the basis of each of these grounds, whether considered “independently or collectively”.³⁹

³² This is part of the four-part analysis expressly adopted by the Court of Final Appeal in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, [70]–[77].

³³ *Ibid.*, [108]–[112].

³⁴ *Ibid.*

³⁵ *Jeong-Eun Lee v Republic of Korea*, Communication No 1119/2002, UN Doc CCPR/C/84/D/1119/2002 (2005), [7.2]–[7.3].

³⁶ *Umo Ilinden-Pirin v Bulgaria*, ECHR (First Section), Application no 59489/00 (20 October 2005), [56].

³⁷ *Ibid.*

³⁸ Enclosure 2 (n 10 above) para 2. See also “Transcript of Remarks by Secretary for Security on Exercising Powers under Societies Ordinance” (24 September 2018), available at <https://www.info.gov.hk/gia/general/201809/24/P2018092400678.htm>.

³⁹ Enclosure 2 (n 10 above) para 4.

(a) Is the Order “Necessary” to Protect National Security?

In the area of national security, courts generally give the government a certain “margin of discretion” because the executive branch may be in a better position to assess potential threats.⁴⁰ But that does not mean that the court will accept a bald assertion that a political party threatens national security.⁴¹ Rather, the government has the burden of demonstrating that the order is truly “necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose.”⁴² The government must demonstrate in “specific and individualised fashion” the precise nature of the threat posed by the HKNP and the “necessity and proportionality of the specific action taken”.⁴³

The Human Rights Committee has consistently applied these requirements when governments have attempted to use “national security” as a justification for restricting the rights of association and expression. For example, in *Jeong-Eun Lee v Republic of Korea*, the Committee rejected South Korea’s assertion that it was necessary to criminalise membership in Hanchongnyeon (a party representing university students) because the government failed to demonstrate, in specific terms, how the party presented “a real danger to the national security and democratic order” of South Korea.⁴⁴ Similarly, in *Tae-Hoon Park v Republic of Korea*, the Committee determined that South Korea violated the ICCPR when it prosecuted a student for his involvement in an organisation that advocated for the peaceful reunification of North and South Korea. The South Korean government could not demonstrate *how* the party’s advocacy threatened national security. These two decisions are striking because the Committee acknowledged that South Korea is in a precarious security situation. Nonetheless, simply designating certain organisations as “enemy benefiting” was not sufficient to demonstrate a threat to national security. Rather, the burden was on the government to “specify the precise nature of the threat” posed by the student groups.⁴⁵ The Committee has applied a similar approach when reviewing complaints arising from restrictions on advocacy for a labour strike or other peaceful assembly.⁴⁶

⁴⁰ *Hysan Development Co Ltd* (n 32 above), [116]–[117].

⁴¹ UN Human Rights Committee, General Comment 34 art 19. Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 35. General Comments by the treaty-monitoring body are considered highly authoritative interpretations of treaty obligations.

⁴² *Jeong-Eun Lee* (n 35 above), [7.2].

⁴³ General Comment 34 (n 41 above), para 35.

⁴⁴ *Jeong-Eun Lee* (n 35 above), [7.2].

⁴⁵ *Tae-Hoon Park v Republic of Korea*, Communication No 628/1995, 3 November 1998, [10.3].

⁴⁶ *Sohn v Republic of Korea*, Communication No 518/1992, 14 July 1995, especially [10.4].

The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (which have been cited by the Hong Kong courts as persuasive authority) set similar standards for governments seeking to rely upon national security as a ground for restricting fundamental rights.⁴⁷ National security can only be used to justify restrictive measures when they are demonstrably necessary to respond to a genuine threat to the existence of the nation, its territorial integrity or political independence. Similarly, under the Johannesburg Principles, governments bear the burden of proving that the genuine purpose and demonstrable effect of the restriction is to “protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use of force.”⁴⁸

In the case of the HKNP, the Secretary for Security has argued that the HKNP threatens national security simply because it has taken “concrete steps” to achieve independence. The term “concrete steps” was probably intended to convey a picture of actions that pose a genuine threat to China’s national security or territorial integrity. In fact, the “steps” cited by the Secretary consist of a long list of speech acts and other peaceful activities, such as printing leaflets, giving radio interviews, raising funds and attempting to register the HKNP as company (which the government blocked). It is hard to imagine how any of these activities — especially when taken by a miniscule party that was already prohibited from fielding candidates for the Legislative Council — constitute a genuine threat to China’s territorial integrity or its capacity to respond to the use of force. Indeed, Chan had previously stated (in an affirmation) that the tiny party was not hoping to seize power or to declare independence unilaterally. Rather, the HKNP hoped to build public support for its cause and then eventually pursue “political engagement with the PRC authorities” to discuss changes that might occur in 2047.⁴⁹ It is inconceivable that this mild plan could threaten the national security of one of the world’s great military powers.

Indeed, there are a host of political parties in other parts of the world, which actively advocate for regional self-determination, either in the

⁴⁷ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, UN Doc E/CN.4/1985/4, at Pt VI, National Security.

⁴⁸ *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, published as an Annex to UN Doc E/CN.4/1996/39 (1996), Principles 1(d) and 2(a).

⁴⁹ Written Submissions (n 15 above), para 87 (quoting from Chan’s second affirmation in support of his election petition, which was rejected).

form of autonomy or full independence. Examples include the Hawaiian Independence Party, the Parti Québécois in Canada, the Scottish National Party and the New Flemish Alliance in Belgium.⁵⁰ Governments that adhere to the ICCPR generally understand that they cannot prohibit these parties solely on the basis of their separatist beliefs.

When certain European governments have tried to outlaw separatist parties, the European Court of Human Rights has consistently rejected the argument that advocacy for independence is an inherent threat to national security.⁵¹ For example, in a case brought against Bulgaria, the Court did not accept the government's assertion that it needed to ban the activities of a Macedonian organisation in order to protect Bulgaria's security and territorial integrity. The Court held that:

[t]he mere fact that a group of persons calls for autonomy or even requests secession of a part of a country's territory — thus demanding fundamental constitutional and territorial changes — cannot automatically justify interference with their rights ... expressing separatist views and demanding territorial changes in speeches, demonstrations, or program documents does not amount, *per se*, to a threat to a country's territorial integrity and national security.⁵²

The European Court of Human Rights has also considered a number of cases in which the government alleged that the separatist party was inciting violence and these decisions illustrate the level of evidence that would be required. For example, in *Sürek v Turkey (No 3)*, the Court accepted Turkey's argument that it was necessary to prosecute the applicant because he expressed support for the use of armed force by the PKK, a known terrorist organisation that was already engaged in an armed conflict with the Turkish government.⁵³ In contrast, in *Incal v Turkey*, the Court found that Turkey violated the European Convention when it prosecuted the applicant for circulating a pamphlet that simply accused the government of harassing Kurdish traders and urged citizens to oppose the harassment through neighbourhood committees.⁵⁴ Similarly,

⁵⁰ For a more comprehensive list of such parties in Europe, see Christian On Sun, *Political Autonomist and Secessionist Parties in the EU* (Association of Accredited Public Policy Advocates to the European Union, 2017), available at <http://www.aalep.eu/political-autonomist-and-secessionist-parties-eu> (visited 1 November 2018).

⁵¹ See, eg, *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, ECHR (First Section), Applications nos 29221/95 and 29225/95 (2001), [97].

⁵² *United Macedonian Organisation Ilinden v Bulgaria*, ECHR (Application no 59491/00 (19 January 2006), [76].

⁵³ ECHR (Grand Chamber), Application no 24735/94 (1999).

⁵⁴ ECHR (9 June 1998), in *Reports of Judgments and Decisions 1998-IV*, p 1569.

when Turkey prosecuted a trade union president for writing an article that condemned acts of “state terrorism” against the Kurdish people, the Court found that the criminal conviction was disproportionate because there was no evidence that the article encouraged violence against the state.⁵⁵

Thus, if the Hong Kong government hopes to justify the prohibition of the HKNP on national security grounds then it should be prepared to show that the HKNP was either a violent separatist movement itself or was, at a minimum, likely to incite violence against state authorities. In the press conference announcing his decision to ban the party, the Secretary for Security strongly implied that the HKNP fell within this category, stating that “I cannot ignore the fact that the [HKNP] has repeatedly advocated that it would use all methods, including the use of force, and also encouraging its supporters to use force.”⁵⁶ If a court were to accept this factual inference then it might be able to uphold the order banning the HKNP on the narrow ground that it had, at least at one time, advocated violence. Interestingly, however, in the Secretary for Security’s formal statement of the reasons for prohibiting the party, the section devoted to national security does not even allege that the party was likely to engage in or incite violence. Rather, the Secretary relied entirely on the party’s peaceful activities (mostly speech acts), which the Secretary characterised as “concrete actions” aimed at achieving independence. In other words, the Secretary has done exactly what the UN Human Rights Committee and the European Court of Human Rights have ruled out — he has assumed that the goal of Hong Kong independence is *per se* a threat to China’s national security. On this record, a judgment upholding the Secretary’s argument that it was “necessary” for national security to ban the HKNP would set a very dangerous precedent.

Finally, it should be noted that under the heading of “national security” the Secretary for Security has also relied upon speech acts by Chan that the Secretary believes were designed to weaken China’s international standing.⁵⁷ There is no doubt that Chan has criticised Beijing and that this could diminish the reputation of the local and central governments. But a threat to the international reputation of a particular government does not constitute a threat to national security. The Human Rights Committee emphasised this point in *Mukong v Cameroon*, in which the government

⁵⁵ *Ceylon v Turkey*, ECHR (Grand Chamber) (1999).

⁵⁶ Hong Kong Government, “Transcript of Remarks by Secretary for Security on Exercising Power under Societies Ordinance” (24 September 2018), available at <https://www.info.gov.hk/gia/general/201809/24/P2018092400678.htm>.

⁵⁷ Enclosure 2 (n 10 above), especially paras 9, 14 and 15.

of Cameroon prosecuted a journalist for “intoxication of international and national opinion” after he criticised the government and Cameroon’s one-party system in the international press.⁵⁸ The government argued that this advocacy weakened the state and its efforts to build national unity. The Human Rights Committee firmly rejected Cameroon’s position, concluding that even if strengthening national unity were accepted as a legitimate aim (it is not expressly stated as such in the ICCPR), the government could not lawfully pursue that aim by attempting to muzzle advocacy for multiparty democracy and human rights. Similarly, the Secretary for Security cannot lawfully restrict advocacy for self-determination (a right stated in the ICCPR) simply by asserting that Chan’s public comments could “weaken” national unity or China’s international standing.

(b) Is the Order Necessary to Protect Public Safety and Public Order?

If the HKNP had engaged in or incited violence (even small-scale local violence that was not a direct threat to China’s national security), then the Secretary for Security could rely upon that as an independent justification for prohibiting the party. A foundational principle in the Johannesburg Principles is that a government can restrict rights if it demonstrates that the expression is intended to incite imminent violence and is likely to do so.⁵⁹ In the section of his decision devoted to public order, the Secretary has cited some colourful remarks made by Chan (apparently more than two years ago) to argue that the HKNP has the *potential* to incite violence. For example, Chan is alleged to have initially endorsed “whatever effective means” to gain independence and to have urged Hong Kong people to “pick up their weapons” to protect Hong Kong.⁶⁰

Of course, the timing of these remarks creates a problem for the Secretary — if Chan really intended to incite violence with this language and had the capacity to do so, then one would expect at least one violent incident since he made those remarks in 2016. The lack of actual violence in the past two and one-half years argues in favour of Chan’s explanation, which is that his more colourful remarks have been taken out of context by the Secretary and constituted mere political rhetoric, delivered at times when Chan was feeling particularly emotional.⁶¹ Moreover, Chan maintains that the HKNP has publicly

⁵⁸ Communication No 458/91. Views adopted on 21 July 1994, [9.7].

⁵⁹ Johannesburg Principles (n 48 above), at Principle 6.

⁶⁰ Enclosure 2 (n 10 above) para 18.

⁶¹ Written Submissions (n 15 above) paras 62–69.

disavowed violence since at least mid-2016. The Secretary has been careful to note Chan's submissions on this point but has entirely discounted them, concluding, without evidence, that the commitment to peaceful means was just a cynical tactic to help Chan run for office, register his company, and, avoid an order of prohibition.⁶²

To a large extent, this issue would depend not on the law but on a court's assessment of the evidence. If a court were to accept the Secretary's factual conclusions, then it could perhaps uphold the order on the narrow ground that Chan's early advocacy was intended to incite violence and had the capacity to do so, that his more recent commitment to nonviolence was not believable, and that it was therefore necessary to prohibit the HKNP in order to protect public safety and public order. If such a judgment were expressly tied to Chan's apparent endorsement of violent means then this would not set a dangerous precedent.⁶³ Other political parties that advocate for self-determination or independence would just have to be very careful to expressly disavow all forms of violence and avoid any language that might be construed as advocating for the use of force.

What is more concerning is the Secretary's second argument under the heading of "public order", which is that the HKNP has not ruled out organising peaceful assemblies that might be large enough to block traffic.⁶⁴ Given its tiny size, it is highly unlikely that the HKNP could inspire a massive protest along the lines of Occupy Central in 2014. More importantly, however, the capacity of a political party to organise a large-scale peaceful assembly should never be used as a justification for declaring that party to be an "illegal society". In his explanation for relying upon this rationale, the Secretary for Security speculated that because of the HKNP's previous language there is a risk that supporters with violent tendencies may turn out to join even a peaceful protest. This is, of course, a possibility for any organisation engaged in social movements. But it would be an exceedingly damaging precedent if the court were to uphold the order on this basis. If genuine, the Secretary's concern would be more appropriately dealt with under the Public Order Ordinance, which gives the Hong Kong government significant discretion over the location and timing of public

⁶² Enclosure 2 (n 10 above) para 21.

⁶³ The government would, however, be open to criticism for its selective enforcement of this strict "non-violence" standard because it has not taken equivalent action against pro-China politicians who have advocated violence against pro-independence advocates. See Earnest Kao, "'Unhealthy and Stupid' Calls to Kill Advocates of Hong Kong Independence Criticised by City's Leader" *South China Morning Post* (19 September 2017).

⁶⁴ Enclosure 2 (n 10 above) para 23.

demonstrations.⁶⁵ To ban a political party on this highly speculative basis would constitute a disproportionate and draconian measure, in violation of the ICCPR and the Basic Law.

(c) Arguments Based on “Hate Speech” and the Need to Protect the Rights of Others

Finally, the Secretary for Security has argued — perhaps as a backup position — that the HKNP “spreads hatred and discrimination” against Mainland Chinese and that this provides an independent justification for prohibiting the party.⁶⁶ The ICCPR does permit restrictions on the freedoms of expression and association where *necessary* to protect the rights of others.⁶⁷ Indeed, art 20 of the ICCPR obligates governments to prohibit propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.⁶⁸

Article 20 does not, however, create a general exception to the government’s obligations under arts 19 and 22 of the ICCPR. Rather, a government should only use art 20 as a justification for prohibiting speech of “an extreme nature” and it must always abide by the duty of proportionality.⁶⁹ Prohibiting an entire political party on this ground is a draconian measure which requires an especially strong showing of necessity. In countries that adhere to the ICCPR, an organisation would not normally be banned on this basis unless its very purpose was to promote ethnic or racial hatred and it had the capacity to do so.⁷⁰ A good example of an organisation that met that standard is the National and Patriotic Association of Polish Victims of Bolshevism and Zionism: the association’s memorandum of association demonstrated a clear intent to revive anti-Semitism, as did the “anti-Semitic tenor” of the party’s submissions in court.⁷¹ These facts and the tragic consequences of anti-Semitism in Poland enabled the European Court of Human Rights to uphold the Polish government’s decision to

⁶⁵ The government has been widely criticised for using that discretion to make it more difficult for pro-democracy groups to organise marches. See Christy Leung, “Hong Kong’s July 1 March Participants Could Face Legal Action over Start Point in Shopping Areas, Police Chief Stephen Lo Warns” *South China Morning Post* (15 April 2018).

⁶⁶ See ICCPR art 20, which obligates governments to prohibit advocacy for “national, racial or religious hatred that constitutes incitement to discrimination, hatred, or violence.”

⁶⁷ ICCPR arts 19(3) and 22(2).

⁶⁸ *Ibid.*, art 20.

⁶⁹ General Comment 34 (n 41 above) para 53.

⁷⁰ See European Commission for Democracy through Law (Venice Commission), *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures* (10 January 2000), available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2000\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)001-e).

⁷¹ *WP v Poland*, ECHR, App no 42264/98, 2 September 2004.

prohibit the association. In contrast, in *Jersild v Denmark*, the European Court of Human Rights held that it was disproportionate to prosecute a journalist who produced a documentary, even though it included very explicit expressions of hatred by a group of racist youths. The Court noted that the journalist's purpose was not to promote racial hatred but rather to stimulate public debate on racism and other social problems in Denmark.⁷²

Similarly, the stated purpose of the HKNP was obviously not to promote discrimination but rather to advocate for independence. The Human Rights Committee has expressly stated that art 20 should not be interpreted as a justification for prohibiting advocacy for self-determination.⁷³ The fact that Chan believes that increased immigration from Mainland China to Hong Kong has caused certain social problems — and that these problems would be reduced by independence — does not magically transform the HKNP into a racist party. There also appears to be no evidence that the HKNP incited discrimination against anyone. In light of these facts, prohibiting the party is a grossly disproportionate response, even if Chan made some comments that were considered offensive to Mainland Chinese.

What is perhaps most disturbing about the Secretary for Security's reasoning under this heading is his reliance on Chan's 2018 speech at the FCC as an example of hate speech. The vast majority of this speech did not even mention Mainland Chinese. Rather, Chan criticised the Chinese Government — not only for its treatment of Hong Kong but also for its violations of the rights of ethnic minorities in other parts of China. (In this sense, Chan's speech would be more accurately characterised as condemning discrimination rather than endorsing it.) There is only one paragraph in the speech that focused on Mainland Chinese migrants themselves. That paragraph argued that the level of migration is overwhelming local housing and medical resources and may eventually cause Hong Kong to abandon Cantonese and switch to Mandarin in the local educational system. Chan thus referred to the Central Government's policies (including its efforts to stifle local democracy) as a form of "national cleansing".⁷⁴ In his decision to ban the HKNP, the Secretary for Security cited this paragraph as an example of "incitement of hatred and discrimination against people of

⁷² *Jersild v Denmark*, App no 15890/89, (1995) 19 EHRR 1, 23 September 1994.

⁷³ UN Human Rights Committee, General Comment 11 art 20 (Prohibition of propaganda for war and inciting national, racial, or religious hatred), 29 July 1983, HRI/GEN/1/Rev 9 (Vol I, p 182).

⁷⁴ For the video and text of the speech, see "Video: In full — Activist Andy Chan Says Hong Kong Independence Is the only Path to Democracy at Press Club Talk" *Hong Kong Free Press* (14 August 2018), available at <https://www.hongkongfp.com/2018/08/14/video-full-activist-andy-chan-says-hong-kong-independence-path-democracy-press-club-talk/>.

Mainland origin on the ground of where they were from”.⁷⁵ This is an absurd characterisation of Chan’s speech, which contains no suggestion that Mainland Chinese are inferior or evil or that local residents should discriminate against them.

Finally, the Human Rights Committee has reminded governments that any restrictions designed to protect people from expressions of racial hatred must be in “strict conformity” with art 19 and the duty of proportionality.⁷⁶ This means that even if the government genuinely believes that Mainland Chinese might experience discrimination as a result of the HKNP’s rhetoric then it has a duty to explore less draconian ways of protecting Mainland Chinese than banning the HKNP. In this case, there is an obvious alternative, which is to add language to the Race Discrimination Ordinance (Cap 602) to make it clear that the term “national origin” includes origin from anywhere outside Hong Kong.⁷⁷ This would give Mainland Chinese the right to go to the Equal Opportunities Commission and request a legal remedy if they experience discrimination, harassment or vilification because of their origin. Yet, when commentators have made this suggestion the government has always rejected it as unnecessary. Under these circumstances, it is disingenuous for the Secretary to rely upon a sudden desire to protect Mainland Chinese from discrimination as the justification for the very extreme measure of prohibiting a political party.

5. Conclusion

Most residents of Hong Kong will not miss the HKNP if the ban is allowed to stand. It was never a popular group and was considered, even by most pro-democracy groups, to be on the fringe of Hong Kong politics. The government may have hoped that Chan would not even challenge the order in court due to his limited financial resources and the lack of public legal funding. If this happens then the order will have a chilling effect on many people even though it will not have been tested in court.

If the order is challenged in court then the judiciary will be placed in an exceedingly difficult position. In some respects, the situation will be similar to that faced by the courts in *Ng Kung Siu* because the Central Government will have such a strong interest in the outcome. However, as a content-based restriction on the freedoms of association and expression, the ban on the HKNP would be far more difficult to reconcile with the

⁷⁵ Enclosure 2 (n 10 above) para 27.

⁷⁶ General Comment 34 (n 41 above) para 53.

⁷⁷ Carole J Petersen, “Racial Equality and the Law: Creating an Effective Statute and Enforcement Model for Hong Kong” (2004) 34 *HKLJ* 459, 465–467.

ICCPR than an ordinance prohibiting flag desecration. If the order declaring the HKNP to be an illegal society is upheld then it is essential that the judgment be tied closely to the specific facts of this case and to the evidence (however thin) that Chan originally suggested the use of force to achieve independence. The court must avoid issuing any judgment that defines advocacy for independence as a *per se* threat to either national security or public order or that defines criticism of migration policies as a form of hate speech. The court would also need to craft its judgment in a way that makes it clear that Hong Kong residents have the right to advocate peacefully for democracy and human rights, including the right to self-determination.⁷⁸

⁷⁸ ICCPR art 1. It should be noted that self-determination does not necessarily amount to independence. In international law, the term “internal self-determination” is used to refer to the right to democracy and political participation or to the right to exercise cultural, linguistic, religious, territorial or political autonomy within the boundaries of the existing state. See Michael C van Walt and O Seroo (eds), *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998, UNESCO Division of Human Rights Democracy and Peace and the UNESCO Centre of Catalonia, p 12 (discussing different meanings of “internal self-determination” and controversies surrounding the term), available at <http://www.unpo.org/downloads/THE%20IMPLEMENTATION%20OF%20THE%20RIGHT%20TO%20SELF.pdf>.