

On “National Consciousness” of the Basic Laws of the Special Administrative Regions

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I. “National Consciousness” from the Constitutional Perspective

Generally speaking, the basic elements that constitute a “state” include four essential factors as people, government, land and sovereignty. In modern society, the concept of the “state” contains such multiple meanings as politics, society and natural physics. In fact, it becomes a unity that covers political, social, and natural physical properties. The so-called “national consciousness” is the identity and recognition that people on the specific land holds for the state and embodies the cognitive status and mental state of people for the value consensus of the political community.

In social sciences, legal science is considered as a discipline that is most “associated with the state”. The research and application of law proposition must be in the national background and context, and shall adapt to the actual situation of the country. Since the formation of the modern Western nation-state, the emphasis on “national law” has become a basic premise of discourse.¹ Savigny, great master of German historical law school, believes that the essence and foundation of law is “the national spirit”. Legal thinking and understanding of the law must be done in the history of a nation and country.² Therefore, in the study of legal science, “legal thinking must implement the national consciousness”, which is a proposition without much controversy.

Furthermore, in the various departments of the law, the constitution has a distinct national characteristic. In the countries with a continental law system, the concept of “national laws” has been used more often than that of “constitution” for a long time.³ The constitution has two levels of meaning: One is a constitution with the supreme legal meaning. The other is a constitution in the sense of the legal departments. the *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (hereinafter as “the Hong Kong Basic Law”) and the *Basic Law of the Macao Special Administrative Region of the People’s Republic of China* (hereinafter as “the Macao Basic Law”) enacted by the National People’s Congress (NPC) fall under the basic laws of the People’s Republic of China (PRC) in the sense of the constitutional departments. Since the two Basic Laws are laws under *The Constitution of the People’s Republic of China* (hereinafter as “the Constitution”) and since the interpretation and implementation of the two Basic Laws is the application and practice of legal thinking, one cannot fail to notice the national consciousness embodied in the texts of the two Basic Laws and in their implementation.

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II. "State" and National Consciousness in the Text of the Constitution

2.1 The meaning of "state" in the text of Constitution

In Chinese, "*guojia*" (國家) is the Chinese equivalence of "state", and it may also be translated as some other synonyms such as "country" or "nation". In order to understand the national consciousness embodied in the Basic Laws, it is necessary first to understand the national consciousness embodied in the Constitution. Therefore, it is necessary to analyze the concept of "state" in the text of the Constitution. In the valid text of the current Constitution (the Chinese version), the term "*guojia*" has been used for 151 times in its catalogue and text. The term "*guojia*" has different connotations in the different contexts of the Constitution. What follows is an induction of the concept of several different connotations of "*guojia*" from the different contexts of the Constitution:

2.1.1 "Country" used in the sense of a unified political entity

"Country" in the most common usage of the term represents a unified political entity. Specifically, it is divided into the following two senses: an independent sovereign country to the outside world and a sovereign state power to the domestic people. The former usage is illustrated in the second paragraph of the preamble of the "Constitution": "Feudal China was gradually reduced after 1840 to a semi-colonial and semi-feudal country. The Chinese people waged wave upon wave of heroic struggles for national independence and liberation and for democracy and freedom." The latter usage is often described as "the power of the state", "state organ", "national institutions", etc. For example, Article 57 of the "Constitution" provides: "The National People's Congress of the People's Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People's Congress."

2.1.2 "State" used in the corresponding sense of society

The term "state" is often used in the corresponding sense of society. The frequent used expressions in text are "state and society". For example, Article 45 of the "Constitution" provides: "Citizens of the People's Republic of China have the right to material assistance from the state and society when they are old, ill or disabled. The state develops the social insurance, social relief and medical and health services that are required to enable citizens to enjoy this right." Society has a special significance in the development of the Constitution and it is necessary to reveal its connotation and value functions.

2.1.3 "State" used in the contrast sense of the local authorities

The term "State" is sometimes used in contrast to the local authorities. It is often used in sentences connected with the local authorities. In this sense, "state" refers to the Central Government. These provisions reflect the unity of the state power configuration under the unitary form of structure. For example, Article 115 of the Constitution provides: "The organs of self-government of autonomous regions, prefectures and counties exercise the right of autonomy within the limits of their authority as prescribed by the Constitution, the law of regional national autonomy and other laws, and implement the laws and policies of the state in the light of the existing local situation."

2.2 "State" and "national consciousness" provided in Article 31 of the Constitution

After analyzing the different uses of the "state" ("*guojia*") in the entire text of the Constitution,

we will further analyze Article 31 of the Constitution on the basis of which the Basic Laws have been enacted.

Article 31 of the Constitution provides: “The State may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of the specific conditions.” Here the “State” is as a unified political entity. This means that the establishment of a Special Administrative Region (SAR) is the decision of China’s entire political unity, which means that the SAR is bound to implement the common values and common beliefs of the entire political unity – including the basic value consensus and beliefs of SAR residents. The basic national consensus has integrity and national unity and is of great significance to the development of the country. In modern society, the state has multiple value connotations and is playing a more and more important role in construction, balance and protection. Although the negotiations on the handovers of Macao and Hong Kong to the motherland was carried out between the Chinese Government and the Portuguese Government and between the Chinese Government and the British Government, the decision to adopt the policy of “One Country, Two Systems” and apply the SAR system to deal with the arrangement of the constitutional system after the handovers of the two regions is the decision of the entire China including Macao region and Hong Kong region. Therefore, the establishment of the SARs is not the decision of the NPC but the decision of China as a political unity after the formation of the common will.⁴ The NPC has only provided the specific systems of the SARs in the form of legal provisions. The establishment of the SARs is the result of the national consciousness whereas the law specifying the SAR system is the textualization and itemization of this national consciousness.

The term “State” used in Article 31 of the Constitution can also be interpreted as the “state” corresponding to the local authorities, i.e. the “State” as “the Central Government”. Combined with the relevant provisions on the unitary system in the text of the Constitution, one can clearly understand the nature of the SAR system as a special local system. In other words, the SAR is a special local system established by the “State” as “the Central Government”.

III. “State” and “National Consciousness” Used in the Text of the Basic Laws

The Hong Kong Basic Law and the Macao Basic Law are enacted against the background that the PRC resumed the exercise of sovereignty over Hong Kong and Macao. In these two Basic Laws, the term “State” appears mainly in the preamble, Chapter one General Principle and Chapter II The Relationship between the Central Government and the SAR. Its connotation also covers the three types of meanings mentioned earlier but mainly it refers to the following two meanings: one is the “State” as the unified political entity and the other is the “State” in contrast to the local authorities. Here, the Macao Basic Law is used as an example for illustration:

The Macao Basic Law (the Chinese version) has mentioned the “state” (“*guojia*”) for 21 times in its preamble and text. Seventeen (17) of them are used in the first sense, i.e. the “state” is emphasized as a unified political entity. For example, the second paragraph of the preamble says: “the People’s Republic of China [in the Chinese version, here is “*guojia*”] has decided that, upon China’s resumption of the exercise of sovereignty over Macao, a Macao Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the

People's Republic of China, and that under the principle of 'one country, two systems', the socialist system and policies will not be practiced in Macao;" The third paragraph of the preamble says: "In accordance with the Constitution of the People's Republic of China, the National People's Congress hereby enacts the Basic Law of the Macao Special Administrative Region of the People's Republic of China, prescribing the systems to be practiced in the Macao Special Administrative Region, in order to ensure the implementation of the basic policies of the People's Republic of China [in the Chinese version, here is "guojia"] regarding Macao." Article 21 specifies that the locally elected Macao SAR deputies of the National People's Congress "to participate in the work of the highest organ of state power". This article uses the term "state" in both senses of unified political entity and the Central Government simultaneously.

It can be seen that the use of the term "state" in the Macao Basic Law is consistent with that of the Constitution in spirit and fully embodies the specific implementation of the national consciousness of the Constitution in the Macao Basic Law. It can thus be seen that the understanding and implementation of the Macao Basic Law and the Hong Kong Basic Law must follow the guidance of the national consciousness established in the Constitution.

IV. Understand the "National Consciousness" of the Basic Laws in the Constitutional System and its Innovative Value

By the foregoing analysis, the SAR system is the product of the national consciousness and the understanding and implementation of the Basic Laws must reflect the national consciousness. Meanwhile, the analysis of the problem of understanding and implementation of the Basic Laws which embodies the national consciousness cannot be confined only to Article 31 of the Constitution. The analysis should cover the entire Constitution and one should understand the national consciousness contained in the Constitution from the perspective of a complete constitutional system and its value kernel.

4.1 The unitary state protected by the Constitution and the Basic Laws

The provisions of the Constitution on the unitary form of the state structure have embodied the national consciousness of national unity pursued by the Chinese nation for thousands of years in history. An important manifestation of this consciousness in the Constitution is unitary with openness. Therefore, an essential aspect of implementing the national consciousness in the interpretation of the Basic Laws is the deep understanding of the basic unitary constitutional system of China.⁵

Specifically, the SARs were legally established in accordance with Article 31 of the Constitution, while the two Basic Laws were enacted by the NPC as the highest organ of state power under the Constitutional power. Therefore, the Basic Laws are part of the legal system of the PRC and part of the constitutional system with basic legal properties. The Constitution and the Basic Laws give a high degree of autonomy to the SARs, which is recognized by law but is not inherent. However, it should be pointed out that the authorization by the Constitution and the Basic Laws, the relationship between the Central Authorities and the SARs and the relationship between the central power and the local high degree of autonomy have been guaranteed in law. In other words, the unitary structure system including the SARs on the whole complies with the form of

state structure confirmed by the Constitution. The national consciousness exhibited therein is also confirmed by such legal norms as the Constitution and the Basic Laws.

With regard to the understanding of the nature of the Basic Laws, some people liken it to a “Mini-Constitution”. From the point of view of the Constitution, the Basic Laws are the “basic laws”. It is expressly specified in the Constitution and the *Legislation Law of the People’s Republic of China*. However, compared with other basic laws, the Hong Kong Basic Law and the Macao Basic Law have their own characteristics, such as the particularity on the basis on which the Basic Laws were enacted, the particularity on the amendment procedures, the particularity on the configuration of the right for interpretation, etc. It should be said that the existence and the successful practice of the SAR system has developed and consolidated the unitary Chinese constitutional system. The unitary system is one that has included different social systems, economic systems and legal systems. Some scholars have called it “a complicated unitary system”.⁶ Therefore, the discussion of the unitary structure system in the context of the mutual relationship between the Constitution and the Basic Laws cannot simply be understood as a unitary system reflected merely in the institutional framework of the Mainland. The national consciousness embodied in the understanding and implementation of the Basic Laws certainly includes the national consciousness recognized by the constitutional system of the SAR system.

4.2 Core constitutional values

There existed great differences between the Mainland and Macao and Hong Kong in every respect when the 1982 Constitution was first promulgated. This was the objective historical and social background against which the policy of “One Country, Two Systems” was introduced. Although Article 31 and other articles of the Constitution have laid a foundation for the national consciousness, how to constantly implement and even to enhance the national consciousness in the practice of the SAR system is a continuous process. The Constitution has been revised four times in the past 30 years and has incorporated into it such goals or values as democracy, freedom, equality, market economy, rule of law, human right, etc so that the core constitutional values are continually enriched. As a result, the Mainland and the SARs have developed and shared more common values in various respects. What is particularly significant is that the “human right” clause has been incorporated into the Constitution.

Paragraph 3 of Article 33 of the Constitution provides: “the state respects and protects human rights.” Marked with this clause, the Chinese constitutional system has turned to the intrinsic value construction with human rights as the center. In other words, the national consciousness confirmed and protected in the current Constitution reflects not only such essential factors as the traditional ethnic, cultural, historical memories, but also more the obligation of the state to respect and protect human rights. The country that the entire Chinese citizens including the SAR citizens identify with and are loyal to must be one with human rights as the core value leading the national norms of the Constitution. It must be a country that respects and protects human rights. In this sense, the recognition and confirmation of the national consciousness by the Constitution and the Basic Laws will have a clearer, more logical, more legitimate and self-consistent basis. We can find on this basis that this essential factor of the unitary system in the national consciousness has by no means undermined the SAR system, nor abandoned or replaced the special value confirmed and protected in the Basic Laws but emphasized in a more fundamental and sharing sense the priority of the human rights value over the entire political community.

In fact, Chapter III of the Macao Basic Law: Fundamental Rights and Duties of the Residents and the human rights clause of the Constitution have echoed each other. It is believed that the commitment of the Macao Basic Law to the fundamental rights has been constrained by the Constitution since 2004, enriched the connotation of value and filled in more solid normative basis for the realization of the fundamental rights clauses of the Macao Basic Law.

V. Enrich and Develop the National Consciousness in the Implementation of the Basic Laws

The positive progress that the Basic Laws has achieved in implementation is obvious. We need to sum up the experience of its success. But at the same time we also need to reflect the existing problems and the challenges we are faced with in an objective and rational manner. How to adhere to the national consciousness in the implementation of the Basic Laws in the future remains an important practical issue. Only when the SARs are promoted to identify themselves with the national consciousness under the total framework of "One Country, Two Systems", can the practice of the Basic Laws become successful. The implementation of the national consciousness also means the implementation of the spirit of the Constitution in the practice of the Basic Laws. To achieve this goal, we need to continue to explore the following questions:

5.1 Adhere to understanding and implementing the Basic Laws from the perceptive of the constitutional system

Due to reasons of legal tradition and culture, some residents of the SARs do not fully understand the Chinese constitutional basics, or there are some doubts. Identification of the basic law should be combined with identification of the constitutional spirit. As mentioned earlier, along with the process of building the rule of law, China's constitutional system and constitutional concepts have also been changing, which has produced a positive effect on the practice of the Basic Laws. After four constitutional amendments, the Constitutional normalization has been further strengthened. The Constitution is playing an increasingly important role in social development. In particular, the "human rights clause" was introduced into the Constitution in its 2004 amendment and became a basic principle and norm to restrict the public authorities. The national values to respect and protect human rights has become the basic national values consensus of the people, which has a great positive significance for the implementation of the Basic Law and the protection of human rights of the SAR residents and is creating a favorable constitutional background for the protection of human rights in Macao and Hong Kong. Therefore, the Constitution is actually the value fulcrum behind the Basic Laws.

5.2 Respect the Basic Laws, enhance national consciousness and enhance national identity of SAR residents

Patriotic education is important to promote national unity and to enhance national identity; therefore, the State should advocate patriotic education. The Constitution has a clear definition on it in this regard in Article 24. And for the Basic Laws, the ways and means to enhance national consciousness must be conducive to the realization of the purpose of the Basic Laws. The purpose is to fully protect the autonomy of the SARs, protect human rights and improve the people's living

standards under a unified national consciousness and with the authorization of the Central Government.⁷

5.3 Diverse forms of education on the Constitution and the Basic Law

The education on the Constitution and the Basic Laws plays a very important role in the process of the formation of the national consciousness. It is the objective basis to develop a common notion, a carrier of the national emotion and the fundamental support for the development of a common national consciousness. At present, the education on the Constitution and the Basic Laws has played an important role in enhancing the national consciousness, but there are still some areas for improvement. The educational content shall be adjusted in the future on the basis of the original form of education and a more flexible form of education shall be adopted:

First, patriotic education and the Constitution education shall be closely linked to popularize knowledge of the Constitution.

Second, readers of the Basic Laws shall be prepared for the SARs, making them books conducive to the accurate understanding of the Basic Laws.

Third, a Basic Law Memorial museum shall be established, which will popularize the knowledge on the Basic Law and enrich the forms of education on national consciousness.

Fourth, a new mechanism for the fixed legal exchange between the Mainland, Macao and Hong Kong shall be established to provide a theoretical basis to resolve legal issues encountered in the implementation of the Basic Laws.

Fifth, educational forums on the Macao Basic Law and the Hong Kong Basic Law shall be held regularly to jointly discuss the issues on the education of the Basic Laws. The education on the Basic Laws should not only be professional, but also popular and only a solid foundation can lead to the ultimate success. Regular forums of the two SARs can enhance mutual understanding of the issues encountered in the Basic Law education, improve the educational techniques and methods and enhance the national identity feelings.

Notes:

¹ The nation-state is a legal structure of universalism on identity construction, geopolitics, ethnic identity and cultural unit. See Xu Zhangrun (Ed.) (2008). *Nationalism and State Structure*. Beijing: Law Press. 25.

² The scientific concept of law or legislation is an elaboration of the legislative functions of a certain country at a given age from a historical perspective. See Savigny and Green (2008). *Savigny Legal Methodology and Green Lecture Notes*. (Chinese revised version translated by Yang Daixiong). Beijing: China Law Press. 5.

³ Xu Chongde (1986). *Chinese Constitution*. Tianjin: Tianjin People's Publishing House. 1.

⁴ We were able to distinguish between the Constitution and the law just because a law or regulation does not contain the essence of the constitution. Prior to the development of all the norms, there has already been a fundamental political decision of the constitutional right body. This decision is made by the people in a country with a democratic system and made by the monarch in a pure monarchy country. See Schmitt, C. (2005). *Constitutional Theory* (Chinese version translated by Liu Feng). Shanghai: Shanghai People's Publishing House. 28.

⁵ Article 3 of The Constitution provides: "The division of functions and powers between the central and local state organs is guided by the principle of giving full play to the initiative and enthusiasm of the local authorities under

the unified leadership of the central authorities.”

⁶ Wang Yu (2008). *The Study of the Constitutional Spirit of "One Country, Two Systems"*. Guangzhou: Guangdong People's Publishing House. 66-69.

⁷ Legal duties and responsibilities to society inevitably require the control of the ways of training the legal workers. If the purpose of the legal system is mainly to maintain the health of the social body so that the people live a worthy and happy life, then we must take the legal workers as social doctors. See Bodenheimer, E. (2004). *Jurisprudence: The Philosophy and Method of the Law* (Chinese version translated by Deng Zhenglai) Beijing: China University of Political Science and Law Press. 529ss.