

The Constitutional Significance and Legal Status of the Law on Safeguarding National Security in HKSAR

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Content

I The Constitutional Significance of the HKNSL

Thesis: The constitutional significance of the HKNSL lies in the fact that this law has materialized the constitutional identity of the HKSAR as an integral part of China in particular ways.

II The Legal Status of the HKNSL

- Thesis: The HKNSL is below the Constitution and the Basic law, but prevails over Hong Kong local laws.



I The Constitutional Significance of the Law on Safeguarding National Security in HKSAR

- **Constitutional Significance of HKNSL:** the contribution made by the HKNSL to the implementation of the national constitution and the HKBL.
- **1. Conceptual Clarification**
- **1.1. Two senses of ‘Constitution’:**
The absolute sense and the relative sense.
- **1.2. The concept of national security:**
IR (international relations) Vs. HKNSL.
- **1.3. State of exception VS. Rule of law**
- **1.4. Tone of Discourse:**
Mainly about domestic security, a discourse of normalcy and rule of law.



- **2. Theoretical Basis: constitutional identity.**
- The identity of a state does not depend on its natural characteristics, but on its constitution ____Aristotle
- a state = a polity constituted = a constitution.
- Misconception of ‘One Country Two Systems’: the national constitution totally suspended or not applicable in HKSAR.
- **3. The constitutional significance of the HKNSL: materializing the constitutional identity of HKSAR as an integral part of China in three ways.**
- **3.1. identifying the components of the state to be safeguarded**
- 3.1.1. Component Parts of the State: theory of Professor Barry Buzan
- -----*The idea of the state: Nation, organizing ideologies*
- -----*Physical bases of the state: territory, population, wealth, etc.*
- -----*Institutional Expression of the state: state machinery, procedures and norms.*



3.1.2. Four types of crimes and the corresponding components to be protected

- secession: territory, nation
- subversion: government machinery; organizing ideologies
- terrorist activities: wealth, population
- collusion with foreign or external power: hybrid
- **Note 1:** the HKNSL does not specify the criminal activities against the officials, especially those representing the state and HKSAR.
- **Note 2:** Why does it criminalize collusion with foreign power?
- a state is not guaranteed by a power outside itself; it is not kept in motion by a motor or referee located outside its own structure, it is not carried by a heteronomous cause or guarantee, but integrates itself, merely by dint of an inherent logic of values into an integrating system gravitating toward itself. ___Ruldolf Smend



3.2. Stipulating the duty-bearers and the content of duties

categorization of duties:

- the duty of action / the duty of non-action;
- general duty / specific duty.
- **3.2.1 Duties of Action**

Duty-bearers	The Content of duties
the Hong Kong residents who are Chinese citizens	Article 6.1 : safeguard the sovereignty, unification and territorial integrity of the PRC general duty
the central people's government	Article 3.1: fundamental responsibility
HKSAR	Article 3.2: constitutional responsibility and duty
Specific duty-bearers: the HKSAR's administrative, legislative, and judicial organs	Article 3.3: statutory duties in carrying out the HKNSL



3.2.2 Duties of Non-action

Duty-bearers	Content of Duties
all institutions, organizations, and individuals in the HKSAR	General duty: shall not contravene articles 1 and 12 of the Basic Law statutory duties: Article 6.2
the persons who are not permanent residents of the HKSAR	statutory duties: Article 38

3.3. Drawing the line of foe-friend distinction, imbuing HK with a legal concept of the political

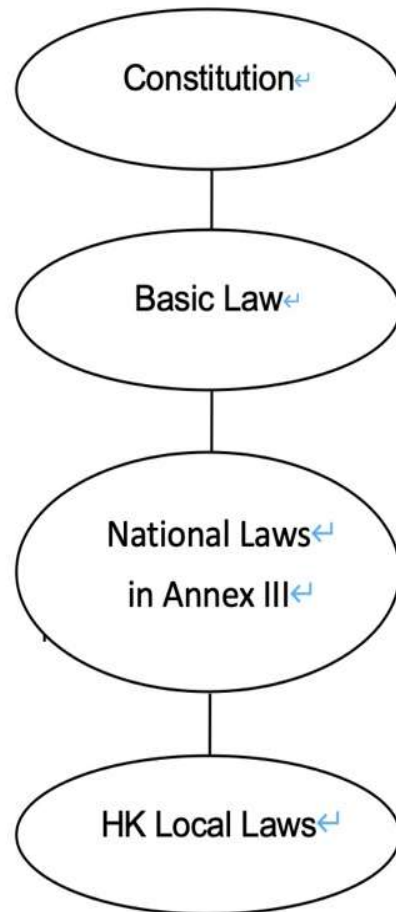
- National Security Law is a set of norms which can be used to tell friends from enemies.

The political standards of friend-foe distinction are diversified and flexible. In criminal law, an enemy is transformed into a criminal, and the penalties must be imposed strictly in accordance with legal procedures and standards.



II The legal status of the HKNSL

- 1. What is the relationship between the HKNSL and the HKBL?



- 1.1. General remark:
- HKNSL is below the Constitution and the Basic law, but above Hong Kong local laws.



- 1.2. Two current misconceptions

- Misconception 1: The HKNSL is higher than the HKBL.

The argumentation takes two steps: ① the HKNSL says in article 62 that ‘this law shall prevail where the local laws of the HKSAR are inconsistent with it’; ② and the HKBL is one of Hong Kong local laws.

- It made a terrible mistake at the second step in regarding the HKBL as a HK local law.

- Misconception 2: The HKNSL at the same level as, or is side by side with HKBL.

In lack of a theory of constituent power, one cannot see the nature of the HKBL and its special legal status.



- 1.3. Two hard questions?

- Question 1: Does Article 14 contravene the HKBL?

'Decisions made by the Committee for Safeguarding National Security of the HKSAR shall not be subject to judicial review.'

No. In the UK, judicial review is a common law remedy which could be precluded by a statute. Article 158 of the HKBL in no sense precludes the NPC from stipulating an ouster clause.

- Question 2: Is Article 60 in conformity with the HKBL?

'The acts of duty by the CPG's Office for Safeguarding National Security in the HKSAR (OSNS) and its staff in accordance with this Law shall not be subject to the jurisdiction of the HKSAR.'

Yes. Comparing with the doctrine of federal immunity in states; Centralization of national security law enforcement.



2. Why should the HKNSL prevail over HK local laws?

- *Article 62 : 'This Law shall prevail where the local laws of the HKSAR are inconsistent with this Law.'*

Two explanations:

The principle of minimum legal identity (minimum preemption)

Centralization of national security management.

2.1. An illuminating reference: federal legal supremacy or preemption.

- *Article 6 (2) of the US Constitution:*

'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'



2.2. Under the doctrine of OCTS, the principle of central preemption is discounted to a great degree.

----Only the national laws included in Annex III are applicable in HKSAR.

----The national laws in Annex III can be further divided into two types:

those promulgated by the CE has full superiority;

those adapted by the LegCo has relative superiority.

Article 17 of HKBL: 'If the NPCSC, after consulting the Committee for the Basic Law of the HKSAR under it, considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, **the Standing Committee may return the law in question but shall not amend it. Any law returned by the NPCSC shall immediately be invalidated.** '



Thank you!

