BASIC LAW, BASIC POLITICS: THE CONSTITUTIONAL GAME OF HONG KONG

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Most lawyers have a doctrinal understanding of the constitution. They are sceptical of any political understanding of a constitution, feeling that this may taint the sacredness of the legal paradigm. Political scientists view things differently. They offer three approaches to understanding a constitution from the perspective of the political paradigm: the attitudinal approach, the institutional approach and the strategic approach. The author argues that the incorporation of the political paradigm into one's analytical framework is unavoidable if one wants to have a comprehensive understanding of the constitution. The author integrates the legal and political paradigms into the form of a constitutional game, and applies this analytical framework to the Basic Law, thereby illustrating how law and politics have interacted in the constitutional development of Hong Kong over the last 10 years.

Introduction

As Chief Justice Li of the Court of Final Appeal (CFA) of the Hong Kong Special Administrative Region (HKSAR) said, the Basic Law of the HKSAR is a constitution.[1] Therefore, the Basic Law shares the characteristics[2] and functions of most other constitutions.[3] To understand the real meaning and significance of the Basic Law, one would then also have to apply similar methods and approaches to those used when interpreting a constitution.[4]

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1 *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315, at 337: "The Basic Law is a national law and is the constitution of the Region."

2 *Ng Ka Ling*, at p 339: "It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. 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 purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument."

3 *Ng Ka Ling*, at p 337: "Like other constitutions, it distributes and delimits powers, as well as providing for fundamental rights and freedoms. As with other constitutions, laws which are inconsistent with the Basic Law are of no effect and are invalid."

4 One may argue that the Basic Law is more than a constitution even if one treats it as a legal code. As Chan CJHC said, "The Basic Law is not only a brainchild of an international treaty, the Joint Declaration. It is also a national law of the PRC and the constitution of the HKSAR. It translates the basic policies enshrined in the Joint Declaration into more practical terms." (*HKSAR v Ma Wai-kwan* [1997] HKLRD 761 at 772.)

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There are many decisions a society makes that involve its constitution. There are decisions to make, implement, interpret, adjudicate, amend and change a constitution. To have a comprehensive understanding of a constitution, one needs to know how all these decisions relating to a constitution are made.

Most lawyers treat a constitution as a legal code and apply the same doctrinal analysis to the interpretation of a constitution as they would any other legal codes. Doctrinal analysis "aims to understand the law from no more than a thorough examination of a finite and relatively fixed universe of authoritative texts consisting of cases, statutes, and other primary sources, the relative importance of which depends on the legal tradition and system within which the legal researcher operates."[5]

Such a doctrinal mindset causes lawyers to view constitutional interpretation as mainly a process of assigning meaning. Their primary concern is to discern the meaning embedded in the constitutional text. A practical reason for the need to have a definite meaning for the text is that this is necessary to resolve constitutional disputes that may break out in a courtroom, a legislative chamber or even in the public square.

Legal scholarship is also predominately normative.[6] The main interest of legal scholars is to make prescriptions to legal decision makers on how they should give meaning to the constitutional text and decide cases accordingly.

This may be called the doctrinal paradigm or legal paradigm[7] of constitution. In this article, a paradigm of constitution is the perspective through which constitutionalists with their presuppositions and disciplinary orientation understand the nature, functions, purposes and meaning of a constitution.

Applying the doctrinal paradigm, legal scholars and judges develop different legal principles or approaches to assist them in ascertaining the "right" meaning of the text of a constitution[8] and debate with each other on what should be the proper method of interpretation.

5 Douglas W. Vick, "Interdisciplinarity and the Discipline of Law," (2004) 31 *Journal of Law and Society* 163, at 178.

6 Edward L. Rubin, "Law and the Methodology of Law," (1997) *Wis. L. Rev.* 521, 522 and Barry Friedman, "The Politics of Judicial Review," (2005) 84 *Texas Law Review* 257.

7 The word "paradigm" has been widely used in academia since Thomas Kuhn published his book, *The Structure of Science Revolutions* in 1962. Kuhn defined a paradigm as "an entire constellation of beliefs, values and techniques, and so on, shared by the members of a given community." *See* Thomas Kuhn, *The Structure of Science Revolutions* (Chicago and London: The University of Chicago Press, 3rd edn, 1996), p 175. In legal study, the concept of paradigm has also been used. *See* Jürgen Habermas, "Paradigms of Law," (1996) 17 *Cardozo Law Review* 771 in which Habermas has used the term "paradigm" to refer to the social ideal or social vision that guides the making and application of law.

8 This article does not provide a very elaborate description of the different approaches as it is assumed that the readers are mainly lawyers and they are familiar with these approaches of the legal paradigm. For a detailed description of the different approaches, *see* Philip Bobbitt, *Constitutional Interpretation* (Oxford, UK and Cambridge, USA: Blackwell, 1991); Richard H. Fallon Jr., "A Constructive Coherence Theory of Constitutional Interpretation," (1987) 100 *Harvard Law Review* 1189; and Robert Post, "Theories of Constitutional Interpretation, (1990) 30 Representation pp 13–41.

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Bobbitt provides a summary of the six principles or approaches that are used by legal scholars and judges to discover the meaning of a constitutional provision. They are:

> ". . . the historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary 'man on the street'); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the . . . ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule)."[9]

Though the approaches are different and may even conflict with each other, they share the same assumption that upon identifying the right method of interpretation, one can make the right interpretive decision.[10]

However, the sufficiency of the legal paradigm to understand decision making concerning constitution has been questioned by many.[11] Dahl comments that:

> ". . . competent students of constitutional law, including learned justices of the Supreme Court themselves, disagree . . . where the words of the Constitution are general, vague, ambiguous, or not clearly applicable; where precedents may be found on both sides; and where experts differ in predicting the consequences of the various alternatives or the degree of probability that the possible consequences will actually ensue."[12]

Besides lawyers, political scientists belong to another group which also has an interest in examining constitutions. As Sweet said, "All law is politics, but not all politics is law."[13] Among all forms of law, constitution must be

[9] Bobbitt, n 8, pp 13–14. Bobbitt preferred to use the term, modality, which is defined as "the way in which [one] characterize a form of expression as true."

[10] Ronald Dworkin put forward his controversial "one right answer thesis" in "No Right Answer," in P.M.S. Hacker and J. Raz (eds), *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Oxford: Clarendon Press: 1977) but the thesis is much disputed. *See* A.D. Woozley, "No Right Answer," (1979) 29 *Philosophical Quarterly* 25 and Brian Bix, *Law, Language, and Legal Determinacy* (Oxford: Clarendon Press, 1993), Ch 4.

[11] Segal and Spaeth provided a comprehensive critique on the legal paradigm. *See* Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press, 2002), Ch 2.

[12] Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," (1957) 6 *Journal of Public Law* 279 at 281.

[13] Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," (2007) 5 *International Journal of Constitutional Law* 69, at 72.

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the one with the strongest political flavour. The status and coverage of a constitution make any decision concerning its making, interpretation, implementation, adjudication and amendment or change highly political because it deeply and widely involves and affects political and social interests and groups.[14]

Since the establishment of the HKSAR in 1997, Hong Kong has been embroiled in many political controversies.[15] The HKSAR Government, the Courts of the HKSAR, the Standing Committee of the National People's Congress (NPCSC) and all other political actors in Hong Kong without exception have stated their political stances in these controversies in legal and constitutional terms.[16] The limitation of the legal paradigm of constitution can be clearly demonstrated as it can provide no rational or objective method or principle that can settle these political or constitutional controversies. They have been settled or suppressed more by non-legal means and considerations or at least the legal paradigm has only provided partial answers.

Unlike lawyers, political scientists' focus is not so much "what does the constitution mean?" but "why is the constitution understood by the political actors (including the court) in a particular way?"[17] Different methods have been applied by political scientists to answer this question. Their approaches may be called the political paradigm of constitution.[18]

[14] The three central issues in politics are "the selection of society preferences, the enforcement of the choices that reveal them and the production of goals or outputs that embody the choices." Different decisions concerning a constitution all involve these three central political issues. *See* William H. Riker and Peter C. Ordeshook, *An Introduction to Positive Political Theory* (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1973), p 2. William Riker is the pioneer of the positive political theory which is one of the major approaches (the strategic approach) used to study constitutions from a political perspective. *See* discussion below.

[15] The best examples of these political controversies include the right of abode controversies, the Art 23 controversies, the democratic development controversies and the controversy concerning the length of the term of office of a re-elected chief executive.

[16] *See* Johannes Chan, Fu Hualing and Yash Ghai (eds) *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong: Hong Kong University Press, 2000) and Benny Y.T. Tai, "Ng Siu Tung and Others v Director of Immigration" (2002) 1 *The International Journal of Constitutional Law* 147–151 for the right of abode controversies; *see* Fu Hualing, Carole J. Peterson and Simon N.M. Young (eds) *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong: Hong Kong University Press, 2005) for the Article 23 controversies; *see* Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debate*, 2005 (Hong Kong: Hong Kong Law Journal Limited, 2005) and Albert H.Y. Chen "The Constitutional Controversy in Hong Kong Spring 2004," 34 (2004) *HKLJ* 215 for the democratic development controversies; and *see* Benny Y.T. Tai, "A Tale of the Unexpected: Tung's Resignation and the Ensuing Constitutional Controversy" (2005) 35 *HKLJ* 7–16 for the controversy concerning the length of the term of office of a re-elected chief executive.

[17] Friedman, n 6, p 258.

[18] There may be a very fine distinction between pure politics and constitutional politics and the differences will be explained in Section 3 of this article. Therefore, in approaching constitution from a political paradigm, not all approaches in the study of political science will be used. For those approaches that are borrowed, questions concerning the making, interpretation, implementation, adjudication and amendment of a constitution might not be expressed in their original form. For the different approaches of political science, *see* David Marsh and Gerry Stoker, *Theory and Methods in Political Science* (Basingstoke: Macmillan, 1995), Chs 1–6.

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The thesis of this article is that for one to have a comprehensive understanding of decisions concerning constitution including its making, interpretation, implementation, adjudication and amendment or change, both the legal and political paradigms of constitution have to be studied.

There are five sections to this article. Section 1 introduces the approaches of the political paradigm and explores the contribution of these approaches in enriching lawyers' understanding of a constitution. Section 2 explains why the two paradigms are not necessarily conflicting and could be complementary to each other. Section 3 puts forward an analytical framework – a constitutional game to integrate the legal and the political paradigms aiming to assist one in arriving at a comprehensive understanding of constitution. Section 4 applies this "constitutional game" analytical framework to the Basic Law and illustrates how law and politics have interacted in the constitutional development of Hong Kong in the last ten years. Section 5 makes some conclusive observations on the application of the "constitutional game" analytical framework to Hong Kong.

1. The Approaches of the Political Paradigm of Constitution

Like the legal paradigm, there is more than one approach from the political paradigm. At least three can be identified.[19] They are the attitudinal approach, the institutional approach and the strategic approach.[20] Political scientists also disagree among each other on what should be the proper approach of the political paradigm. This article will argue that the debates among political scientists, among lawyers, and between political scientists and lawyers on which approach or paradigm should be preferred are unnecessary. All the approaches and paradigms can be integrated to give a comprehensive understanding of a constitution's complexity.[21]

[19] Nancy Maveety, "The Study of Judicial Behavior and the Discipline of Political Science," in Nancy Maveety (ed) *The Pioneers of Judicial Behavior* (Ann Arbor: The University of Michigan Press, 2003), p 5.

[20] These approaches are developed by political scientists in their study of judicial behaviour. Among all political actors in a constitutional system, judges are more likely to adopt a legal paradigm in understanding a constitution. If judges are also found to have been applying a political paradigm of constitution, the other political actors must also be using a political paradigm to understand a constitution though the political factors influencing their understanding would be very different from those of judges.

[21] *See* Sections 2 and 3.

(a) The Attitudinal Approach[22]

According to the attitudinal approach, political actors give meaning to the constitution in light of their ideological attitudes and values[23] and make decisions concerning the constitution accordingly so as to have those values realised in the constitutional system.

There may not be too much difficulty in applying the attitudinal approach to political actors who are free to rely on their ideological attitudes and values to make political decisions like the members of the legislature or the chief executive. However, the explanatory power of the attitudinal approach may be more limited if it is applied to judges. Most people believe that judges make constitutional decisions only on the basis of its legal nature. That is the reason why most of the works on the attitudinal approach pertain to an analysis of judicial decision making.

Segal and Spaeth are the most prominent promoters of the attitudinal approach.[24] As they explained in their most important publication, *The Supreme Court and the Attitudinal Model Revisited*,[25] the attitudinal approach "represents a melding together of key concepts from legal realism, political science, psychology, and economics."[26]

Like the legal realists, the attitudinal approach deconstructs the legal paradigm by asserting that the legal text cannot be the actual basis of meaning given to constitutional provisions. Behaviouralism from political science, in turn, provides the research methodologies and orientation.[27] It also

[22] If it is considered from a wider perspective of political science rather than just within the context of constitutional politics, this approach can be referred to as the behavioural approach.

[23] Segal and Spaeth, n 11 above, p 86.

[24] Earlier works on the attitudinal approach include Herman Pritchett, *The Roosevelt Court: A Study in Judicial Votes and Values 1937–1947* (New York: Macmillan, 1948) and Glendon Schubert, *The Judicial Mind Revisited: Psychometric Analysis of Supreme Court Ideology* (New York: Oxford University Press, 1974). The significant difference between the more recent work of the attitudinal approach and the earlier works is that later works have based their analysis more from the rational choice analysis borrowed from economics. *See* the discussion below.

[25] *See* n 9 above.

[26] Segal and Spaeth, n 11 above, p 86.

[27] There are eight main claims for behaviouralism: (1) There are discoverable regularities in politics which can lead to theories with predictive value. (2) Such theories must be testable in principle. (3) Political science should be concerned with observable behaviour which can be rigorously recorded. (4) Findings should be based on quantifiable data. (5) Research should be made systematic by being theory oriented and directed. (6) Political science should become more self-conscious and critical about its methodology. (7) Political science should aim at applied research that can provide solutions to immediate social problems. The truth or falsity of values is not its proper concern as it cannot be amenable to empirical investigation. (8) Political science should become more interdisciplinary and draw on the other social sciences. *See* Peter Burnham, Karin Gilland, Wyn Grant and Zig Layton-Henry, *Research Methods in Politics* (Basingstoke, England and New York: Palgrave Macmillan, 2004), p 15.

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supplies the explanation that political actors are all "motivated by their own preferences."[28]

The attitudinal approach obtains its definition of attitude from psychology. An attitude is "an interrelated set of beliefs about an object or situation."[29] In the discussion of constitutional politics, the object of the beliefs may be the nature, purpose and function of a constitution. The situation of the beliefs may be the historical, ideological, economic, political, social and cultural backgrounds and contexts from which a constitutional question arises and has to be answered.[30]

The influence of economics can be seen from the emphasis of the attitudinal approach in which political actors choose a decision concerning constitution by applying an economic notion of rationality.[31] They select an understanding of the constitution among various alternatives available within the framework of the formal and informal rules and norms that can best achieve their policy goal after considering whether the likelihood of this understanding will at the end be realised.[32]

There are several major criticisms about the attitudinal approach. First, it fails to give sufficient account for factors which "complicate the relationship between a political actor's choice and the effectuation of his/her desired outcome."[33] Second, by dismissing the relevance of the legal nature of the constitutional text completely, the attitudinal approach gives no weight to the belief that a constitution would have "a constraining or a motivating force in the mind of political actors."[34]

[28] Pritchett, n 21, pp xii, xiii cited in Segal and Spaeth, n 11, p 87.

[29] Harold J. Spaeth, *An Introduction to Supreme Court Decision Making* (San Francisco: Chandler, 1972), p 65.

[30] A different understanding of object and situation is provided in Segal and Spaeth, n 11, p 91. Further elaboration of their understanding can be found in Harold J. Spaeth, "The Attitudinal Model," in Lee Epstein, *Contemplating Courts* (Washington, D.C.: Congressional Quarterly Inc., 1995), p 307.

[31] Like the strategic approach, the attitudinal approach also incorporates rational choice analysis into its analytical framework. Attitudinalists do not believe that the institutional and strategic contexts could impose too much constraint on political actors in making constitutional decisions. However, they agree that the pure form of the approach, ie political actors can decide according to their unconstrained preferences, is only applicable to Supreme Court judges when deciding constitutional cases. In those cases, they are insulated from institutional and strategic constraints because the judges have lifetime tenure, no ambition for higher office and control over the court's agenda. For other situations faced by Supreme Court judges and other political actors, the attitudinalists' stance may not be too different from the strategic approach. *See* Jeffrey A. Segal, "Supreme Court Deference to Congress: An Examination of the Markist Model," in Cornell W. Clayton and Howard Gillman, *Supreme Court Decision-Making* (Chicago and London: The University of Chicago Press, 1999), pp 237–239.

[32] Segal and Spaeth, n 11, pp 92–97. *See* further David W. Rhode and Harold J. Spaeth, *Supreme Court Decision Making* (San Francisco: W. H. Freeman, 1976).

[33] Jack Knight, "Symposium: The Supreme Court and the Attitudinal Model," (1994) 4 *Law and Courts* Spring Issue, pp 5–6.

[34] Rogers M. Smith, "Symposium: The Supreme Court and the Attitudinal Model," (1994) 4 *Law and Courts* Spring Issue, pp 8–9.

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Third, attitudinalists place too much emphasis on the individual preference of political actors and overlook "how preferences are constituted by broader, institutionalised patterns of meaning."[35] Fourth, by concentrating on the instrumental value of a constitution to achieve what the political actors desired, there is not much description and analysis on the substantive values believed to be embedded in the constitution by the political actors. In other words, prescriptive and normative jurisprudence are excluded.[36] Fifth, the attitudinal approach continues to see the decision of political actors concerning constitution as "shaped by forces outside their strategic context".[37]

Nonetheless, the attitudinal approach opens a new perspective for one to not just see constitution from "a sterile brand of doctrinal analysis" but be able to develop a constitutional understanding with "deeper and more systemic attempts to predict and explain how and why political actors operating under a unique set of institutional constraints decide as they do."[38]

(b) The Institutional Approach

As stated above, one of the limitations of the attitudinal approach is that it fails to explain from where the ideological values of individual political actors originate. The institutional approach asserts that the values and attitudes of political actors are shaped by the institution in which the political actors live and act.

Depending on the conception of institution, the institutional approach is further divided into the old and new institutional approaches.[39] The old institutional approach sees the institution as the formal structures and concrete organisations of the state system[40] while the new institutional approach[41]

35 Cornell W. Clayton, "The Supreme Court and Political Jurisprudence: New and Old Institutionalisms," in Cornell W. Clayton and Howard Gillman, *Supreme Court Decision-Making* (Chicago and London: The University of Chicago Press, 1999), pp 28–29. This is the major criticism from the institutional approach. *See* discussion below.

36 Rubin, n 6 above. Rubin believes that legal scholarship is characterised by its prescriptive and normative quality. Removing such discussion from constitutional study, the attitudinal approach would have no interest for lawyers.

37 This is the major criticism from the strategic approach. *See* Forrest Maltzman, James F. Spriggs II, and Paul J. Wahbeck, "Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making," in Cornell W. Clayton and Howard Gillman, *Supreme Court Decision-Making* (Chicago and London: The University of Chicago Press, 1999), pp 47–48. *See* discussion below.

38 Susan Lawrence, "Symposium: The Supreme Court and the Attitudinal Model," (1994) 4 *Law and Courts* Spring Issue, p 3.

39 Clayton, n 31 above, p 32.

40 It is actually the most traditional approach in political science and has an intellectual history even earlier than the behaviouralism behind the attitudinal approach which only prospered in the 1950s and 1960s.

41 Some authors include the strategic approach within new institutionalism and refer to this new institutional approach as the historical institutional approach. *See* Clayton, n 31 above, p 31 and Howard Gilman, "More or Less than Strategy: Some Advantages to Interpretative Institutionalism in the Analysis of Judicial Politics," (1996) 7 *Law and Courts* Winter Issue, p 6.

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accepts a "more dynamic and porous conception"[42] emphasising the informal norms, myths, habits of thought or background structures and patterns of meaning.[43]

Smith provides a very good summary of the institutional approaches:

> "In these approaches of the study of politics, institutions are expected to shape interests, resources, and ultimately the conduct of political actors, such as judges, governmental officials generally, party or interest-group leaders, and other identifiable persons. The actions of such persons are in turn expected to reshape those institutions more or less extensively. Ideally, then, a full account of an important political event would consider both the ways the context of 'background' institutions influenced the political actions in question, and the ways in which those actions altered relevant contextual structures or institutions."[44]

The new institutional approach adds to the old institutional approach by "showing how the more formal and tangible institutions that old institutionalists saw as causes or motivations for political actions are themselves understood by new institutionalists as created within a received framework of culture and the socially constructed mind."[45]

Unlike the attitudinal approach[46] which mainly uses individual persons (members of political institutions) as the basic unit of analysis, the new institutional approach considers how institutions "influence the self-conception of those who occupy roles defined by them in ways that can give those persons distinctively 'institutional' perspectives."[47] Hence, institutions can be "a unit of analysis in their own right"[48] and can adopt their own value preferences

[42] *Ibid.* But *see* Susan R. Burgress, "Beyond Instrumental Politics: The New Institutionalism, Legal Rhetoric, and Judicial Supremacy," (1993) *Polity* Volume XXV, p 446, at p 450. Burgess believed that the distinction between the old and new institutionalism is more than that: "At its most fundamental level, the new institutionalism posits an understanding of man that moves beyond narrow self-interest, a conception of politics broader than mere decisional outcomes or aggregated preferences, and a conception of law and legal rhetoric that encompasses more than manipulation or mystification." *See* also James G. March and Johan P. Olsen, "The New Institutionalism: Organizational Factors in Political Life," (1984) 78 *The American Political Science Review* 734, at 738.

[43] Roger M. Smith, "Political Jurisprudence, the New 'Institutionalism,' and the Future of Public Law," (1988) 82 *American Political Science Review* 89, at 91. *See* the definition adopted by Smith which included "not only fairly concrete organizations, such as governmental agencies, but also cognitive structures, such as the patterns of rhetorical legitimation characteristic of certain traditions of political discourse or the sorts of associated values found in popular 'belief systems.'"

[44] *Ibid.*

[45] Clayton, n 31 above, p 33.

[46] The strategic approach also places more emphasis on the individual political actor.

[47] Smith, n 43 above, p 95. *See* also March and Olsen, n 42 above, p 739.

[48] Smith, n 43 above, p. 95. *See* also March and Olsen, n 42 above, p 739: "Without denying the importance of both the social context of politics and the motives of individual actors, the new institutionalism insists on a more autonomous role for political institutions. The state is not only affected by society but also affects it. Political democracy depends not only on economic and social conditions but also on the design of political institutions. . . . they are also collections of standard operation procedures and structures that define and defend interests. They are political actors in their own rights."

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as more than just an aggregate of the preferences of their members. A political institution as a political actor is taken to be acting to a certain extent coherently[49] and autonomously.[50]

As members of institutions, individual political actors do not make decisions necessarily out of their personal preferences. They may make decisions to fulfil their duties and obligations which are defined by the institutions to which they belong. These duties and obligations are transmitted to them by socialisation through their participation in the internal processes of the institution.[51]

Political actors also do not necessarily make decisions rationally, in an instrumental sense, to select the best possible outcome that can realise their values.[52] Decisions may be made just to create a certain symbolic effect which gives a perception of legitimacy for such an institution[53] as expected or demanded by other political actors or institutions.

Applying the institutional approaches, especially the new version, to constitutional politics, decisions of political actors concerning constitution are influenced by the formal institution to which they belong and vice versa. This institution in turn is also influenced by the wider social institutions and vice versa.

This approach is also subject to several criticisms. First, the institutional approach's understanding on the general question of preference formation is too narrow. There is no reason that preferences of political actors could only be shaped by their institutions but could not be motivated by various other factors at the same time.[54] Second, the institutional approach does not provide much explanation on how institutions actually affect the behaviours of political actors.[55]

Third, if individual political actors are so inseparable from their specific institutional contexts, the institutional approach would not be able to accommodate at least a certain degree of creative individual choices relatively autonomous from the institutional contexts and social background structures that individuals are embedded within. Without such reflective autonomy of

[49] March and Olsen, n 42 above, pp 738–739. Coherence of a political institution means that it makes choices on the basis of some collective interest or intention, alternatives, and expectations. Political institutions may have varying degree of coherence but institutionalists believe that the collective interest is substantial enough to view an institution as acting as a coherent collective.

[50] March and Olsen, n 42 above, pp 739. The claim of autonomy means that processes internal to political institutions, although possibly triggered by external forces, affect how they make decisions.

[51] March and Olsen, n 42 above, pp 739–741.

[52] This is the major difference between the institutional approach and the strategic approach.

[53] March and Olsen, n 42 above, pp 741–742.

[54] Lee Epstein and Jack Knight, "The New Institutionalism, Part II," (1997) 78 *Law and Courts* Spring Issue, p 4, at p 7.

[55] Peter A. Hall and Rosemary C.R. Taylor, "Political Science and the Three New Institutionalism," (1996) XLIV *Political Studies* 936, at 950.

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their members, there cannot be any change or improvement to the institutions generated from the inside.[56]

Fourth, it is said that political process is so much shaped by contingent events and subjective perceptions that it is highly unlikely that institutions could mould decisions of political actors in a very systematic manner.[57]

Nonetheless, the institutional approach does add another dimension to the study of constitutional politics. Individual political actors might not be as unconstrained as the attitudinalists perceive. The source of such constraints could be external as well as internal. Decisions concerning constitution might not only be instrumental, but could also be symbolic.

(c) The Strategic Approach[58]

The strategic approach has several basic premises. First, political actors make constitutional decisions to achieve certain political goals. This is similar to the attitudinal approach. Second, unlike the attitudinalists, the strategic approach does not see political actors as unsophisticated actors who make decisions merely on the basis of their ideological attitudes.[59] According to the strategic approach, political actors realise that their ability to achieve their goals depends on a consideration of the preferences of other political actors and actions they expect them to take.[60] In other words, their decisions are dependent on the decisions of other political actors.

Third, the choices available to political actors are structured by institutions. This is similar to the institutional approach but the strategic approach has a stronger emphasis on the external constraints rather than the internal constraints from institutions.[61]

Maltzman, Spriggs II and Wahlbeck give a very good description of how strategic considerations work in institutions:

[56] Clayton, n 31 above, p 34.

[57] Ellen M. Immergut, "Historical-Institutionalism in Political Science and the Problem of Change," in Andreas Wimmer and Reinhart Kössler, *Understanding Change: Models, Methodologies, and Metaphors* (New York: Palgrave Macmillan, 2006), p 254.

[58] The earliest work on the strategic approach may be Walter Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964). For the development of the strategic approach, *see* Lee Epstein and Jack Knight, "Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead," (2000) 53 *Political Research Quarterly* pp 625–661.

[59] Some attitudinalists do accept that political actors may take into consideration the preferences of other actors but just believe that they are not substantial enough to cause the political actors to compromise their ideological values. *See* Clayton, n 31 above.

[60] Epstein and Knight, n 54 above, p 4. This is drawn from the rational choice theory. For rational choice theory in general, *see* Jon Elster, *Rational Choice* (New York: University Press, 1986).

[61] The strategic approach includes intra-institutional (ie between different political actors or organs of the same institution like the interaction between different judges in the same court and between the supreme court and the court of appeal) and inter-institutional constraints as the external constraints while the institutional approach sees the constraints as originating internally from the institution as an entity in itself.

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> "To act strategically . . . [political actors] must understand the consequences of their own actions and be able to anticipate the responses of others. Institutions facilitate this process and thus mediate between preferences and outcomes by affecting the [political actors] beliefs about the consequences of their actions. Institutions therefore influence strategic decision makers through two principal mechanisms – by providing information about expected behavior and by signaling sanctions for noncompliance."[62]

On the basis of these premises, many followers of the strategic approach have applied a game-analytical framework to analyse the inter-relationships of political actors in different constitutional settings.[63] This game analytical framework will be further elaborated in Section 3.

The strategic approach also has its criticisms. First, this approach presumes that there is at least a certain degree of institutional separation of powers within the constitutional system before political actors can act strategically.[64] The explanatory power of the strategic approach is more limited for authoritarian regimes.

Second, like all analysis relying on rational choice thinking, the strategic approach has another questionable assumption that all political actors must act rationally and only engage in instrumental politics.[65]

Third, it seems that the goals of political actors under the strategic approach must be short term and self-centred.[66] This may be too narrow a view of what actually motivates political actors.

Fourth, the strategic approach presents all interactions between political actors as if they are all in the form of competition, ie each competing to have one's goal be realised. This dismisses the possibility of consensus reached by the political actors through genuine dialogue or deliberation.[67]

62 Maltzman, Spriggs II and Wahlbeck, n 37 above, p 47.

63 *See* William N. Jr. Eskridge, "Reneging on History? Playing the Court/Congress/President Civil rights Game," (1991) 79 *California Law Review* 613 (United States); Jack Knight and Lee Epstein, "On the Struggle for Judicial Supremacy," (1996) 30 Law and Society Review 87 (United States); Georg Vanberg, "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review," (2001) 45 *American Journal of Political Science* pp 346–361 (Germany); Lee Epstein, Jack Knight, and Olga Shevetsova, "The Role of Constitutional Courts in Establishment and Maintenance of Democratic Systems of Government," (2001) 35 *Law and Society Review* pp 117–163 (Russia); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), Ch 3 (Asian Countries). For other methods of the strategic approach, *see* Epstein and Knight, n 53, pp 641–651.

64 Most studies in this field examine constitutional courts vested with a certain degree of power over constitutional review.

65 Howard Gillman, "More or Less Than Strategy: Some Advantages to Interpretive Institutionalism in the Analysis of Judicial Politics," (1996) 78 *Law and Courts* Winter Issue, p 6, at p 9.

66 Howard Gillman, "Placing Judicial Motives in Context: A Response to Lee Epstein and Jack Knight," (1997) 78 *Law and Courts* Spring Issue, p 10, at p 11.

67 *Ibid.*

Nonetheless, another important dimension in understanding political actors in their decisions concerning constitutions is provided by the strategic approach. Constitutional politics is a dynamic process involving the interdependent decisions of all political actors who perceive, predict and prepare for the decisions of others before making their own.

2. Paradigm vs Paradigm? Approach vs Approach?

There is disagreement among legal scholars on what is the right legal approach to adopt. Political scientists also dispute with each other on what should be the right political approach. In addition, there is dissent between legal scholars and political scientists on whether one should use a legal or a political approach to understand constitution; sometimes, fierce debate ensues. At other times, the opposing parties are simply ignored. Both situations may not be healthy for reaching an in-depth understanding of our legal reality.

(a) Epistemological Presuppositions

These disagreements are caused by an epistemological presupposition that there can only be a single path to arrive at a unique understanding of reality. According to this presupposition, the different approaches and paradigms must then be incommensurable. If a certain constitutional understanding arrived at by a particular approach or paradigm of constitution is right, then all other approaches and paradigms cannot be right at the same time.[68] However, must we see the approaches and paradigms of constitution as incommensurable? Must we approach the study of constitution with such a presupposition?

This article will put forward some alternative epistemological presuppositions drawn from two general factual propositions that most people will accept intuitively or find it difficult to dispute. First, the world is a complex system and therefore a constitution must also be a complex system. Second, human beings have limited capabilities and therefore researchers in constitution also only have limited capabilities. No matter how intelligent and knowledgeable a person is, no one can claim that they can understand everything in this world or just a part of this complex world. The alternative epistemological presuppositions developed from these two propositions may help us overcome the theoretical bar from integrating the different approaches and paradigms into a bigger analytical framework for understanding constitution.

[68] Jonathan Sacks calls this presupposition "Plato's Ghost". *See* Jonathan Sacks, *The Dignity of Difference: How to Avoid the Clash of Civilizations* (London, New York: Continuum, 2002), Ch 3: The Dignity of Difference: Exorcizing Plato's Ghost.

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The concepts of "system" and "complexity" are borrowed from the general system theory.[69] A systems view sees the world as a world full of systems.[70] A system is understood to be "a complex of interacting elements"[71] or "a regularly interacting or interdependent group of items forming a unified whole."[72]

This systems worldview provides us a perspective to analyse and understand the wholeness of the world, not only the details in its parts. Through it, it can be seen how parts are embedded in a bigger system which is also a part of an even bigger system. Also, it can be appreciated how the connection, interaction, and interdependence between the parts and the systems work to make a particular system function.[73]

Applying the systems worldview to constitution shows that a constitution creates a constitutional system with at least the following elements: textual elements, institutional elements (the executive authorities, legislature, judiciary and civil services),[74] ideological or normative elements,[75] and political elements.[76]

A constitution is not only a system; it is also a complex system. The complexity of a system illustrates the following characteristics: (1) complex systems consist of a large number of elements; (2) the elements interact in a dynamic manner; (3) the interaction is fairly rich, ie any element in the system influences, and is influenced by, quite a few other ones; (4) the interactions are non-linear; (5) the effect of interactions can feed back onto the elements; (6) complex systems are usually open systems, ie they interact with their environment; (7) complex systems operate under conditions far from equilibrium; (8) complex systems have a history; and (9) each element in the system is ignorant of the behaviour of the system as a whole; it responds only to information that is available to it locally.[77] Applying these characteristics to a constitution, there is little doubt that a constitution must be a very complex system.

69 Ludwig von Bertalanffy is generally regarded as the pioneer of the general system theory. *See* Ludwig von Bertalanffy, "An Outline of General System Theory," (1950) 1 *British Journal for the Philosophy of Science* pp 134–165.

70 Ludwig von Bertalanffy, *General System Theory: Foundations, Development, Applications* (New York: George Braziller, 1968), p 3.

71 Bertalanffy, n 69 above, p 143.

72 This is a dictionary definition adopted by Lynn M. Lopucki, "The Systems Approach to Law," (1996) 82 *Cornell Law Review* 479, at 482.

73 *See* Ervin Laszlo, *The Systems View of the World: A Holistic Vision for Our Time* (New Jersey: Hamption Press, Inc., 1996), pp 10–12.

74 These are the political actors.

75 The constitutional norms incorporated in the constitutional text setting the goals or ideals of the constitution.

76 These are the choices of the political actors made under the constitutions.

77 Paul Cilliers, *Complexity and Postmodernism: Understanding Complex Systems* (London: Routledge, 1998), pp 3–5.

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Understanding the complexity of systems, social systems and constitutional systems highlights the problem of the original epistemological presupposition. It would not be too rational to insist that there can only be one single path to understand the reality concerning a system that is very complex. Therefore, some alternative epistemological presuppositions, which may be more realistic, can now be suggested.

First, a social system is composed of many distinct components each with their characteristics, but the components are inseparable for the survival of the system. A constitutional system has its legal as well as political components and they must be inseparable in order for the constitutional system to function. Therefore, to understand a constitution, a method must be adopted that can analyse both the legal and political components.

Second, the same event in a complex system could have different dimensions of meaning and significance.[78] A constitutional decision may have legal as well as political consequences. Therefore, to fully appreciate the impact of a constitutional decision resulting from the interactions between the elements to the constitutional system itself or with other social systems, a constitution's multi-dimensional implications must be considered.

Third, the truth or reality may be reached or discovered by not just one method or one single path. To make a decision concerning constitution, a form of legal or political reasoning might produce the same conclusion. There is no need to exclude other paths to reality in our understanding of constitution.

Fourth, researchers may observe a phenomenon from different perspectives. What they can derive from the observation will depend on the vantage point at which they position themselves and from which they observe. Different researchers (legal and political), depending on their academic orientation, may have adopted different vantage points to approach a constitutional question. Different conclusions might be reached but this does not mean that one is right and the other must be wrong. They could be arrived at from different perspectives and considering all the conclusions complementarily may enrich our understanding of the reality.

Fifth, even if researchers adopt the same perspective, they may have different perceptions of the same phenomenon owing to the different

[78] Hommes applying the theory of Herman Dooyeweerd identifies the following dimensions (aspects) in any matter in the world: numerical, spatial, kinematic, physical, biological, sensory, logical-analytical, cultural-historical, symbolic or linguistic, social, economic, aesthetic, legal (juridical), ethical and fiduciary. *See* Hendrik Jan van Eikema Hommes, *Major Trends in the History of Legal Philosophy* (Amsterdam, New York, Oxford: North-Holland Publishing Company, 1979) Ch 15 and Herman Dooyeweerd, *A New Critique of Theoretical Thought, Vol. I: The Necessary Presuppositions of Philosophy* (Amsterdam: H. J. Paris; Philadelphia: Presbyterian and Reformed Pub. Co., 1953–1958) Prolegomena, pp 22–165.

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pre-understanding, background, training and concern of the researchers. Through personal reflection on the differing reasoning and conclusions of other researchers, the subjective factors which might have distorted our perception and understanding of the reality may be exposed. It can also enable a deeper appreciation of the concerns of other researchers which may have been overlooked.

Sixth, the natural limitations on the capacity and ability of an individual researcher (or even a team of researchers) restrict most studies to a narrow scope of the phenomenon. Legal and political science scholars can only approach a narrow scope of a constitution. Working together can provide more pieces of the constitutional jigsaw puzzle.

Seventh, the reality is never static and is, in fact, ever-changing though it may appear to have not changed for a long time. However, the impression of the lengthiness of the period is only considered from the perspective of the researchers. Researchers are also limited by time. In most situations, they can only study a phenomenon observable at a specific moment. Even if they can study a matter's behaviour in a time period, that time period cannot be too long (at least not longer than the life of the researcher).

The legal or the political nature of a constitution may seem to be more explicitly influential on the constitutional process during a certain period of the life of a constitution but as the constitutional process is also ever-changing, the originally more explicit element may give way to another. If legal or political science researchers observe only a certain period of the life of the constitution,[79] they may reach a wrong conclusion on the actual impact that the legal or political element could have upon the constitutional process in the whole lifespan of the constitution. Joining the legal and political research together will allow a more thorough understanding of the evolutionary process of the constitution.

These epistemological presuppositions: multi-component, multi-dimension, multi-path, multi-perspective, multi-perception, multi-scope and multi-period would justify an attempt to integrate the different approaches and paradigms. Surely, if they are incommensurable[80] to such a degree that even

[79] They might ignore certain periods of the constitutional process since the element of the constitution which is the orientation of their research might not be too active during those periods. As a result, those periods would not be interesting enough for them to conduct an in-depth analysis.

[80] The concept of incommensurability was first raised by Thomas Kuhn, the historian on science, claiming that different paradigms are incommensurable. *See* Kuhn, n 7 above, p 148. Derek L. Philip provides a critique of the incommensurability of paradigms and concludes that different paradigms need not be incommensurable on the condition that the paradigms are not postulated as totally closed systems. *See* Derek L. Philip, "Paradigms and Incommensurability," (1975) 2 *Theory and Society* 37, at 60. Kuhn later modified his position on incommensurability in "Commensurability, Comparability, and Communicability," *Proceedings of the Biennial Meeting of the Philosophy of Science Association*, Vol 1982, Vol Two, pp 669–688.

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these presuppositions could not help, this attempt to integrate may still fail. Therefore, how incommensurable they are must now be examined.[81]

(b) Integration of the Approaches of the Legal Paradigm

If a political actor has to interpret a constitutional provision, he or she may have to choose one particular interpretation approach to assist him or her in determining the meaning to be given to the constitutional text and make decisions accordingly to resolve the constitutional question encountered.

Seeing merely for the purpose of making decisions concerning constitution, the various approaches of the legal paradigm seem to be incommensurable because most political actors will only rely on one approach to interpretation at a time though it is possible that several approaches of interpretation could reach the same conclusion on the meaning to be given to the constitutional text.

However, this is not the only way for these legal approaches to be use. If, instead of "how can a decision be made to resolve a constitutional dispute by applying the constitutional provision?", we ask "what are the options available in resolving a constitutional dispute?" or "what is the theoretical basis of each of the options?" or "why has a particular option been chosen in resolving a particular dispute?" or "which is the best option?" or "is the option a legitimate one under the present constitutional context?", then these approaches would not be incommensurable in a sense that only one can be right and the others must be wrong and have to be excluded.[82]

Presenting all the approaches together in a form of pluralistic theory of constitutional interpretation[83] will help the understanding of the complexity of legal reasoning of constitutional provisions and the interdependence of legal approaches with external standards and considerations.

(c) Integration of Approaches of the Political Paradigm

It seems that political scientists are more receptive to the political approaches advanced by their fellow colleagues. As they face no immediate need to make a decision in resolving a constitutional dispute and the main objective of

[81] If the conflicts between the approaches or paradigms involve some fundamental values that are incommensurable other than on the philosophical methods, the approaches and paradigms might be more difficult to incorporate into one's analytical framework. For the concept of incommensurable values, *see* John Alder, "Incommensurable Values and Judicial review: The Case of Local Government," (2001) *Public Law* pp 711–735 and Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) Ch 13: Incommensurability. However, even if the approaches and paradigms are developed on the basis of some incommensurable values, this does not mean that there is no possibility that these could not be compatible with each other at least in the sense that people with incommensurable values could still live peacefully within the same community and cooperate to build the community together.

[82] *See* Bobbit, n 8, Ch 5: Justifying and Deciding and Stephen M. Griffin, "Pluralism in Constitutional Interpretation (1994) 72 *Texas Law Review* 1753, at 1767.

[83] Griffin, n 82 above.

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their studies is to discover why a decision concerning constitution is made or provide guidance for decision making in the future, the need to make an exclusive claim is less pressing than it is for lawyers.

Comparing the first edition[84] of Segal and Spaeth's classic text on the attitudinal approach with their second edition,[85] one will find that they have added a substantial section on the influence of rational choice theory to the development of the attitudinal approach. Segal later also makes the following comment:

> "In sum, outside of the decision on the merits, attitudinal works, broadly defined, very much resemble many of the strategic-choice hypotheses of more recent vintages."[86]

The contribution of the attitudinalists is also well recognised by followers of the institutional approach and the strategic approach. They all agree with the finding of the attitudinalists that decisions concerning constitutions, especially judicial decisions, are political decisions and the Court in making such decisions is also a policy-making body. They only disagree that the claims of the attitudinalists cannot be complete and adequate explanations of constitutional decision-making.[87]

The difference between the institutional approach and the strategic approach is also not as substantial as one thinks. Speaking on behalf of the institutional approach, Gillman said,

> "We agree that there are advantages to explore the ways in which judicial decision-making is influenced, constrained, or constituted by institutional contexts. We also agree . . . that our accounts should emphasize 'the political elements institutional development' and not merely 'organizational logic' or functionalism. . . . And so the benefits of rational choice institutionalism [strategic approach] should not be discounted on the grounds that it does not explain everything about institutional politics and the new historical institutionalism [institutional approach] should not be discounted on the grounds that it uses data that is not machine readable and feels no need to translate explanations into models."[88]

[84] Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge University Press, 1993), Ch 2.
[85] Segal and Spaeth, n 11 above, Ch 3.
[86] Segal, n 31 above, p 239.
[87] Jack Knight, "The Supreme Court and the Attitudinal Model," (1994) 75 *Law and Courts* Spring Issue, p 5 and Rogers M. Smith, "The Supreme Court and the Attitudinal Model," (1994) 75 *Law and Courts* Spring Issue, p 8.
[88] Gillman, n 63 above, p 10.

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Both followers of the institutional approach[89] and the strategic approach[90] agree that the two approaches are complementary. Even when they compete with each other, the competition could be a healthy one with each trying to demonstrate that it "is doing the most work"[91] without excluding the contribution of the other. What Gillman said on the relationship between the approaches seems fitting:

> "No single method can illuminate everything we might be interested in knowing, and this means that we should evaluate the strengths and weaknesses of various approaches by asking whether they give us satisfying answers to particular questions."[92]

(d) Integration of the Legal and Political Paradigms

For those within the same paradigm, trying to integrate may still be easy; but for those from totally different paradigms, an intuitive presumption may be that they are inherently incompatible.

Fortunately, there are people who are already working to integrate law and politics. Barry Friedman is a professor of law at the New York University School of Law. He provides an alternative view on the relationship between law and politics: "Politics and law are not separated, they are symbiotic."[93] He suggests that legal scholars do not need to resist any political project outright. He finds that the political paradigm could illuminate "rich veins even in the well-mined field of traditional normative and doctrinal scholarships."[94]

With the insights from the political paradigm, legal scholars can continue to do their primary work in formulating normative constitutional doctrines but in a new way. They could take up a new challenge by "designing workable doctrine"[95] rather than indulging in designing doctrines for an ideal world out of touch with the issues of "practical implementation" and "realities of political trends."[96] He challenges other legal scholars to make use of the findings from political scientists and develop new constitutional theories.[97]

Even among the existing legal approaches, it can be found that some of the political considerations have already been explicitly or implicitly considered. Just by referring back to the six legal approaches identified by Bobbitt, it is not difficult to find the concerns of institutionalists (old and new) in the

89 Theda Skocpol, "Why I am an Historical Institutionalist" (1995) 28 *Polity* 103, at 106.
90 Morris Fiorinal, "Rational Choice and the New (?) Institutionalism" (1995) 28 *Polity* 109, at 110.
91 Rogers M. Smith, "Ideas, Institutions, and Strategic Choices" (1995) 28 *Polity* pp 135–140.
92 Gillman, n 63 above, p 10.
93 Friedman, n 6 above, p 333.
94 Friedman, n 6 above, p 262.
95 Friedman, n 6 above, p 337.
96 Friedman, n 6 above, p 336. *See* also Richard H. Fallon, Jr. *Implementing the Constitution* (Cambridge, Massachusetts, and London, England: Harvard University Press, 2001).
97 Friedman, n 6 above, pp 331–337.

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historical, structural, ethical, and the doctrinal approaches. These approaches all require the political actors to infer the meaning of the constitutional text from matters embedded in the formal or informal institutions established directly or indirectly by the constitution.

Attitudinalists' emphasis on ideological values is not too different from the ethical approach which legitimises political actors referring to political or moral ideologies which they believe to be the ethos of the society as the basis of their interpretation of the constitutional text. In the process of identifying the ethos of the society, it may not be easy for the political actors to separate their personal values from those values they identified as the values of the society.

It will also not be too difficult for followers of the prudential approach to befriend followers of the strategic approach as both must find cost-benefit analysis the most useful analytical tool. The loneliest ones may be the followers of the textual approach. However, even for them, the meaning of the constitutional text may in some cases be found within or determined by their interpretive communities which can also be a form of institution.

Similarly, legal considerations can be found in the analysis of the political approaches[98] though Friedman warns that they should take law more seriously.[99] The ideological attitude of the political actors can be a sincere commitment to follow the original understandings of the constitutional fathers and need not be some kind of political value.

The text of the constitution and the accompanying norms as understood and enriched by an interpretive community applying whatever approaches of legal interpretation is surely a part of the institution in a wide (or new) sense.

To follow the textual meaning of the constitution as far as possible may be a strategic constraint upon political actors as they may be expected to be doing so or their decisions concerning constitution may only be legitimate if they can demonstrate that they are so doing.

Therefore, the legal and political paradigms actually are not that far apart and there are already many points of contact which can be used as seedbeds for a full-scale integration to take place. However, before finally moving on to integrate the two paradigms, some last words about integration have to be said.

(e) Some Thoughts on Integration

Integration presumes the existence of at least two distinct matters and it is about how they are linked together. The process of integration is not

[98] *See* John A. Ferejohn and Barry R. Weingast, "A Positive Theory of Statutory Interpretation," (1992) 22 *International Review of Law and Economics*, pp 263–279.

[99] Barry Friedman, "Taking Law Seriously," (2006) 4 *Perspectives on Politics* pp 261–276.

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automatic.[100] It requires a judgment regarding the guiding value for the integration which, in turn, will affect how the matters are integrated and the extent of their integration.[101] In other words, the answer to the question of why integration happens underlies the answers for the questions of what to integrate and how to integrate.[102]

If the objective of integrating the legal and political paradigms of constitution is just developing a more comprehensive understanding, then the methodology for integration to be adopted in this project does not need to be so demanding as to require a complete blending of the two paradigms into a new paradigm.

The legal and political paradigms can basically maintain their own entities and the contribution of each can still be recognisable in the analytical framework that will be developed in this integration project. Surely, this is not the only way to integrate the two paradigms as one may have an integrated product that has a lesser or a higher degree of integration.

In addition, the proportion of the ingredients may also vary depending on the taste of the chef or the customers. Even if the methodology is the same, the resulting integrated product may still be strong in a particular flavour, legal or political. As this author is trained in the law, the integrated analytical framework may still be considered to be too legal by political scientists. Ironically, some legal scholars may at the same time feel that it is too political. These may be criticisms that an integrationist or interdisciplinarian must live with.

However, the reward from participating in an integration project will surely outweigh these aspects. It may provide a valuable opportunity for a researcher in a particular discipline to reflect on some taken for granted "truths" in their discipline.[103] To some, this may even transform their thinking of the subject and new perspectives or innovative methodologies may be developed.[104] Even if all these cannot be achieved, a researcher can at least know how much they do not know.[105]

[100] Pickens E. Harris, "Philosophic Aspects of Integration," in L. Thomas Hopkins (ed) *Integration: Its Meaning and Application* (New York, London: D. Appleton-Century Company, 1937), p 50.

[101] Moti Nissani, "Fruits, Salad, and Smoothies: A working definition of Interdisciplinarity," (1995) 29 *Journal of Educational Thought* 121, at 125.

[102] For the four methods used in integration or interdisciplinary study, *see* Julie Thompson Klein, *Interdisciplinarity: History, Theory, and Practice* (Detroit: Wayne State University Press, 1990) pp 64–65.

[103] Moran, Joe, *Interdisciplinarity* (London and New York: Routledge, 2002), p 182.

[104] *Ibid.*

[105] Moti Nissani, "Ten Cheers for Interdisciplinarity: The Case for Interdisciplinary Knowledge and Research," (1997) 34 *The Social Science Journal* 201, at 210.

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3. An Integrated Analytical Framework for Understanding Constitution: A Constitutional Game[106]

The integrated analytical framework for understanding constitution that is suggested in this article is a kind of game framework.[107] This can illustrate how political actors, in an occasion where a constitutional decision is demanded or expected, interact with the constitutional text, the constitutional or institutional contexts and other political actors resulting in a constitutional decision that has an impact on the short- and long-term development of the constitutional system. To put it in a more easily accessible form, this analytical framework is called "a constitutional game".

To be consistent with the epistemological presuppositions stated above, it is not claimed that this analytical framework is complete or even comprehensive though this concept of constitutional game could provide a more coherent framework to help understand the complexity of the practices of any constitutional system.

Like all games, a constitutional game must have these basic features:[108] (a) players; (b) rules of the game; (c) winning goals; (d) game resources; (e) playing field; (f) game actions; (g) interaction; (h) strategy; and (i) end of the game.

(a) Players of the Constitutional Game

To have a game there must be players and in most games there will be more than one player. The players in a constitutional game can basically be identified within the constitution. The institutions in the constitutional system[109] and

[106] From the title, one can already see the influence of the strategic approach of the political paradigm. *See* n 63 above.

[107] The strategic approach is very close to the game theory which is a branch of applied mathematics studying strategic interaction of individuals. These studies start off as scientific projects aiming at giving explanation to structures and rules for how individuals' decisions and acts are interrelated or predicting what strategic options are available to an individual in a specific situation of strategic interaction. Based on certain assumptions on rationality of individual choices, these game theoretical models or applications of these models specify the relevant parameters that will be manipulated by the players in the game and adopt deductive analysis to gain an understanding of specific aspects of different social phenomena. However, this study will only follow the game theory to the extent that it constructs a game framework where different players in the constitutional process interact with the other players strategically. It will not develop game theoretical models or apply a game theoretical model to predict the choices of players in a particular circumstance as most studies applying game theory do.

[108] For definitions of game, *see* Chris Crawford, *The Art of Computer Game Design* (Berkeley, Calif.: Osborne/McGraw-Hill, 1984), Ch 1: What is a Game; E.M. Avedon, "The Structural Elements of Games," in Elliott M. Avedon and Brian Sutton-Smith (eds) *The Study of Games* (New York: John Wiley & Sons, Inc., 1971); Kevin Langdon, "What is a Game?" http://www.polymath-systems.com/games/whatgame.html (last visited 4 Aug 2007); and Wolfgang Kramer, "What is a game, really?" The Game Journal, http://www.thegamesjournal.com/articles/WhatIsaGame.shtml (last visited 4 Aug 2007).

[109] For an example of how different constitutional institutions interact in a constitutional game, *see* Jeffrey Segal, "Separation-of-Powers Games in the Positive Theory of Congress and Courts," (1997) 91 *American Political Science Review* pp 28–44.

other political actors referred to directly or indirectly by the constitution are usually the main players of the game.[110]

A constitutional game in a typical Western liberal constitution has the president or/and the prime minister, the parliament, the supreme court or the constitutional court, and the bureaucracy as the main players.[111] A new player can join a constitutional game if it has a significant role to play in the game after some fundamental changes in the social and political contexts.

There is an assumption that the players enjoy at least a certain degree of autonomy from the other players for a constitutional game to be played. If not, not many interesting things will happen in a constitutional game. Fortunately, in most constitutional systems, even in constitutional systems that are authoritarian, some form of separateness between the institutions still exist, qualifying them to be players in a constitutional game.

The Constitution as the Rules of the Game

All games have rules and the constitution is the rules for a constitutional game. In a purely political game, only power matters,[112] but in a constitutional game the constitution provides a set of binding rules for the game and all players accept being bound by the constitution when they join the game. This is the most important thing that distinguishes a constitutional game from a purely political game. In other words, players' willingness to be bound by the constitution is a precondition of a constitutional game.[113]

In theory, the rules of any game must clearly set out what the roles of the players in the game are, how the players can win and actions the players can take in the game. If not, disputes will naturally arise and a game cannot be played effectively without such clear provisions.

However, this may not be the case for the constitution as it sets the rules of the game in a constitutional game. Though a constitution will also set out for every player their role, game resources and limitations on game actions

[110] The prominent role to be played by institutions in a constitutional game is borrowed from the institutionalists of the political paradigm.

[111] *See* n 63 above. *See* also John Ferejohn and Charles Shipan, "Congressional Influence on Bureaucracy," (1990) 6 *Journal of Law, Economics, and Organization* pp 1–20; Jonathan R. Macey, "Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies," (1991) 80 *Geo. L. J.* pp 671–703; and Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police versus Fire Alarms," (1984) 28 *American Journal of Political Science* pp 165–179.

[112] In this understanding, there is no condition on how the constitution was made. When the constitution is respected by all players so that it has a binding effect upon their acts, a political game becomes a constitutional game. However, as will be illustrated by Hong Kong's constitutional game, a player in a game may set the rules of the constitution in such a way that it is vested with almost all powers under the constitution. This kind of constitutional game will be played quite differently from games where no player in the game has such overwhelming powers. It will be very easy for this kind of game to relapse back to being a purely political game where winning or losing is decided only by crude power. In other words, the rule of law and constitutionalism are conditions for a constitutional game.

[113] This is also the presumption of the legal paradigm and its relevance in constitutional analysis is therefore clearly demonstrated.

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they can take in the game, the main difference between a constitutional game and other games is that a constitution in many cases cannot accurately or clearly define the roles, powers and limits of the players in the constitutional game.

This is mainly caused by the ambiguity inherent in constitutional language. In such occasions where language cannot indicate what the exact roles, powers and limits of the players are, players will be left with a certain amount of room to choose what they want to do, what they can do, and what actual actions they will take in the game. This room within a constitution for players to make use of is the very special thing that makes constitutional decision making so complex and studying constitution so difficult but also so interesting.

Giving a certain interpretation or reading to the constitutional text is one of the main forms of action of a player in a constitutional game and resolving competing interpretations of the constitution by the players is one of the main forms of interaction between the players. Constitutional interpretation is, therefore, the key of a constitutional game.

(c) Winning Goals of Players

Like all games, players in a constitutional game play to win.[114] In most games, the winning goal of all players is the same; obtaining the highest score. Usually, there may only be one winner in the game and the game will end when a player wins.

However, the winning goals for the players in a constitutional game may not be the same.[115] The winning goal of each player is basically set out by the constitution. A player's winning goal is very much related to the institutional role assigned by the constitution.[116] This refers to the institutional role of a player in a constitution as so perceived by the player as their constitutional position in a constitutional game. By ascertaining their constitutional position, a player in a constitutional game can define their winning goals.

The winning goal of a player may be very complicated, e.g. may cause the constitutional system to actualise certain substantial values in the society on the basis of the player's ideological beliefs. The goal may also be as simple as just ensuring the terms of the constitution (no matter what) are followed by all players.

[114] This idea of making a constitutional decision as if it is a player who plays to win in a game clearly originates from the strategic approach of the political paradigm.

[115] Winning a game is closely related to how a game ends. As the winning goals of players in a constitutional game may not be the same, there may be more than one winner in a constitutional game and a constitutional game may not end when a player wins. *See* the discussion below on the end of the game.

[116] It is not difficult to see the influence of the institutionalists of the political paradigm in this relationship between a constitution, institutions established by the constitution, roles of the players, constitutional positions of the players and the winning goals of the players.

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Another special thing about the winning goals of players in a constitutional game is that they may not be constant. The constitution may assign a particular constitutional position to a player with the accompanying winning goals. However, because of the indeterminacy of the constitutional text to definitely and exclusively define the constitutional position of the players, the language of the constitution will always allow some room for an individual political actor as a player in the game to refine or develop their constitutional positions. Their winning goals may also be refined accordingly on the condition that they do not conflict directly with the positions and goals explicitly provided in the constitution and are considered to be legitimate by other players.

A player's personal ideological values may influence how they define their constitutional positions and prioritise their goals in the game. The institutional context may also have a similar influence upon a player.[117]

For example, the constitution may give the court the power to review administrative actions and the constitution may set that the basic goal for such review is to ensure that the administration acts are within the legal boundary of the empowering statutes. The court's winning goal in the game is to ensure the administrative bodies act within the legal boundary. However, there may still be room for the court to further develop the concept of legality and it may incorporate the concept of rationality or even proportionality into the concept of legality enriching it to such an extent that the court may achieve more winning goals than the one expressly provided by the constitution. The constitutional position of the court may then not be just a guardian of legality but a vanguard for good governance.

Refining constitutional positions and winning goals within the room allowed or provided for by the constitution is actually part of the game actions, interactions and strategies of the players in a constitutional game.

(d) Game Resources of the Players

Players come to a game with certain capabilities of their own or they may possess different levels of skills. The game will allocate to each of the players equal or unequal game resources which they can utilise to win the game. For example, in any card game, a player will be given a certain number of cards randomly and each card will enable the player to take different actions in the game depending on the rules of the game. Some players may have more resources and their chance of winning the game will be enhanced.

It is the same situation in a constitutional game that players come to the game with different capabilities of their own and different levels of skills. The constitution may also allocate equal or unequal constitutional powers (games

[117] The influence of the attitudinalists and the institutionalists can be felt here.

resources) which they can make use of by applying their personal capabilities and skills so as to attain their winning goals in the game. A parliament can make laws, but a president can veto those laws. A constitutional court can invalidate a law by exercising its constitutional review power. These are all typical examples of game resources available to different players in a constitutional game.

Apart from enabling players to refine their constitutional positions and winning goals, a constitution may allow some room for the players to refine what game resources they could use. For example, in exercising their powers to review legislation, a constitutional court may further develop what kind of constitutional remedies they can provide to a successful challenge of the constitutionality of a law especially if the constitution is silent on this.

(e) Game Actions

All players in a game act in a particular way in order to win. However, not all actions by a player are allowed by the rules of a game as there are limitations on the players' actions.

As the constitution plays such an important role in a constitutional game, it should come as no surprise that most game actions concern constitutional decision making. Game actions in a constitutional game may include decisions on what provisions will be included in a constitution and how to express the provisions to ensure their goals will be achieved; what statute has to be made to implement the provisions of the constitution; how to exercise powers granted by the statute or the constitution to implement the provisions of the constitution; how the provisions of the constitution should be interpreted; what ruling should be given in adjudicating a constitutional dispute; which provisions in the constitution need to be amended and how they are to be amended.

In a constitutional game, because the constitutional positions and winning goals of the players are not the same, the specific actions they can take in constitutional decision making also differ. The players need to take these specific actions on constitutional decision making so that they can achieve their winning goals in the constitutional game.

Similarly, the constitution in a constitutional game also imposes limits on the kind of actions players can take. Every player must act in the game according to the constitution. Instead of using raw power to gain maximum benefits for themselves, all players have to play in conformity with the constitution to win. Free fights between the players are not allowed in a constitutional game but they are not banned from doing so in a purely political game.[118]

[118] The significance of the constitution as a set of rules setting out what game actions are allowed originates from the legal paradigm.

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Again, the constitution may not be specific enough to state what the exact limits on their actions are. In addition to the room given in the constitution for players to refine their constitutional positions with the accompanying winning goals and the constitutional powers (their game resources) they have in the game, there is also room for players to apply their understanding to the constitutional limits on their actions and refine these actions so that they may act beyond what the constitution expressly allows.

Because of the constitutional room accorded to players to refine their positions and powers, providing an interpretation of the constitutional text is the main form of action that all players take in a constitutional game. This action may precede all their other actions in the constitutional game as players need to offer an interpretation of certain provisions in the constitution to justify their specific actions. In most cases, the interpretations are related with how they understand the constitutional provisions in relation to their positions and powers.

However, the player cannot arbitrarily choose any legal method of interpretation and meaning for the text. They are still under internal and external constraints as determined by the institutional contexts of the constitution.

The constitutional text provides room for different interpretations but it also sets boundaries for interpretations a player can give. Each player will adopt a certain legal approach of interpretation and a particular meaning for the constitutional text that can best advance their constitutional position but this position will also impose constraints on the approach of interpretation and specific interpretation they will adopt. This is the internal constraint. The interpretation chosen cannot conflict with the specific constitutional position adopted by the player.

The language of the constitutional text is an external constraint. It would be very difficult for a player to justify an interpretation if the meaning adopted was a meaning that the language cannot bear. Another external constraint is the pressure generated from the interpretations by the other players who are also under their internal constraints. Depending on the relative powers and limitations in a constitutional game, a player may have to adjust even their legal approach to interpretation as a result of strategic interactions with the interpretations of other players. Constitutional interpretation is, therefore, part of a player's winning strategy in a constitutional game.[119]

(f) Playing Fields

Players' game actions must happen within the boundary of a certain defined playing field. As the game actions of players in a constitutional game are all

[119] *See* further discussion below on playing fields, interaction and strategy in a constitutional game. The emphasis of using legal platforms as the playing fields is also under the influence of the legal paradigm.

related with constitutional decision making, it is natural to find the playing fields of a constitutional game in venues where the making, implementation, interpretation, adjudication and amendment of the constitution take place. The playing field of a constitutional game may be a constitutional convention, a meeting of the constitution's drafters, a cabinet meeting, an administrative official's office, a meeting with citizens by administrative officials, a legislature's chamber, a courtroom, or a referendum.

One common thing about all these playing fields is that they are all basically legal platforms. The consideration of legality plays a very important role in a legal platform in the sense that decisions made in the platform are expected either to be expressed in legal terms or reached on the basis of certain legal codes. A legal platform is a process where legality plays a major role in legitimising an action and an action's legality will be determined. Legality here is the concern expressed by the legal paradigm of constitution stated above.[120]

Different playing fields or legal platforms may involve different kinds of game actions. Some players may only be allowed by the constitution to act in certain playing fields. Different legal platforms may also have different processes of legitimatisation and specific requirements in determining an action's legality.

After a constitution is made and the constitutional game starts, the main playing fields of a constitutional game are in the implementation, interpretation and adjudication stages. In these playing fields, based on how they see their own constitutional positions and winning goals, players will utilise the constitutional powers which they understand to be available for them to use and make constitutional decisions which they believe to be within the limits set by the constitution.

The nature of the playing fields as legal platforms imposes further constraints on the actions of the players in a constitutional game. Even though a player may have some room to determine their constitutional position, powers and limits, any action taken must be recognised as a legitimate act by other players. As the actions are taken in a legal platform, they must at the end find legal authority from the constitution and this must likewise be recognised by the other players in accordance with the specific requirements on legality of that particular legal platform.

Though political bargaining and strategies may still be needed in constitutional decision making, other players of the game will apply and enforce the legal terms of the constitution and the specific requirements on the legality of that legal platform and determine whether the action in question is legal and therefore legitimate.

[120] The emphasis of using legal platforms as the playing fields is also under the influence of the legal paradigm.

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As mentioned above, players will have to give an interpretation to the constitutional text before they take other actions in the game so as to justify those actions. Therefore, the interpretation given by a player will also have to be considered by other players to be a legitimate interpretation in the legal platform in which the need for constitutional decision making arises.

Illegitimate actions by any player may be counteracted by other players. A player may be paralysed from taking further action in the game or be forced by other players to abandon an illegitimate action and get back on the right track if they still want to stay in the game. This is how the players interact in a constitutional game.

A typical example is how a constitutional court in a constitutional adjudication applies the constitutional provision to determine whether a legislative act is unconstitutional. The constitutional court exercises its constitutional review power under the constitution to determine whether the legislative act is unconstitutional, but the manner of how the constitutional court exercises this power must also be considered as legal and legitimate by other players in the sense that the constitutional court is acting within the goals, powers and limits set by the constitution.

(g) Interaction between the Players

Interaction between the players is the key to any game, including a constitutional game. Players act within the playing field but they do not act alone. Any action by a player will immediately attract reactions from the other players and their actions are to block the way to obtaining the winning goal if it causes a conflict with their winning goals or would cause them to lose the game. A player must also immediately respond to the reactions of other players. Therefore, interaction in a game is a continuous process of actions and reactions between the players.

The interaction in a constitutional game is the same. As mentioned above, the main form of action of players in a constitutional game is to provide constitutional interpretations of the constitutional text to justify their specific actions. These specific actions are needed for obtaining their winning goals in the game. As the playing fields of a constitutional game are legal platforms, other players can react by considering these acts as legally illegitimate. The main form of reaction from other players will include competing interpretations of the constitutional provisions and accompanying specific actions.

If a player makes certain constitutional decisions on the basis of their interpretation of the constitution which is related to their position or power but is considered to be legally illegitimate by some other players, they will respond by making another constitutional decision to cancel out the first decision on the basis of their constitutional interpretation of the constitution in pursuance of their positions and powers.

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A law passed by the parliament may be vetoed by the president who believes the law is unconstitutional. The parliament may override the veto by a special majority but the constitutionality of the law may be further challenged in the constitutional court. The constitutional court may declare such a law unconstitutional but a referendum may be held to amend the constitution with the effect of endorsing the invalidated law. All these interactions between the players happen within the framework of the constitution, but they also originate from the different readings of the constitution by the players.

As a constitutional game emphasises legality, players in the playing fields all apply a notion of legality to judge the legitimacy of the other player's action. However, legal legitimacy is only one aspect of legitimacy. Fallon suggests that in addition to legal legitimacy, there are also sociological legitimacy and moral legitimacy.[121]

Legal legitimacy looks at the legality of an action and if an action is considered to be illegal or to have contravened legal norms, the act will be illegitimate. Legal legitimacy may be the basic requirement of legitimacy. The mere fact that an act has complied with the legal requirements on content and process will already bestow on it at least a certain level of legitimacy no matter what the actual content is. However, a legally valid act may still be considered as illegitimate or an illegal act may be legitimate if we see legitimacy beyond legality.

The notion of sociological legitimacy does not refer to what makes an act legitimate but only captures the actual attitude of a person towards an act. A person's acquiescence to an act may indicate that they accept the legitimacy of that act no matter what causes their acceptance.

Sociological legitimacy can have different degrees. People may accept the legitimacy of an act because they personally support the act. People may accept by convention because most other people also accept. They may accept out of habit or accept merely out of indifference. People may accept but only reluctantly if their negative sentiment is not strong enough to cause them to object to it. Even people who do not accept the legitimacy of an act may still give an impression that they accept the legitimacy until and unless they take any overt action to object to it.[122]

Moral legitimacy goes back to examine what causes a person to accept the legitimacy of an act. It looks at legitimacy from the perspective of moral justifiability. As Fallon points out: "Even if a regime or decision enjoys broad support, or if a decision is legally correct, it may be illegitimate under a moral concept if morally unjustified."[123]

[121] Richard Fallon, "Legitimacy and the Constitution," (2005) 118 *Harvard Law Review* pp 1789–1853.
[122] David Held, *Models of Democracy* (Cambridge: Polity Press, 1987), p 238.
[123] Fallon, (n 120 above), p 1796.

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There is no space to examine the different theories of moral legitimacy here. What is relevant to this discussion is that beyond legal legitimacy, which is very much emphasised by the playing fields in a constitutional game, considerations of sociological and moral legitimacy may also cause reactions from other players in the game.

The room in a constitution for players to refine their positions, powers and limits provides space for the consideration of sociological and moral legitimacy to influence actions and reactions of players. There may be situations in which an action of a player may not seem to be legally legitimate, but the degree of illegitimacy to another player may not be strong enough that they may choose not to react against it and accommodate it by giving an alternative reading to the constitution which may not be the preferred one.

In another situation, a player's act may be legally legitimate, but there may be another player who considers that the act is morally illegitimate according to their theory of moral justification and they will react against the act. However, in all these situations where the legality of act cannot resolve the differences between the players,[124] all players must still put their views in legal terms as legal legitimacy is still the ultimate standard on legitimacy to be applied in the playing field. They will utilise the room for alternative interpretations of the constitution to justify their actions, inaction and reactions.

If these other notions of legitimacy are not included in this analysis, it will fail to show the political aspects of a constitutional game and cannot explain the behaviour of players in the game.[125]

(h) Strategy

In a game, players will develop strategies that can maximise their chance of winning. All players in a constitutional game will also have their winning strategies.

Players will strategically use their resources in their interactions with other players in order that their winning goals can be attained. Players may need to adjust or refine their original strategies and in some cases, may even have to adopt a completely different strategy.

In making constitutional decisions in a constitutional game, players will try their best to justify their actions by giving an expansive reading to the constitution which can best fit their winning goals and accompanying actions. All players will play according to their understanding of the constitution and strive to win the game through exerting influence upon other players by their

[124] These situations may not be common in a constitutional game or in the day-to-day operation of a constitutional system, but it cannot be denied that they often arise when there is constitutional controversy or dispute and often may have a long-lasting impact on the development of the constitutional system.

[125] The political paradigm has a very important contribution to this part of the analysis.

game resources to accept their reading of the constitution in the legal platforms. This may be a player's basic strategy.

However, such actions by a player may attract reactions from other players who will block their way to achieve their own goals. They must also develop a strategy in the game that can avoid other players who are trying to prevent them from winning the game.

As can be seen, the understanding of the constitutional provisions by a player on their own positions, powers and limitations may not be the same or may even be in conflict with how other players in the game perceive these things. Owing to the ambiguity inherent in constitutional provisions, players will tolerate a certain degree of difference in their understanding of each others' role, powers and limitations. As a result, there is always a varying degree of room for each player to fine tune their winning strategy which will not immediately attract a reaction from others. However, if a player moves beyond that, reactions from other players are expected though the exact dividing line is drawn differently.

If a player perceives that an act will be considered illegitimate by other players but still insists on taking that action, they will have to take the risk that they may be paralysed by other players from playing the game further or be forced to abandon the action they has taken if they want to stay in the game unless their game resources make them so strong that they can ignore any reaction from the other players. A rational player will not take an action if they perceive that the action will be considered as illegitimate by other players. This is a more advanced strategy.

However, to do this, a player must know what the reactions of the other players to their actions would be. If a player could have complete information about the other players, their chance of winning would be much greater. However, no player in a game can have complete information. They must then base their decisions on the incomplete information they have, and predict what may be the action of the other players.

Therefore, it is important to players in a constitutional game to gather as much information as possible about the other players.[126] Such information may be gained through mutual interaction.

The first piece of information that a player must have is about the interpretative approaches adopted by the other players. As the approach of interpretation to be adopted by a player is determined by their perceived constitutional position which, in turn, is influenced by the player's ideological values and institutional contexts, these are also relevant pieces of information.

[126] For the importance of information in constitutional politics, *see* Georg Vanberg, n 63 above and James R. Rogers, "Information and Judicial Review: A Signalling Game of Legislative-Judicial Interaction," (2001) 45 *American Journal of Political Science*, pp 84–99.

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Another piece of information that a player needs in a constitutional game is whether the other players will consider their action to be illegitimate especially from the perspectives of sociological and moral legitimacy.

As a player's information and perception of the reactions of the other players reveal themselves to be wrong, their actions or reactions may be over-conservative or over-aggressive. After many rounds of playing this game, a player may forecast the possible reactions of other players to their acts. If they can learn from that, their chance of winning the game increases.

(i) End of the Game

In most games, there is a clear end. But there is no end to a constitutional game. Players in a constitutional game want the game to be played continuously. A constitutional game will only end when some players are no longer willing to be bound by the constitution as they perceive that they can never win in the game. They would then like to reset the whole game by enacting a new constitution or revoking the constitution.

Therefore, in a constitutional game, no matter what the winning goals of the other players are, every player will share at least one winning goal in common, that is to have the game maintained. To do so, each player must play in such a way that all other players can achieve their winning goals at least to a certain extent. If not, some players may be so frustrated that they may choose to end the game by quitting or leaving it. In another words, a constitutional game is a win-for-all game if it is played well.

Such a state may be called the equilibrium of a constitutional game. If all players have almost equal game resources in the game, equilibrium will be achieved through give and take interactions between the players in the legal platforms. Equilibrium will be maintained through the operation of such a balancing mechanism. This illustrates how the legal paradigm integrates with the political paradigm, especially the strategic approach.

However, if all players fail to follow or honour the constitution, the constitutional game will collapse. Either another constitution is made and a new constitutional game with a new constitution will replace the collapsed one or a constitutional game will regress to a purely political game.

(j) Constitutional Game as an Analytical Framework

Even if a constitutional game can successfully integrate the legal and political paradigms of constitution, what values this analytical framework has which cannot be observed by having the two paradigms of constitution analysed separately must be examined.

First, using a game framework allows us to understand a constitution not just from one political actor's perspective but to consider it from the perspectives of all political actors, old and new or existing and potential. The

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problem of the legal paradigm is that it only focuses on one political actor, ie the court, and ignores how other political actors would understand the constitution.

Second, a major function of this game analytical framework is to demystify the "sacredness" of the so-called "legal meaning" of constitutional text. Many people believe that the key to the resolution of constitutional disputes is to discover the "legal meaning" or the "right answer" of the relevant constitutional text by using the proper rule of interpretation to interpret the relevant constitutional provision. However, a constitutional game framework shows that there is no such "one" proper rule of interpretation or "one" right answer. Different legal meanings may be arrived at after applying the same rule of interpretation and different rules of interpretation may arrive at the same legal meaning.

Third, the constitution still plays a central role in a constitutional game as the rules of the game. The significance of law in constitutional politics is re-emphasised. If the second reason is a response to the over-legalistic approach of the legal paradigm, then this is a response to the under-legalistic approach of the political paradigm. It avoids the problem of the political paradigm which sees everything only from the perspective of rational calculation, power struggle, or self interest. There is a fundamental difference between a constitutional game and a purely political game but this might have been overlooked by the political paradigm.

Fourth, the complexity in the interaction between the constitutional text and the political actors is exposed. They have a dialectical relationship. One the one hand, the constitution is the source of authority of the political actors and sets the legal boundaries for the political actors. On the other hand, political actors enjoy a certain degree of freedom to redefine the legal boundaries by making use of the inherent language indeterminacy of the constitutional text.

The process of interpretation is not as rigid or mechanical as putting in the right coin and receiving the right product from a slot machine. However, it also does not mean that the constitutional text can be manipulated by a political actor to bear any meaning in the interpretation process. The first view arises from the legal paradigm and the second view arises from the political paradigm.

The reality is that political actors interpret within the boundaries set by the constitution but they will make use of the room available in the constitution to achieve what they can achieve on the basis of their readings of their constitutional positions assigned by the constitution.

Fifth, the constitutional game analysis provides a framework broad enough to accommodate various strands of institutional influences upon political actors (legal and non-legal, formal and informal, symbolic and substantial,

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internal and external) together with their ideological values in accounting what causes political actors to adopt a particular interpretation of the constitution.

A constitutional game accepts the important role that institutions play in influencing the decisions of political actors but it also does not need to adopt a form of institutional determinism excluding the autonomous and creative role individual political actors could play in the constitutional process.

Sixth, the notion of rationality in constitutional interpretation is uncovered which is often hidden in legal analysis. The interaction between the political actors and their strategic planning provide a lot of explanation on how they formulate their actual stances and behaviours in constitutional decision making. Though the explanation may still solely be focused on the external aspects of the institutional impact, this is already much more than what has been achieved in the past. Going deeper into the mind of the political actors may need the integration of another discipline, psychology, in the study of constitutional politics.

Constitutional game analysis does not over-emphasise the role of rational choice as it is considered to be only one of the many factors that affect the actions of political actors though it may be a very important one. In addition, it does not limit itself to instrumental rationality and actions taken to fulfil duties or to serve symbolic functions can be accommodated in the strategic planning of the political actors.

Seventh, the interaction between political actors and the development of strategies in a constitutional game open an understanding of the dynamic aspect of constitutional interpretation and practices. This dynamic nature of the constitution process has long been discovered by the political paradigm but is just ignored by the legal paradigm. Legal scholars tend to only see the constitutional process, and in particular the interpretation process, as a static process. Their sole concern is whether the political actors, especially the judges, have found the right method of interpretation and arrived at the correct meaning.

However, the political paradigm may also have a limitation in this aspect. It looks mainly at the outcome of the dynamic constitutional process but very often overlooks the detailed reasoning in the interpretation provided by the political actors. If it is accepted that the legal text is still a major force influencing the choices of the political actors, a fuller picture can be arrived at if legal scholars can introduce a dynamic view in their understanding of the interpretation of the constitution, and this is how the constitutional game analysis can contribute to this discourse.

Eighth, even though the constitutional game analysis does not explicitly mention what substantive values political actors should read into the constitution, some substantive constitutional values are already embedded in the

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constitutional game analysis like rule of law, constitutionalism, separation of powers and autonomy.

Also, this framework does not prevent researchers (legal or political) from recommending what substantial values should be embedded in the constitution and the framework may be broad enough to accommodate many substantive values. Constitutional game analysis only gives a warning to such normative projects to beware of any institutional constraint which may make any such prescription unworkable. Normative scholars could then refine their proposals to have a practical dimension[127] as well as an evolutionary dimension.[128]

4. The Constitutional Game of Hong Kong

The game analytical framework will now be applied to the Basic Law and the constitutional game of Hong Kong will be presented. By understanding the Basic Law through a game framework, one may gain a more comprehensive view of how the constitutional mechanisms set up by the Basic Law in Hong Kong have operated in the last 10 years and, in particular, how legal and political considerations have interacted to produce the state of the constitution as it exists now.

(a) Players of the Constitutional Game of Hong Kong

The main players of the constitutional game of Hong Kong are already provided by the Basic Law. The Beijing Government has replaced the British Government in exercising sovereign power in Hong Kong. The Beijing Government has different capacities in the HKSAR: the National People's Congress (NPC),[129] the Standing Committee of the NPC (NPCSC),[130] Central People's Government (CPG),[131] the People's Liberation Army[132] and the Foreign Office of the CPG.[133] Owing to the nature of the government in China, these different capacities of the Beijing Government will not be considered as separate players in Hong Kong's constitutional game.

[127] Normative scholars can provide practical advice on how to overcome the institutional obstacles that stand in the way of a successful application of their proposals.

[128] With the understanding of the institutional constraints, normative scholars can provide an evolutionary plan for their proposals and the implementation of their proposals can be divided into stages with each stage having more limited goals. Each stage can aim to transform the institutional contexts only to an extent so as to prepare for a later stage of development.

[129] Basic Law, Preamble, Arts 2, 20, and 159.

[130] Basic Law, Arts 17, 18, 20, 158, 159, 160, Annex I and Annex II.

[131] Basic Law, Arts 12, 15, 18, 19, 22, 43, 45, 48(3), 48(5), 73(9), 96, 106, 125, 129, 131, 132, 133, 134, 150, 151, 152, 153, 154, 155, 156, 157 and Annex I.

[132] Basic Law, Art 14.

[133] Basic Law, Art 13.

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The political system of the HKSAR to a certain extent is very similar to the political system under colonial rule.[134] Many political actors who were players in the constitutional game under the colonial rule re-entered the constitutional game of Hong Kong after the transfer of sovereignty in the same or a different capacity.[135] So when the new constitutional game of Hong Kong started on 1 July 1997, all the players had already lined up to play this new game.

The First Chief Executive leading the Executive Council, the principal officials and the civil service form the HKSAR Government.[136]

Basically, the main political interest groups in the form of political parties or loose political coalitions find their political representation in the Legislative Council (LegCo) and there has been no major change in the last 10 years except a slight adjustment to the proportion of each one. LegCo is basically divided into three main camps: the pro-democracy camp,[137] the pro-Beijing camp[138] and the business camp.[139] There are also divisions and conflicts within each camp but in most cases, each camp could act as one single player in the game.

The Basic Law also provides that the judicial system previously practiced in Hong Kong is maintained,[140] but a new institutional structure has been added to Hong Kong's judicial system, ie the Court of Final Appeal (CFA).[141] A new and powerful player is added to Hong Kong's constitutional game and it emerged that the CFA was the most unpredictable player in the early rounds of Hong Kong's constitutional game.

Throughout these 10 years, there have been several major changes in the players. The first major change was the replacement of Tung Chee Hwa with Donald Tsang as the Chief Executive. Tung was the First Chief Executive and he was re-elected as the Second Chief Executive in 2002 after an uncontested election with overwhelming nominations within the Election Committee. However, Tung resigned two and a half years later in March 2005 and Tsang was elected to serve Tung's remaining term of two years as the "new" Second Chief Executive. Tsang was re-elected as the Third Chief Executive in March 2007 and his term of office will end in 2012.

[134] *See* Ch 4 of the Basic Law.
[135] The First Chief Executive, Tung Chee Hwa, was a member of the Executive Council under colonial rule.
[136] In some situations, one may take the HKSAR Government as one single player in the game.
[137] It includes the Democratic Party, the Frontier, Hong Kong Association for Democracy and People's Livelihood, Hong Kong Confederation of Trade Unions, the Neighbourhood and Workers' Service Centre, the Civic Party and the League of Social Democrats.
[138] It includes the Democratic Alliance on the Betterment of Hong Kong and the Hong Kong Federation of Trade Unions.
[139] It includes the Liberal Party and The Alliance.
[140] Basic Law, Arts 19 and 81(2).
[141] Basic Law, Arts 2 and 19.

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Tung and Tsang have very different backgrounds. Tung was a businessman and had no previous experience in running a government before he took up the position of Chief Executive of the HKSAR. Tsang has a civil service background and has more than 30 years of experience in public service. He was the Chief Secretary for Administration under Tung's Administration. Tung had a very close relationship with the Chinese Government but Tsang served in the colonial administration and was even honoured with a knighthood by the British Government. Their different backgrounds surely must have an impact on the constitutional position they adopt as Chief Executive in this constitutional game.

The second major change is a new player who has joined the game: the civil society of Hong Kong. When the game started, the civil society of Hong Kong[142] was still generally perceived as apolitical and decentralised.[143] The people of Hong Kong can, and have, freely organised themselves into a web of associations functioning quite independently from the government, but there was no record of general political mobilisation except during the events of 1989.[144] Political participation was fragmented and individualistic.[145] However, it is also agreed that since the 1980s and 1990s, civil society had already evolved to a state where it has acquired at least a certain degree of self-awareness[146] and political sensitivity.[147]

The Basic Law has provided the necessary conditions for the civil society of Hong Kong to grow[148] but the entrance of the civil society into the playing

[142] The definition of civil society adopted in this study is the definition adopted by the Centre for Civil Society, London School of Economics and Political Science: "Civil society refers to the arena of un-coerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organizations such as registered charities, development non-governmental organizations, community groups, women's organizations, faith-based organizations, professional associations, trades unions, self-help groups, social movements, business associations, coalitions and advocacy groups."

[143] The understanding of civil society adopted in this analysis of a constitutional game is basically a liberal notion of civil society, emphasising the state *vis-à-vis* civil society relationship. However, this relationship is not necessarily confrontational and could also be cooperative, instrumental or institutionally intertwined. The study of civil society in a constitutional game aims to illustrate the role, capacity, capability and autonomy of the civil society in causing political and constitutional change in a constitutional system.

[144] Sing Ming. "Mobilization for Political Change – The Pro-democracy Movement in Hong Kong (1980s–1994)" in Stephen W.K. Chiu and Lui Tai Lok (eds) *The Dynamics of Social Movement in Hong Kong* (Hong Kong: Hong Kong University Press, 2000), pp 21–53.

[145] Lau Siu-kai and Kuan Hsin-chi, "The Attentive Spectators: Political Participation of the Hong Kong Chinese," (1995) 14 *Journal of Northeast Asian Studies* pp 3–25.

[146] Ip Po Keung, "Development of Civil Society in Hong Kong: Constraints, Problems and Risks," in Li Pang-kwong (ed) *Political Order and Power Transition in Hong Kong* (Hong Kong: The Chinese University Press, 1997), pp 159–186.

[147] Lau and Kuan called the Hong Kong Chinese "attentive spectators." *See* n 145 above.

[148] The Basic Law expressly protects Hong Kong citizens' freedoms of association, of assembly, of procession, and of demonstration. Similar protection can be found under Article 21 of the International Covenant on Civil and Political Rights made applicable to Hong Kong via Article 39 of the Basic Law.

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field in 2003 at the First of July Rally to challenge the enactment of Article 23 legislation still caught everyone by surprise. Tung's poor governance had rejuvenated the political quest of the civil society of Hong Kong, a quest which it might have suppressed since 1989. Even the more privileged sectors in civil society joined hands with the others in the First of July Rally in 2003.

The widespread participation of the civil society was unexpected by all players, including even the civil society itself. No matter what had caused so many people to express their dissatisfaction against the HKSAR Government in such a symbolic manner, the First of July Rally is a landmark in the history of social movement in Hong Kong, indicating how a widespread people's movement could achieve significant change in major government policies.[149]

The significance of the emergence of this new player to the constitutional game will be further analysed in this article, but the entrance of the civil society into the playing field has at least disturbed the equilibrium of the game and every other player (maybe except the CFA, at least at that moment) must readjust their constitutional positions to accommodate the changing political and constitutional environment in the "post-First-of-July-Rally" era.

Besides these two major changes, there were also some less significant changes in the players. Under the Principal Officials' Accountability System (POAS) introduced by Tung in July 2002,[150] all principal officials were no longer civil servants. The term of office was set for five years and will not exceed that of the Chief Executive who nominates them. Principal officials are accountable to the Chief Executive, meaning that the Chief Executive may terminate their contracts at any time. The civil servants, who originally led the bureaus, were re-titled to become the permanent secretaries of the bureaus and are now under the authority of the principal officials. They are responsible for assisting the principal officials in formulating, implementing, and marketing policies under their assigned portfolios. Some outsiders joined the team, but there were also some senior civil servants who, after a change to their status, stayed in office.

Originally, there was not much difference between the principal officials and the civil service. However, this change in the form of principal officials has caused some new players who have great potential to interact with other

[149] Joseph Y.S. Cheng (ed), *The July 1 Protest Rally: Interpreting a Historic Event* (Hong Kong: City University of Hong Kong Press, 2005).

[150] Tung had already provided some hints in his Policy Address in 2000 and in his Policy Address in 2001. *See* also the Address by Tung on 17 April 2002 at LegCo and the Code for Principal Officials under the Accountability System (G.N. 3845, 28 June 2002).

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players to join the game and the influence of senior civil servants is also much reduced.[151]

Another change Tung made was to reform the Executive Council. Tung appointed the chairpersons of two major political parties in LegCo, the Democratic Alliance on the Betterment of Hong Kong (DAB), the major political party representing the pro-Beijing camp, and the Liberal Party, the major political party representing the business camp, to be members of the Executive Council. Tung believed that this could form a ruling coalition and would ensure support from LegCo on government bills and policies.

When Tsang took over, he introduced another major change to the Executive Council. He added more non-official members into the Executive Council. Principal officials other than the Chief Secretary for Administration, the Financial Secretary, and the Secretary for Justice are not required to attend the meeting of the Executive Council unless their policy portfolios are part of the agenda of the meeting.

(b) Basic Law as the Rules of the Constitutional game of Hong Kong

As stated at the beginning of this article, the Basic Law has been viewed as a constitution. However, the status and nature of the Basic Law as a constitution in Hong Kong's constitutional game is not unanimously accepted. In addition to being the constitution of Hong Kong, the Basic Law is also considered to be "the brainchild of an international treaty, the Joint Declaration,"[152] and "maintains the common law and a common law judicial system."[153] However, whether the Basic Law should be understood as a constitution had been raised at an early stage of the drafting of the Basic Law.[154] Another emphasis that the Basic Law is a "national law" of China[155] may affect its status in regulating players' behaviour in the game.

[151] Immediately after the introduction of the new system, there was concern that this was not really an accountability system, as the principal officials are only accountable to the Chief Executive but not to the Hong Kong citizens. There is no mechanism for Hong Kong people or their representatives to remove incapable principal officials or principal officials who have committed wrongdoings. To many people, the POAS was only a mechanism for Tung to cleanse the executive authorities of the HKSAR, ensuring that his policies would be supported wholeheartedly by all officials. Not long after its launch, the POAS system suffered a serious blow. In January 2003, Antony Leung, the Financial Secretary, was found to have purchased a vehicle shortly before his announcement of the increase in the first registration tax of motor vehicles. The serious criticism from the public and the media that Leung's conflict of interest generated in this incident only resulted in a letter of reprimand to Leung from Tung. The establishment and the enforcement of the POAS all depended on the will of the Chief Executive himself.

[152] *HKSAR v Ma Wai-kwan David & Others* [1997] HKLRD 761 at p 772, *per* Chan CJHC.

[153] *Lau Kong-yung and 16 others v Director of Immigration* [1999] 3 HKLRD 778, at p 820, *per* Sir Anthony Mason.

[154] Zhang Youyu, "The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and Its Essential Contents and Mode of Expression," (1988) 2 *Journal of Chinese Law* 5, at p 7.

[155] *Lau Kong-yung*, n 153 above, p 821.

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As a result, on some occasions, some rules other than the Basic Law have been referred to as the rules of the game for Hong Kong's constitutional game[156] and this adds more complication to the already complex situations caused by the inherent indeterminacy of the Basic Law. Sometimes, it is not too clear whether the Basic Law or some other rules should be referred to in determining the rules of the game.[157]

Several approaches of interpretation have been suggested by the players.[158] The first player to use an interpretation approach was the CFA. The CFA in the landmark decision concerning migrant children from mainland China which is also the first Basic Law case it considered, *Ng Ka Ling and Others v Director of Immigration*,[159] established the purposive approach as the approach of interpreting the Basic Law. In essence, the purposive approach is a form of textualist approach as mentioned in Bobbit's list of legal approaches.

The CFA described the purposive approach in the following terms: ". . . in resolving the gaps and ambiguities of the constitution, the court is bound to give effect to the principles and purposes declared in the constitution by resorting to the purposive approach in interpreting the provision in question. The true meaning of the instrument (constitution) is to be ascertained from relevant provisions, the language of its text in light of the context as well as relevant extrinsic materials."[160]

However, in a later case also concerning migrant children from mainland China,[161] the CFA refined its approach of interpretation and called the

[156] The Decision of the Standing Committee of the National People's Congress on the Motion Proposed by Mr Zheng Yaotang and 31 Other Deputies to the National People's Congress adopted by the Ninth Session of the Standing Committee of the Eighth National People's Congress on 31 August 1994 and the Resolution of the Eighth National People's Congress at its Fifth Session on the Work Report of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress adopted by the Eighth National People's Congress at its Fifth Session on 14 March 1997 had been referred to as the legal basis for the establishment of the Provisional LegCo.

[157] In determining the constitutionality of provisions in the National Flag and National Emblem Ordinance, it is not clear whether the Basic Law or the Law of the PRC on the National Flag should be the final authority. The Law of the PRC on the National Flag was enacted by the NPCSC at the 14th Session of the Seventh NPCSC on 28 June 1990 and was made applicable to the HKSAR through the Decision of the Standing Committee of the NPC on the Addition and Deletion of National Laws listed in Annex III of the Basic Law of the HKSAR of the PRC adopted at the 26th Session of the Eighth NPCSC on 1 July 1997 in accordance with Art 18 of the Basic Law. The CFA in *HKSAR v Ng Kung-Siu and Lee Kin-Yun* (FACC 4/1999) avoided this issue in making its ruling in the case. *See* also the analysis in Benny Y.T. Tai, "Chapter One of Hong Kong's New Constitution: Constitutional Positioning and Repositioning" in Ming Chan and Alvin Y. So (eds) *Crisis and Transformation of China's Hong Kong* (M.E. Sharpe, 2002).

[158] For a detailed analysis of the approaches of the interpretation by the players, *see* Peter S.C. Chau, Sally P.L. Ho, Connie H.Y. Lee and Benny Y.T. Tai, "Seeing the Evolution of Constitutional Interpretation in Hong Kong through the Grids Model," a paper presented in the Interpretations and Beyond Conference organised by the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong, Hong Kong, 25–26 November 2005.

[159] *See* n 1, at p 339.

[160] *See* n 1, at p 340.

[161] *The Director of Immigration v Master Chong Fung Yuen* (FACV No 26 of 2000).

new approach, the common law approach. The major difference between the common law approach and the purposive approach is that in certain circumstances, the court would base its interpretation more on the language of the specific provision in question and does not need to refer to the wider textual context and extrinsic materials.[162] Therefore, like the purposive approach, the common law approach is also a form of textual approach, though a narrower one.

Another approach of interpretation that has been considered by players in Hong Kong's constitutional game is the historical approach in Bobbitt's list, more often referred to as the originalist approach. After the decisions of the CFA in *Ng Ka Ling*, Tung made a report to the CPG to seek for assistance from the CPG to deal with the unbearable pressure on the HKSAR from the effect of the CFA's interpretation. Tung asked the State Council to make a request to the NPCSC to interpret the relevant provisions of the Basic Law. The main ground Tung put forward was that the CFA's interpretation of the relevant provisions of the Basic Law is different from the HKSAR Government's understanding of the "wording, purpose and legislative intent of these provisions."[163] It seems that the major difference between the CFA and Tung is their understanding of the "legislative intent" of the Basic Law. Though Tung did not suggest any alternative approach of interpretation explicitly, it is likely that he preferred the historical approach.

The NPCSC in its first interpretation on the Basic Law[164] upon this request from Tung also did not advance any other method of interpretation or question the purposive approach adopted by the CFA, but it did refer to "the legislative intent" of the relevant provisions of the Basic Law that can be

[162] The CFA stated in the case that: "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. The courts do not look at the language of the article in question in isolation. The language is considered in the light of its context and purpose. See *Ng Ka Ling* at 28–29. The exercise of interpretation requires the courts to identify the meaning borne by the language when considered in the light of its context and purpose. This is an objective exercise. Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear.

Once the courts conclude that the meaning of the language of the text when construed in the light of its context and purpose is clear, the courts are bound to give effect to the clear meaning of the language. The courts will not on the basis of any extrinsic materials depart from that clear meaning and give the language a meaning which the language cannot bear."

[163] Report on Seeking Assistance from the Central People's Government in Solving Problems Encountered in the Implementation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Chief Executive of the HKSAR, 20 May 1999.

[164] Interpretation of the Standing Committee of the National People's Congress on Art 22(4) and para 3 of 24(2) of the Basic Law of the Hong Kong Special Administrative Region adopted by the Standing Committee of the Ninth National People's Congress at its 10th Session on 26 June 1999.

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found in a document outside the Basic Law.[165] The NPCSC ruled that the interpretation of the CFA "is not consistent with the legislative intent" of the Basic Law.[166]

There is no additional information on the NPCSC's approach of interpretation[167] from its second interpretation on the Basic Law.[168] In its third interpretation, it seems that the NPCSC has applied both the textual approach and the historical approach in resolving the conflict on the length of the term of office of the re-elected Chief Executive after Tung's resignation.[169]

(c) Winning Goals of the Players in the Constitutional game of Hong Kong

As the winning goals of the players in a constitutional game are determined by their constitutional positions, these positions in Hong Kong's constitutional game are examined here.

The constitutional position adopted by the Beijing Government is one of an open-minded sovereign. This originates from Beijing Government's policy of unification, "One Country Two Systems". From that position, the winning goals of the Beijing Government are fourfold. First, the Beijing Government wants to maintain its sovereign status in Hong Kong by ensuring that no player can pose any substantive challenge against its sovereignty over Hong Kong. The maintenance of stability and economic prosperity in Hong Kong is its second goal. Third, it needs to convince the international community that Hong Kong can continue to practice a high degree of autonomy in deciding its internal affairs. Fourth, the Beijing Government also wants to use the Hong Kong model to convince the people of Taiwan to agree to unify with the Mainland.

Tung as the First Chief Executive of the HKSAR viewed himself as a Chinese Official from Hong Kong and a conservative reformer. These two

[165] Opinions on the Implementation of Art 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China adopted at the 4th Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress on 10 Aug 1996.

[166] *See* the Explanatory Note on the Interpretation by the Standing Committee of the National People's Congress of Arts 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of The People's Republic of China presented at the 10th Session of the Standing Committee of the 9th National People's Congress on 22 June 1999 by Qiao Xiaoyang, the Deputy Secretary of the Legislative Affairs Commission, NPCSC.

[167] Some critics view the interpretations by the NPCSC in both the first and the second interpretation as not really interpretation but legislative decisions. In China's constitutional system, it is not easy to distinguish interpretation and legislation in the NPCSC's power of legislative interpretation provided by Art 67(4) of the Constitution of the PRC and Art 42 to 47 of the Law on Legislation of the People's Republic of China. *See* Chau, Ho, Lee and Tai, n 158 above.

[168] Interpretation of the Standing Committee of the National People's Congress on Clause 7 of Annex I and Clause 3 of Annex II of the Basic Law of the Hong Kong Special Administrative Region adopted by the Standing Committee of the 10th National People's Congress at its 8th Session on 6 Apr 2004.

[169] Interpretation of the Standing Committee of the National People's Congress on Art 53(2) of the Basic Law of the Hong Kong Special Administrative Region adopted at the 15th Session of the Standing Committee of the 10th National People's Congress on 27 Apr 2005.

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constitutional positions reek with ironies. The first constitutional position is concerned with the relationship between Beijing and Hong Kong and the second position is related to the internal administration of Hong Kong.

Tung's winning goal was to gain the trust and support of both the Beijing Government and Hong Kong people. If there were to be a conflict between Beijing and Hong Kong, it would be difficult for Tung to make a choice.[170] Therefore, an accompanying goal was to avoid any possible conflict between Beijing and Hong Kong. The winning goal from Tung's second constitutional position was to reform Hong Kong's social systems without changing them in ways that may affect vested interests too much.

After Tung failed miserably in most of his goals, Tsang took up the office of the Chief Executive. What winning goals Tsang and all other would-be Chief Executive of the HKSAR can have are limited by the institutional context. At least at this stage, a Chief Executive needs the blessing of the Beijing Government before he can be elected. This made Tsang's primary winning goal to earn the trust of the Beijing Government especially while he served the remaining term of Tung and because he did not have a track record of a close relationship with officials in the CPG.

Like Tung, Tsang also wants to be trusted by Hong Kong people. On internal policies, Tsang wanted to restore strong governance.[171] Also, he wants the HKSAR Government to play a more limited role and the market a more prominent role in governance.[172]

The Executive Council and the principal officials as institutional entities do not have any winning goals different from the Chief Executive as their constitutional positions are advisors and assistants to the Chief Executive respectively. However, some individual members of the Executive Council or some individual principal officials may want to make use of their positions to enhance their chance to succeed Tsang to be the Chief Executive of the HKSAR in the following term, as Tsang has provided an example of career advancement for senior members in the HKSAR Government.

In the civil service, only the administrative officers (the most prestigious rank of civil servants) can have any constitutional status. Again, their role is to assist the Chief Executive in implementing his policies. During the colonial rule, administrative officers did not merely implement policies, they were also policy makers. The wining goal of administrative officers at that time was to administer Hong Kong in the public interest according to their understanding of public interest. There was no change during the first term of Tung's rule. However, after Tung introduced the POAS, administrative officers could

[170] If there were to be a conflict, Tung at the end might see himself more a loyal agent of the Beijing Government rather than a representative of Hong Kong.
[171] Policy Address of the Chief Executive 2005–2006, paras 5–10.
[172] Policy Address of the Chief Executive 2006–2007, para 68.

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only be assistants to the principal officials and they lost any substantial constitutional position as well as any winning goal in the constitutional game.

Tsang, with a civil service background, found it much easier to work with civil servants. Among the 15 principal officials nominated by Tsang for the third term of the HKSAR Government, nine are from the civil service. However, these appointments are political as they are no longer civil servants. Therefore for those senior civil servants who remain in the civil service, they do not have any substantial constitutional position and winning goal except that they may try their best to attract the attention of Tsang through their loyal and effective service in the hope that Tsang will nominate them when there are vacancies for principal officials. Whether the future Chief Executive will be like Tsang, favouring civil servants in his choice of principal officials, is not clear. The significance of administrative officers in the civil service as a player of Hong Kong's constitutional game remains to be seen.

The three camps in the LegCo all have their constitutional positions. The pro-democracy camp, knowing that it is still a minority in LegCo, set its constitutional position to be the opposition. However, it also sees itself as a democratic reformer to the current unfair political system. Its winning goals are to put an effective check on the administration and to have an early implementation of geographical direct elections for both the Chief Executive and LegCo. For internal social policies, the pro-democracy camp is divided, with members ranging from the far left to the centre-right.

The pro-Beijing camp's constitutional position is the supporter of the Beijing Government in Hong Kong and therefore it must also be the supporter of the Chief Executive who has the backing of the Beijing Government. Its major winning goal is to see the Beijing Government and the HKSAR Government both being supported by Hong Kong people.

However, there may be tension between this constitutional position and its other position as a potential ruling party. The winning goal of the latter constitutional position is to cultivate as much support from the general public of Hong Kong as possible because it needs their votes in elections. In some cases, it may need to join hands with the pro-democracy camp to criticise the HKSAR Government, though at critical issues and moments it will be called back to act out its role as the supporter of the HKSAR Government.

The business camp's representation in LegCo is institutionally guaranteed through the functional constituency system in LegCo.[173] For decades, the

[173] Simon Young and Anthony Law, "Privileged to vote: inequalities and anomalies of the FC system" in C. Loh and Civic Exchange (eds), *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong; Hong Kong University Press, 2006) 59–109 and Simon Young, "Elected by the elite: functional constituency legislators and elections" in C. Loh and Civic Exchange (eds), *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong; Hong Kong University Press, 2006) 111–142.

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policies of the colonial government and the HKSAR Government have been in favour of a free market, ie minimal governmental intervention in the market. Therefore, the business camp's constitutional position is a preserver of the status quo with the winning goal of maintaining the present form of political system as long as possible and discouraging the HKSAR Government from changing its "Big Market, Small Government" policy. Gaining more influence in LegCo by winning some seats through geographical election and in the Executive Council by joining the ruling coalition is consistent with its constitutional position.

Ironically, political groups represented in LegCo all have their constitutional positions but LegCo is prevented from having a constitutional position as an entity itself by the institutional design in the Basic Law. The different election methods of the members of LegCo ensure that the interests represented in LegCo are diverse and successfully prevents the formation of a majority party.[174] As no political party represented in LegCo could control the majority, the political parties have to cooperate before they can find a constitutional position for LegCo, but such cooperation can seldom be achieved because of the intense conflict between the camps. As a result, LegCo does not have the capacity to position itself in any significant way other than as a weak or feeble overseer of the HKSAR Government.

Those who have studied constitutional courts in new constitutional systems will not be surprised by the constitutional position taken by the CFA.[175] When it had the first opportunity to spell out its constitutional position in detail in *Ng Ka Ling*, the CFA positioned itself as the guardian of Hong Kong's high degree of autonomy, the guardian of Hong Kong's rule of law and the guardian of human rights in Hong Kong.[176]

The primary winning goal of the CFA was to have the judicial autonomy of Hong Kong courts established, and judicial independence maintained in the new constitutional game. The other winning goals like the establishment of Hong Kong's high degree of autonomy, the maintenance of Hong Kong's rule of law, and the protection of human rights of Hong Kong people could then be achieved through this primary goal.

Civil society, by nature, is very different from the other players in the constitutional game. Civil society is not a single entity but is composed of hundreds of thousands of free associations of citizens outside the direct control of the state. These associations may have a tightly organised structure or

[174] Different sectors elect their own representatives into LegCo through the functional constituencies election. A proportional representation system is adopted in the geographical direct election which allows small political parties to more easily win a seat in the election.

[175] Epstein, Knight, and Shevetsova, n 63 above, Ginsburg, n 63 above, and Shannon Ishiyama Smithery and John Ishiyama, "Judicial Activism in Post-Communist Politics," (2002) 36 *Law and Society Review* pp 719–741.

[176] Tai, n 157 above.

they may be very loose. The relationship with members in these associations can be relatively permanent or it can be just temporary, even incidental. The associations can be very large in size with thousands of members or they can be very small. The objectives of the associations can be political, professional, social, religious, economic, ideological, cultural or racial, or any of the other concerns that cause a group of people to join together. Their relationship with the government also varies from institutional, instrumental or cooperative to confrontational.

The heterogeneity of civil society makes any analysis on the constitutional role it can play in a constitutional game extremely difficult. There is no one association, or even group of associations, in the civil society of Hong Kong, unlike the Catholic Church and Solidarity in Communist Poland, which could mobilise the people to join together to challenge the rulers. Therefore, there is no clear constitutional position one can identify for the civil society. However, at the same time, one cannot ignore its presence in the game and what constitutional position it may suddenly take up at critical moments in the game. This adds a lot of game play uncertainty.

(d) Game Resources of the Players in the Constitutional game of Hong Kong

Again, we must start with the Beijing Government as it has the most resources in the game, to such an extent that one may question whether any meaningful constitutional game can be played if it actually uses all its resources.

The power to enact[177] and amend[178] the Basic Law belongs to the Beijing Government. It is also responsible for the defence[179] and foreign affairs[180] of the HKSAR. The Beijing Government further retains the power to review local legislation,[181] the power to apply national laws to the HKSAR in limited situations,[182] and the power to appoint the Chief Executive[183] and the principal officials.[184]

Though the Basic Law has set limits or conditions for the Beijing Government to exercise these powers, it has the power to interpret the Basic Law which may be the most important and convenient power enjoyed by the Beijing Government in the game.[185] Through interpreting the legal text that describes the conditions for exercising the above-mentioned powers, there is almost nothing the Beijing Government cannot do. In other words, any constitutional limits are self-imposed.

[177] Constitution of the People's Republic of China (PRC), Art 31.
[178] Basic Law, Art 159.
[179] Basic Law, Art 14.
[180] Basic Law, Art 13.
[181] Basic Law, Art 17.
[182] Basic Law, Art 18.
[183] Basic Law, Arts 15 and 45.
[184] Basic Law, Arts 15 and 48(5).
[185] Constitution of the PRC, Art 67(4) and Art 158 of the Basic Law.

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Another very important power of the Beijing Government in the game is its power to determine who will be the Chief Executive. The election method of the Chief Executive ensures that no person without the support of the Beijing Government can be elected.[186] As the Chief Executive must be a person it can trust and the office of Chief Executive is vested with immense power to administer the internal affairs of Hong Kong by the Basic Law, the Beijing Government can also indirectly decide internal affairs in Hong Kong through the Chief Executive if it desires.

One additional power that the Beijing Government has established for itself is that it has control over the whole process involving any change to the election methods of the Chief Executive and LegCo[187] and the HKSAR does not have the power to deicide by itself to introduce any change to the political system of the HKSAR. This is consistent with the emphasis by Wu Bangguo, Chairman of the NPCSC, in an important speech recently delivered in a seminar marking the 10th anniversary of the Basic Law, that the HKSAR does not enjoy residual powers and can only have the powers given by the Beijing Government.[188]

An executive-led form of government has been used to describe the nature of the political system of the HKSAR[189] meaning that governmental powers are mainly vested in the HKSAR Government which, in turn, is centrally led by the Chief Executive.

The Basic Law provides a long list of powers of the Chief Executive including the power to implement laws, to sign bills passed by LegCo and to promulgate laws, to sign budgets passed by LegCo, to decide on government policies and to issue executive orders, to appoint or remove judges of the courts at all levels in accordance with legal procedures, to appoint or remove holders of public office in accordance with legal procedures, to implement the directives issued by the CPG, to approve the introduction of motions regarding revenues or expenditure to LegCo, to decide whether government officials should testify or give evidence before LegCo or its committees, to pardon persons convicted of criminal offences or commute their penalties, to handle petitions and complaints,[190] and to dissolve LegCo.[191]

[186] Basic Law, Art 45 and Annex I.

[187] In the Interpretation of the Standing Committee of the National People's Congress on Clause 7 of Annex I and Clause 3 of Annex II of the Basic Law of the Hong Kong Special Administrative Region adopted by the Standing Committee of the 10th National People's Congress at its 8th Session on 6 Apr 2004, the NPCSC states that no amendment to the provisions in the two Annexes can be made without a report to the NPCSC by the Chief Executive of the HKSAR on whether there is a need to make an amendment and the NPCSC makes a determination. The bills on the amendments after being passed by a two-thirds majority of all the members of the LegCo and the consent of the Chief Executive shall be reported to the NPCSC for approval or for the record.

[188] *See* also Art 20 of the Basic Law.

[189] Wu Bangguo in the same speech re-emphasised that the principle of an executive-led form of government is the most important characteristic of the HKSAR's political structure.

[190] Basic Law, Art 48.

[191] Basic Law, Arts 49–52 and 70.

In addition to these express powers, through the interpretation by the NPCSC, the Chief Executive also has the power to ask the NPCSC to interpret any provision of the Basic Law by making a report to the CPG.[192] However, the Chief Executive cannot use the power to issue executive orders to limit fundamental rights enjoyed by Hong Kong people.[193]

Compared with the HKSAR Government, LegCo has substantially lesser powers and its powers may be even more limited than LegCo during the colonial rule. LegCo has the power to make the HKSAR Government accountable but it can only require the HKSAR Government to implement laws passed by LegCo; to present regular policy addresses to LegCo; to answer questions raised by members of the LegCo; and to obtain approval from LegCo for taxation and public expenditure.[194] It has the power to impeach the Chief Executive for serious breach of law or dereliction of duty[195] which is a power it did not have under the colonial rule but individual members of LegCo have considerably more limitations in introducing[196] and passing bills[197] than during the colonial time.

There are two controversial powers enjoyed by LegCo. One is to summon persons to testify or give evidence before LegCo[198] and the other is to pass a non-legal binding motion on no confidence in government officials. There is a question as to whether a select committee set up by LegCo to inquire into policy failures of government officials can summon the Chief Executive to give evidence.[199]

There is no express provision that allows or prohibits a motion of no confidence but it is argued that such a power is inconsistent with the principle of an executive-led form of government.

The Basic Law does not expressly state the powers of courts of the HKSAR other than providing that the courts of the HKSAR "shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction

[192] *See* the Interpretation of the Standing Committee of the National People's Congress on Art 22(4) and para 3 of 24(2) of the Basic Law of the Hong Kong Special Administrative Region adopted by the Standing Committee of the 9th National People's Congress at its 10th Session on 26 June 1999.

[193] The CFA in *Koo Sze Yiu and Leung Kwok Hung v Chief Executive of the HKSAR* (FACV Nos 12 & 13 of 2006) ruled that an executive order cannot satisfy the requirement of "in accordance with legal procedures."

[194] Basic Law, Art 64 and 79.

[195] Basic Law, Art 79(9).

[196] Article 74 of the Basic Law provides that bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the LegCo. The written consent of the Chief Executive shall be required before bills relating to government polices are introduced.

[197] Basic Law, Annex II, Part II.

[198] Basic Law, Art 79(10) and Legislative Council (Powers and Privileges) Ordinance, Cap 382, s 9.

[199] Article 48(11) gives the Chief Executive the power to decide, in the light of security and vital public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before LegCo or its committees but it is not clear whether he can also exempt himself. In the inquiry into the handling of the Severe Acute Respiratory Syndrome (SARS) outbreak by the HKSAR Government and the Hospital Authority, Tung avoided the problem by meeting with the select committee but not giving evidence before the committee.

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imposed by the legal system and principles previously in force in Hong Kong shall be maintained."

Two powers exercised by the courts of the HKSAR have been questioned. The first one is the power to review the constitutionality of statutes enacted by LegCo and the power to review the legality of administrative actions. Though there is no express provision in the Basic Law that authorises the courts of the HKSAR to have the power of constitutional review[200] and judicial review of administrative actions,[201] from the structure of the Basic Law the courts of HKSAR no doubt have these powers.

The CFA confirmed that the courts of the HKSAR have both powers in *Ng Ka Ling*.[202] What is controversial is that the CFA included in its power of constitutional review the power to review whether the legislative acts of the NPC or the NPCSC are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent.[203] After the CFA issued a subsequent clarification on this ruling,[204] it seems that the courts of the HKSAR will not exercise this extended form of constitutional review power in the future.

In several recent cases, the courts of the HKSAR have provided new remedies like remedial reading[205] and suspension order of unconstitutionality.[206] The courts of the HKSAR have also opened the possibility to conduct an abstract review of constitutionality[207] and provide new constitutional

[200] Article 11 of the Basic Law provides that no law enacted by the legislature of the HKSAR shall contravene the Basic Law. The only constitutional review mechanism expressly provided in the Basic Law is provided in Art 17 to be exercised by the NPCSC. However, the NPCSC will only review laws enacted by LegCo if they contravene the provisions of the Basic Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the HKSAR. There is no provision on which institution will review laws enacted by LegCo that contravene provisions of the Basic Law other than those provisions stated in Art 17. The only institution in the HKSAR that could exercise this power is the courts. Also, Art 19 provides that the courts of the HKSAR shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained. As courts of Hong Kong during the colonial rule had the power of constitutional review (*see Winfat Enterprise (HK) Co Ltd v Attorney General* [1988] 1 HKLR 5), therefore, the courts of the HKSAR should also have this power.

[201] Article 35 provides that Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel. If the courts of the HKSAR have no power to review acts of the executive authorities and their personnel, then it will produce an absurd result in that the residents have the right to sue the HKSAR Government in the courts but the courts have no power to hear the case or give remedies. In addition, the power to review administrative actions is well embedded in common law principles. As the common law will be maintained in the HKSAR (*see* Arts 8 and 18 of the Basic Law) and the courts of the HKSAR can refer to precedents of other common law jurisdictions (Art 84 of the Basic Law), the courts of the HKSAR can also find the origin of their power to review administrative actions in the common law.

[202] *Ng Ka Ling*, *see* n 1 above, at p 337.

[203] *Ibid.*

[204] *Ng Ka Ling v Director of Immigration* (No 2) [1999] 1 HKLRD 577.

[205] *HKSAR v Lam Kwong Wai and the other* (FACC No 4 of 2005).

[206] *Koo Sze Yiu and Leung Kwok Hung v Chief Executive of the HKSAR* (FACV Nos 12 & 13 of 2006).

[207] In *Leung TC William Roy v Secretary for Justice* (CACV 317/2005), the Court of Appeal ruled that the courts of the HKSAR on a case by case basis may determine whether sufficiently exceptional circumstances exist to enable it to exercise the discretion to hear cases concerning constitutionality of statutes notwithstanding that future conduct or a hypothetical situation is involved.

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remedies like prospective overruling[208] and temporary validity order of unconstitutionality.[209]

Civil society does not have any direct institutional power but the civil society can have four main non-institutional powers to influence constitutional decision making in the game. The first power is to initiate constitutional review or judicial review proceeding to challenge the constitutionality of legislation or administrative actions.[210] The second power is to participate actively in public discussion on public policies in the media. The third power is to conduct opinion polls on public policy issues or performance of the HKSAR Government and its officials. The fourth power is to organise and participate in large-scale public demonstrations like the First of July Rally.

(e) Game Actions in Hong Kong's Constitutional Game

Many actions have been taken by the players in the last 10 years in Hong Kong's constitutional game and it is impossible to include them all in this study – it will only illustrate several major actions taken by the players in this part; specifically self-initiated actions. Reactions to the actions of the other players will be covered in the following section, on interaction. However, sometimes it is not easy to distinguish whether an action is actually a self-initiated action or a reaction.

The most important action of the Beijing Government was not to take any action after it had successfully laid the constitutional foundation for the HKSAR through the enactment of the Basic Law, the preparation for the transitional arrangements,[211] and the setting up of the basic governance structure in the HKSAR. The design of the governance of the HKSAR with a trustworthy Chief Executive vested with overwhelming powers to manage Hong Kong on behalf of the Beijing Government would not require the Beijing Government to play any active role in the governance of Hong Kong according to its original thinking. Therefore, many actions taken by the Beijing Government were actually reactions to actions taken by players in Hong Kong including sending four Mainland legal experts to Hong Kong to express concern over a controversial judgment by the CFA, exercising the power to

[208] *HKSAR v Hung Chan Wa and the Other* (FACC No 1 of 2006).

[209] *Koo Sze Yiu*, n 206 above.

[210] The Chief Justice of the CFA in his speech at the Ceremonial Opening of the Legal Year 2006 accepted that this is one of the reasons to explain the rising numbers of judicial review applications. (*See* http://www.info.gov.hk/gia/general/200601/09/P200601090137.htm (last visited 4 Aug 2007).)

[211] The Beijing Government failed to come an agreement with the British Government on the composition of the last LegCo during the colonial rule and the original transitional arrangement for the last LegCo to be the first LegCo of the HKSAR provided in the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China adopted by the 7th NPC at its 3rd Session on 4 April 1990 could not be carried out. The Beijing Government decided that a provisional LegCo had to be set up to fill the legal vacuum. *See* n 156 above.

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interpret the Basic Law upon requests by the Chief Executive, settling the political instability in Hong Kong caused by Tung's poor governance and restoring its control over the pace of Hong Kong's democratic development.

When Tung first took up his position as the Chief Executive, he had many new plans for the betterment of Hong Kong. However, many such plans were either abandoned without giving notice to the public or failed miserably. He put the blame on the non-cooperation of senior members of the civil service. Before the introduction of the POAS, most of the principal officials were civil servants.[212] As Tung had no prior experience in running a government, he relied heavily on the civil servants to assist him in implementing his policies. However, he soon found that some senior officials within the HKSAR Government did not share his view on how the HKSAR Government should position itself in the new constitutional game.[213]

Tung introduced the POAS to reassert his authority in the HKSAR Government. The provisions in the Basic Law provided sufficient room for Tung to introduce such a fundamental change to Hong Kong's political system without amending the Basic Law.[214]

Another proactive move taken by Tung to reassert his authority was the decision to go ahead with the legislative plan to enact Article 23 of the Basic Law after five years of inaction.[215] Article 23 provides that: "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."

[212] The only exception was the then Secretary for Justice, Leung Oi Sie. She was a solicitor in private practice and a member of the Hong Kong Deputies to the NPC before her appointment. She was not the first Attorney General (the name of the post of the Secretary for Justice during the colonial rule) who was recruited from outside the civil service. Another exception was Antony Leung who was appointed to be the Financial Secretary in 2001.

[213] The premature retirement of the Chief Secretary for Administration, Anson Chan, raised serious suspicion about conflict between the Chief Secretary for Administration and the First Chief Executive. The last public speech given by Anson Chan in her capacity as the Chief Secretary for Administration gave a lot of hints on this internal tension within the HKSAR Government. (*See* http://www.info.gov.hk/gia/general/200104/19/0419138.htm (last visited 4 Aug 2007).) Since 2004, Anson Chan has been very active in local politics and often put forward very critical comments against the HKSAR Government. With her insider knowledge, her views are very influential, and in some cases, damaging to the HKSAR Government.

[214] Article 61 of the Basic Law lists the qualifications of principal officials but it does not include the requirement of being a civil servant.

[215] Tung might be under the pressure from the Beijing Government to initiate the legislation for the HKSAR. After waiting for 5 years, the Beijing Government might be reluctant to wait any longer. *See* the view of Qiao Xiaoyang, the Deputy Secretary of the Legislative Affairs Commission, NPCSC, reported in *Wenweipo*, 27 Sept 2002.

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Tung believed that the HKSAR Government had a constitutional duty to enact laws to implement the requirements of Article 23.[216] A consultation paper was issued in September 2002.[217] There might not be much dispute on whether there was such a constitutional duty as it is expressly stated in the Basic Law that the HKSAR "shall enact laws on its own," but the form, the scope, and the timing of the fulfilment of this duty were questioned by many. The Basic Law does not provide any other guidelines on legislation apart from than the general requirements as stated in Article 23 itself.

The consultation paper had adopted a rather expansive reading of the legislative requirements for fulfilling the constitutional duty of Article 23. A series of new offences and old offences to be redefined were suggested, including treason, secession, sedition and subversion. There could be definitions that might be less intrusive to individual rights, but the HKSAR Government chose to provide only the lowest level of protection to Hong Kong citizens' fundamental rights, as opposed to the protection of national security. Many proposals were not directly related with Article 23.[218] The scope of the Official Secrets Ordinance was proposed to be extended to criminalise more acts than just theft of state secrets as required by Article 23. Affiliation with illegal Mainland organisations by local organisations was also covered, though Article 23 only requires the prohibition of political organisations or bodies of the HKSAR from establishing ties with foreign political organisations or bodies. Wide investigative powers were suggested to be granted to the police in dealing with the offences under Article 23. It seemed that the HKSAR Government had tried to address some unspoken concerns of the Beijing Government, even if these concerns might not be directly covered by Article 23.

The HKSAR Government released the results of the consultation in a Compendium of Submissions,[219] showing that the majority supported legislation to implement Article 23. However, it was criticised that the approach of the HKSAR Government in categorising and processing the submissions was biased.[220] There was also a strong opinion in the society asking for a white bill on the national security legislation so that there could be more detailed discussion in the community on the actual wording of all the offences before the

[216] For the analysis of this constitutional duty, *see* Benny Y.T. Tai, "The Principle of Minimum Legislation for Implementing Article 23 of the Basic Law" (2002) 32 *Hong Kong Law Journal* pp 579–614.

[217] Consultation Document on Proposals to implement Article 23 of the Basic Law. Available at http://www.basiclaw23.gov.hk/english/download/reporte.pdf (last visited 4 Aug 2007).

[218] Tai, n 216 above.

[219] Available at http://www.basiclaw23.gov.hk/english/download/forward-e.pdf (last visited 4 Aug 2007).

[220] *See* "Doing Justice to Public Opinion in Public Consultations: What to Do and What NOT to Do – A Case Study of the Government's Consultation Exercise On its Proposals to Implement Article 23 of the Basic Law," a report by the Research Team on the Compendium of Submissions on Article 23 of the Basic Law, 26 May 2003. Available at http://hkupop.hku.hk/Chinese/resources/bl23/bl23gp/report/report.pdf (last visited 4 Aug 2007).

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bill went to LegCo. However, the HKSAR Government refused. It seemed that there was a deadline for the HKSAR Government to complete this legislation, though it was not clear whether the deadline was self-imposed or set by the Beijing Government. For the reactions to this controversial action taken by Tung, see the discussion on the Article 23 game in the following Section.

Though institutionally LegCo did not have a very distinct role in Hong Kong's constitutional game other than endorsing the proposals from the HKSAR Government or putting up some weak or feeble opposition against the HKSAR Government, some actions were still taken by LegCo in utilising its limited resources in the game.

According to Article 74 of the Basic Law, bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of LegCo. The written consent of the Chief Executive shall be required before bills relating to government polices are introduced.

However, it is not clear on whether it should be the President of LegCo or the Chief Executive who determines whether a bill is related to public expenditure or political structure or the operation of the government, and whether a bill is related to government policies. In designing its rules of procedures,[221] LegCo tried to extend its power by vesting this power to the President of LegCo.[222]

LegCo had debated a motion on no confidence in a principal official though the motion did not have any legal or constitutional effect.[223] It had also three times exercised the power to conduct public inquiries on governance failures.[224]

One very important action taken by the CFA in its first case on the Basic Law was to assert its constitutional jurisdiction. This had caused chain reactions from other players and these interactions will be further examined in the following part. What is interesting is that the action of CFA is not unusual for a constitutional court in its early days.[225]

[221] Basic Law, Art 75.

[222] Rules of Procedures of the Legislative Council of the HKSAR, Rules 51 and 57.

[223] *See* the Motion on no confidence in the Secretary for Justice moved by Margaret Ng in March 1999. (http://www.legco.gov.hk/yr98-99/english/counmtg/hansard/990310fc.htm (last visited 4 Aug 2007).)

[224] *See* the Report of the Legislative Council Select Committee to inquire into the circumstances leading to the problems surrounding the commencement of the operation of the new Hong Kong International Airport at Chek Lap Kok since 6 July 1998 and related issues, July 1998 (http://www.legco.gov.hk/yr98-99/english/sc/sc01/papers/report.htm (last visited 4 Aug 2007)); the First Report of the Select Committee on Building Problems of Public Housing Units, Jan 2003 (http://www.legco.gov.hk/yr02-03/english/sc/sc_bldg/reports/rpt_1.htm (last visited 4 Aug 2007)); the Second Report of the Select Committee on Building Problems of Public Housing Units, May 2004 (http://www.legco.gov.hk/yr03-04/english/sc/sc_bldg/reports/rpt_2.htm (last visited 4 Aug 2007)); and the Report of the Select Committee to inquire into the handling of the Severe Acute Respiratory Syndrome outbreak by the Government and the Hospital Authority, July 2004 (http://www.legco.gov.hk/yr03-04/english/sc/sc_sars/reports/sars_rpt.htm (last visited 4 Aug 2007)).

[225] *See* n 175 above.

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The civil society unexpectedly was very active in the game, especially after 2003. Several major constitutional review[226] and judicial review actions[227] were initiated by the civil society as part of its social or political movement against constitutional or legal decisions of the HKSAR Government.

Since 2003, the First of July Rally has become an annual event for the civil society of Hong Kong to present their various demands to the HKSAR Government and the Beijing Government which include the introduction of geographical direct election for the election of the Chief Executive and all members of LegCo.

(f) Playing Fields in Hong Kong's Constitutional Game

During the last 10 years, some playing fields of Hong Kong's constitutional game were expected but some were not. Gamesmanship in the government offices of the HKSAR Government, the chamber of the LegCo and the court rooms were expected but the gamesmanship in the NPCSC and the streets were not.

[226] In *Ng Kung-Siu,* n 157 above, the two accused were alleged to have damaged a national flag and a regional flag contravening s 7 of the National Flag and National Emblem Ordinance, Cap 1557, and s 7 of the Regional Flag and Regional Emblem Ordinance, Cap 1558. They could have put up a defence that they were only displaying a desecrated national flag and regional flag but they wanted to challenge the constitutionality of the provisions by relying on Art 19 of the ICCPR and Art 39 of the Basic Law. In *Leung Kwok-hung and others v HKSAR* (FACC Nos 1 and 2 of 2005), one of the accused, Leung Kwok-hung, was a member of LegCo and a social activist. He organised a procession but refused to comply with the statutory notification procedures under the Public Order Ordinance, Cap 245. Leung believed that the statutory notification procedures contravene Art 27 of the Basic Law, Art 20 of the ICCPR, and Art 39 of the Basic Law protecting the right to freedom of peaceful assembly of Hong Kong citizens. He was charged with committing offences under the Public Order Ordinance and he put forward these constitutional provisions as his defence in the case. Leung was also involved in another case, *Koo Sze Yiu and Leung Kwok Hung v Chief Executive of the HKSAR* (FACV Nos 12 & 13 of 2006). He alleged that as a political activist, he might have been a target of covert surveillance and he started this action to challenge the constitutionality of an executive order made by the Chief Executive that authorised covert surveillance by law enforcement agencies of the HKSAR Government.

[227] In *Town Planning Board v Society for Protection of the Harbour Limited* (FACV 14/2003), the legality of the draft Outline Zoning Plan proposed by the Town Planning Board authorising the reclamation in the Harbour along the Wan Chai Harbour Front was challenged by the Society for Protection of the Harbour for contravening s 3 of the Protection of Harbour Ordinance. Section 3 provides that the harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour. All public officers and public bodies shall have regard to this principle for guidance in the exercise of any powers vested in them. The CFA in deciding that "the presumption must be interpreted in such a way that it can only be rebutted by establishing an overriding public need for reclamation" relied on an analogy from constitutional limitation on rights enjoyed by citizens on the basis that there is a clear legislative intent to accord a unique legal status to the harbour. In *Ho Choi Wan v Housing Authority* (FACV 1/2005), the majority of the CFA resolved the legal disputes purely on the basis of its interpretation of the legal text of the Housing Ordinance, Cap 283, in a challenge against the decision of the Housing Authority not to reduce the rent paid by tenants in public housing estates and to conduct a review of the rent. However, the minority judge, Bokhary PJ, referred to the right to affordable housing protected by the International Covenant on Economic, Social and Cultural Rights to support the legal claims of the tenants.

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Even though the Basic Law expressly provides that the NPCSC is vested with the power to interpret the Basic Law,[228] it was expected that this power would not actually be used, at least not so early and not so frequently.

In 1999, the NPCSC first exercised its power to interpret the Basic Law to resolve the constitutional disputes on the right of abode of emigrant children from mainland China upon the request of the Chief Executive. The second time was self-initiated by the NPCSC in 2004 and resolved the constitutional controversies for the introduction of geographical direct election to the election of the Chief Executive in 2007 and election of all members of LegCo in 2008. The third time was also made upon a request from the Chief Executive to resolve the constitutional controversy on the length of the term of office of a re-elected Chief Executive.

In its first interpretation, the NPCSC's interpretation was not very much like an action taken in a playing field in a constitutional game since not much reasoning on legality was put forward to legitimise the interpretation other than by just referring to the legal authority of the NPCSC to interpret and to determine what should be the legislative intent. In the second and third interpretations, more legal reasoning was provided to legitimise the decisions and they might be hardly recognisable as decisions made in a playing field in a constitutional game. However, the legitimacy relied upon was still mainly legal legitimacy and there was insufficient concern about the sociological and moral legitimacy of those decisions.

The streets may not be unexpected as a playing field as Hong Kong people had already developed a tradition of voicing out their concerns in public demonstrations even before the transfer of sovereignty. What is unexpected is the scale of involvement from the civil society in Hong Kong in these rallies since the First of July Rally in 2003. Though not all claims put forward in the rallies were constitutional decisions, the streets still qualified as a playing field in Hong Kong's constitutional game as many claims raised by the civil society were phrased in legal and constitutional terms. Also, the degree of participation by the civil society in these rallies can at least be seen an indicator of the level of sociological legitimacy in many constitutional controversies engendered by the actions and reactions taken by other players in Hong Kong's constitutional game.

(g) Interactions in Hong Kong's Constitutional Game

This article will now look at the most interesting part of the constitutional game. It has already looked at how the different players searched for their constitutional positions, developed constitutional powers and took actions within the boundaries set by the Basic Law. They tried to utilise the room

[228] Basic Law, Art 158.

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provided by the Basic Law as far as possible to maximise their chances of achieving their winning goals. However, some of the actions taken by individual players threatened the winning goals of the other players and they responded to the initial actions which resulted in chain reactions in the constitutional game. In the last 10 years, there were two main rounds of interactions. The first round was the "right of abode game" and the second was the "Article 23 game".

The immediate action that triggered the reactions was the decisions of the CFA in *Ng Ka Ling*.[229] However, if the incidents are traced back, it might actually be the enactment of the amendments to the Immigration Ordinance by the Provisional LegCo on the basis of the legislative proposals put forward by the HKSAR Government to take away or limit the right of abode of migrant children from mainland China and the constitutional review actions initiated by the parents of these children to challenge the constitutionality of the legislation.

The CFA had issued two key rulings in this case. One concerned the constitutional jurisdiction of the courts of the HKSAR and the other concerned the substantial merits of the case.

As stated above, the CFA in asserting its constitutional jurisdiction extended its power of constitutional review to reassess whether the legislative acts of the NPC or the NPCSC are consistent with the Basic Law. This ruling triggered a reaction from the Beijing Government. However, the Beijing Government did not use its formal constitutional power. It just sent four Mainland legal experts to Hong Kong to question the decisions of the CFA. The HKSAR Government also responded by seeking clarification from the CFA on this part of the judgment.

The reason for such a reaction from the Beijing Government was that the decision of the CFA went against its conception of "One Country Two Systems" and threatened the sovereign status of the NPC and NPCSC. However, as the HKSAR was still in its early days, the Beijing Government did not want to disturb the systems in Hong Kong. As a result, it restrained from using its formal power to interpret the Basic Law to override the decisions of the CFA. Rather it only used a less direct power by criticising the judgments of the CFA through an informal or semi-official channel. By relying on the opinions of legal experts who had been involved in the drafting of the Basic Law, the Beijing Government still wanted to set the tune of the criticism as legal rather than political.

The reason for HKSAR Government's reaction was to coordinate with the moves of the Beijing Government. Though there was no precedent for

[229] This decision was decided together with another decision that concern the right of abode of emigrant children from mainland China, *Chan Kam Nga and others v Director of Immigration* [1999] 1 HKLRD 304.

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the HKSAR to seek for clarification from the judiciary after a final judgment is delivered and for the courts of the HKSAR to clarify its own final judgment, as the nature of the issues had already been set as legal, both the HKSAR and the CFA accepted that the best method to settle the controversy would also be through legal proceedings.

Whether the CFA had really changed its decisions was no longer significant; the cooperative gesture of willingness to clarify its judgment indicated that the CFA accepted that it had acted beyond the legitimate scope of actions in Hong Kong's constitutional game. This controversy could have had a more damaging result if the Beijing Government had used the formal power of interpretation to override CFA decisions or the CFA had refused to clarify its judgment on the request of the HKSAR Government. After this interaction with the Beijing Government, the CFA realised that its understanding of the constitutional jurisdiction of the courts of the HKSAR could not be proper and knew that as regional courts under the constitutional system of the whole of China, the courts of the HKSAR are under more constitutional limitations than it had perceived, even though the CFA is said to have the power of final adjudication under the Basic Law.

In later cases concerning the Basic Law, the CFA did not have to reconsider this constitutional issue on whether the courts of the HKSAR have the power to review the compatibility of legislative acts of the NPC and the NPCSC with the Basic Law. Even if it had to, it is unlikely that the CFA would make the same decision as in *Ng Ka Ling*.

The second key ruling by the CFA in *Ng Ka Ling* also caused reactions from both the HKSAR Government and the Beijing Government, however the central role this time was played by the HKSAR Government and the Beijing Government only acted to coordinate with the reaction of the HKSAR Government.

Seeing that the decisions of the CFA would impose unbearable pressure to the HKSAR, Tung in his capacity as Chief Executive made a report to the CPG and requested assistance from the Beijing Government. The NPCSC was asked to interpret the relevant provisions of the Basic Law and such interpretation was issued.

The HKSAR government had exaggerated the possible outcome of the CFA's decision in *Ng Ka Ling* to justify its reaction to involve the Beijing Government to resolve a purely local issue. Even the Beijing Government had avoided using its formal power to directly challenge the authority of the courts of the HKSAR, but in this case the HKSAR Government had invited the Beijing Government to use its power of interpretation to override the CFA's judgment. The HKSAR Government did not appear to realise how damaging it would be on Hong Kong's rule of law and judicial autonomy.

The problem of this reaction by the HKSAR Government in utilising this extraordinary power provided by the Basic Law to deal with an issue that

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could have been dealt with by other means is that it had set a bad precedent that the power of interpreting the Basic Law could be used for convenience rather than as a last resort.

In a constitutional game, careful interpretation of the constitution is fundamental but the use of the power of interpretation by the NPCSC in this way seriously tilted the balance totally to one side. It increases the danger that the constitutional game of Hong Kong will deteriorate into just a purely political game.

The courts of the HKSAR were put in a difficult position by this act of the HKSAR Government. After this, the CFA had to adjudicate under a potential threat that its decisions might trigger another interpretation by the NPCSC and would be overruled again. Some decisions were clearly made with such self-restraint by the CFA.[230] However, the CFA also had demonstrated that it had acquired the skills to resolve controversial constitutional disputes by wisely exercising its power to interpret the Basic Law,[231] to decide the concrete issues in the cases,[232] and to grant appropriate constitutional remedies.[233]

Fortunately, the HKSAR Government had also learnt some lessons from this incident and since *Ng Ka Ling* the HKSAR Government had not sought another interpretation from the NPCSC to overrule a decision by the CFA. When Wong Yan Lung was appointed to be the new Secretary for Justice in 2005, he promised that he would try his best to avoid another interpretation by the NPCSC though he did not promise that there would never be another interpretation by the NPCSC.[234]

As stated above, legislation to implement Article 23 was one of the proactive moves of Tung to rebuild his authority in the HKSAR. The proposals reflected the attitude of the HKSAR Government and its reading of the provision of the Basic Law. Insufficient attention was paid to the sensitive nature of these legislative proposals in the political and social contexts of Hong Kong and China. These so-called "crimes against the state" have been used by the

[230] *See* the decision of the CFA in *Ng Kung-Siu*, n 157 above, and the analysis in Tai, n 157 above.

[231] *See* the decision of the CFA in *Chong Fung Yuen*, n 161 above, refining its approach of interpretation of the Basic Law. *See* the analysis in Benny Y.T. Tai, "The Judiciary," in Wai-man Lam, Percy Luen-tim Lui, Wilson Wai-ho Wong and Ian Holliday (eds) *Hong Kong Government and Politics: Governance in the Post 1997 Era* (Hong Kong: Hong Kong University Press, 2007), p 70.

[232] *See* the decisions of the CFA in *Ng Siu-tung and Others v HKSAR* [2002] 1 HKLRD 561 and the analysis in Benny Y.T. Tai, "Ng Siu Tung and Others v Director of Immigration" (2002) 1 *The International Journal of Constitutional Law* pp 147–151, Benny Y.T. Tai and Kevin Yam, "The advent of substantive legitimate expectations in Hong Kong: two competing visions" [2002] *Public Law* pp 688–702 and Tai, n 231 above, pp 70–71. *See* also the decision of the CFA in *Leung Kwok Hung*, n 227 above.

[233] *See* decisions of the CFA in *Hung Chan Wa*, n 208 above, *Koo Sze Yiu*, n 206 above, *Lam Kwong Wai*, n 205 above, *Leung Kwok Hung*, n 227 above and the decision of the Court of Appeal in *Leung T.C. William*, n 207 above, concerning the granting of new constitutional remedies.

[234] *See* a speech by Wong Yan Lung entitled "One Country, Two Systems" given on 9 June 2006 at Chatham House, London. Available at http://www.info.gov.hk/gia/general/200606/09/P200606080140.htm (last visited 4 Aug 2007).

Beijing Government to suppress opposition in the Mainland. There was serious concern among Hong Kong people that these new criminal offences, if enacted, might be manipulated to achieve a similar purpose in Hong Kong.

The other matters that had caused unnecessary controversy were the performance of responsible officials, especially Regina Ip, the then Secretary for Security, and some procedural decisions taken during the consultation and legislative processes. There was a three-month consultation period. However, Tung and Ip did not give the public an impression that they were serious about listening to the opinions of the Hong Kong people.[235]

LegCo started its scrutiny of the National Security (Legislative Provisions) Bill in February 2003. The HKSAR Government did make some clarifications and concessions in the bill, but the stance of the government towards three major concerns of the public was still unyielding. They included: (1) the provision regarding the proscription of a local organisation subordinate to a Mainland organisation which has been proscribed by the Central Authorities on national security grounds; (2) a "public interest" defence for unlawful disclosure of certain official information; and (3) the provision which confers to the police the power to search without a court warrant in the exercise of their emergency investigation powers.

With the support from the ruling coalition, Tung believed that opposition in LegCo could be easily smoothened out. The legislative schedule was not disturbed by the outbreak of SARS, and Tung still demonstrated great confidence that the legislative plan could be completed before the end of the session of LegCo in July 2003.

Tung did not notice that the grievances of Hong Kong people against him and the HKSAR Government had already accumulated to such a degree that they were at the verge of erupting.[236]

On 1 July 2003, more than half a million Hong Kong people protested in the streets. There might have been many causes to account for the people's dissatisfaction with the HKSAR Government since the handover. The poor economy, the lack of accountability of the POAS, the poor performance of the officials during the SARS period, the unpopular image of Regina Ip in forcing the Article 23 legislation through LegCo, the undemocratic nature of the HKSAR Government, and the incompetence of Tung in handling all these problems were all causes. However, there is no doubt that Article 23

[235] *See* Carole Peterson, "National Security Offences and Civil Liberties in Hong Kong: A Critique of the Government's 'Consultation' on Article 23 of the Basic Law," (2002) 32 *Hong Kong Law Journal* pp 457–470.

[236] For a detailed account of the Art 23 saga, *see* Carole Peterson, "Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill in 2003", in Fu, Peterson and Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong: Hong Kong University Press, 2005), pp 13–62.

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triggered a deep-seated fear in the hearts of Hong Kong people that the Beijing Government may take away their much treasured freedom via the hands of the HKSAR Government. The civil society reacted in an unexpected way to the proactive move of Tung.

The First of July Rally started a series of chain reactions from other players. The first response came from the Liberal Party. As it could not fully ascertain the significance of the First of July Rally, the Liberal Party decided to withdraw its support of the enactment of the Article 23 legislation if the HKSAR Government insisted on enactment according to the scheduled deadline. Without the votes from the Liberal Party in the LegCo, Tung had no choice but to postpone and later withdraw the enactment. Another result was the resignation of Regina Ip and Antony Leung not long after the First of July Rally, though both claimed that their resignations were unrelated to any accountability issue. It was speculated that the HKSAR Government need to pacify the anti-government sentiment through the resignations of unpopular officials.

The pro-democracy camp took up this opportunity to step up their demands for further democratic development in Hong Kong. More and more people started to question why Hong Kong people only have limited and indirect methods to select their political leaders under the Basic Law. More Hong Kong people started to question the legitimacy of the rule of the HKSAR Government in its present form. They questioned why Tung could continue to stay in office with such poor performance. Institutionally, Hong Kong people did not have any power to remove him from office. It was generally recognised that there must be fundamental changes to the selection methods of the Chief Executive and the members of LegCo before the HKSAR Government could regain its legitimacy in the Hong Kong people's hearts. The demand for further democratic development in Hong Kong was growing ever stronger.

According to the Basic Law, there is a possibility that the third Chief Executive and all members of LegCo will be directly elected in 2007 and 2008, respectively. Article 45 of the Basic Law provides that: "The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures. The specific method for selecting the Chief Executive is prescribed in Annex I: 'Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region'."

Annex I of the Basic Law provides that: "If there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the LegCo and the consent of the Chief

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Executive, and they shall be reported to the Standing Committee of the National People's Congress for approval."

Article 68 of the Basic Law provides that: "The method for forming the LegCo shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the LegCo by universal suffrage. The specific method for forming the LegCo and its procedures for voting on bills and motions are prescribed in Annex II: 'Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures'."

Annex II of the Basic Law provides that: "With regard to the method for forming the Legislative Council of the Hong Kong Special Administrative Region and its procedures for voting on bills and motions after 2007, if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for the record."

Reading all these provisions together, many people in Hong Kong believed that 10 years after the establishment of the HKSAR, Hong Kong people would have already had the power to decide by themselves on whether direct election should be introduced as the method of election of the Chief Executive and all the members of LegCo.[237] The HKSAR Government was under pressure to present a time table to review the political system so that direct elections could be introduced in 2007/2008.

For a long time, the Beijing Government has had reservations against allowing Hong Kong to develop democratically. The Beijing Government was worried that the introduction of democratic reform may affect the vested interests of the business people in Hong Kong who have long been loyal supporters of the Beijing Government and are considered to be the pillars of Hong Kong's stability and prosperity. Also, it may encourage the demand for democratic reform in the Mainland, which may threaten the rule of the Chinese Communist Party. The Beijing Government had to respond to that

[237] In *Explanations on "The Basic Law of the HKSAR (Draft)"*, Ji Pengfei, Chairman of the Drafting Committee for the Basic Law to the National People's Congress, said that, "In the ten years between 1997 and 2007, the Chief Executive will be elected by a broadly representative election committee. If there is need to amend this method of election after that period, such amendments must be made with the endorsement of a two-thirds majority of all the members of the LegCo and the consent of the Chief Executive, and they must be submitted to the Standing Committee of the National People's Congress for approval . . . Ten years after the establishment of the Special Administrative Region, if there is a need to improve the method for forming the Legislative Council and its procedures for voting on bills and motions, such improvements shall be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they must be reported to the Standing Committee of the National People's Congress for the record."

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growing demand for democratic reform in Hong Kong and several critical moves were made.

First, Tung was informed that the decision on the timetable for public consultation and review on constitutional development could not be made by the HKSAR Government even though the Secretary for Constitutional Affairs had already promised the Panel on Constitutional Affairs of LegCo that such a decision would be made before the end of 2003.[238] This move was to call a halt to any planned action of the HKSAR Government.

The second move involved four Mainland legal experts who were called to assist by suggesting that the understanding of whether "there is a need" to amend the method of selecting the Chief Executive or the forming of LegCo must be determined by the Beijing Government.

To coordinate with the Beijing Government's move, Tung in his policy address on 7 January 2004 announced the establishment of the Constitutional Development Task Force. It was headed by the then Chief Secretary for Administration, Donald Tsang, and the other members were the Secretary for Justice and the Secretary for Constitutional Affairs. The Task Force was to examine the relevant principles and legislative process in the Basic Law relating to constitutional development in depth, to consult the relevant departments of the Central Authorities, and to listen to the views of the public on the relevant issues.

To justify the stance that the Beijing Government has the power to decide on whether "there is a need", the previous ambiguous understanding of "One Country Two Systems" had to be elucidated. Again, through the Mainland legal experts, the understanding of "One Country Two Systems" to be "One Country as the premise and foundation of Two Systems" was publicised.[239]

The next move was to use the pro-Beijing media to start a wave of patriotism debate. Referring to a statement made by Deng Xiao-ping in 1984,[240] it should be the patriots who form the main body of administrators of the HKSAR. A patriot was defined to be one who respects the Chinese nation, sincerely supports the motherland's resumption of sovereignty over Hong Kong, and wishes not to impair Hong Kong's prosperity and stability. This move was

[238] *See* the statement of the Secretary for Constitutional Affairs in a meeting of the Panel on Constitutional Affairs of the Legislative Council held on 17 Nov 2003. The minutes of the meeting are available at http://www.legco.gov.hk/yr03-04/english/panels/ca/minutes/ca031117.pdf (last visited 4 Aug 2007).

[239] Xia Yong, the Director of the Institute of Law, Chinese Academy of Social Science is one of the four Mainland legal experts. He published an articled entitled "'One Country' is the premise and foundation of 'Two Systems'" on 22 Feb 2004 through the official Xinhua News Agency. This article quickly became the official line of the Beijing government. Hu Jintao, President of the PRC, in the speech marking the swearing in of the third term HKSAR Government on 1 July 2007 formally adopted this stance on "One Country Two Systems."

[240] "One Country, Two Systems" in Deng Xiaoping, *Selected Works of DengXiaoping: Volume III* (1982–1992).

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made in order to discredit some of the political leaders in the pro-democracy camp in Hong Kong so as to question the legitimacy of their claims for direct election in 2007/2008.

All these acts still needed a critical move that could trump any challenge from Hong Kong. On 6 April 2004, the NPCSC issued an interpretation[241] making it clear that the procedure for making any amendment to Annex I and II can take effect only if the Chief Executive makes a report to the NPCSC regarding whether or not there is a need to make an amendment; and the NPCSC shall, in accordance with the provisions of Articles 45 and 68 of the Basic Law of the HKSAR, make a determination in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The bills shall be introduced by the Government of the HKSAR into LegCo.[242] This interpretation consolidated all the gains from the quick and overwhelming moves by the Beijing Government in the constitutional game. The other players could just pass. To many people, this interpretation can hardly be called an interpretation. It looked more like an enactment or decision.

Then, again to coordinate with the Beijing Government's move, Tung made a report shortly after the Interpretation and recommended that there was a need to amend Annexes I and II.[243] The Task Force also issued a report recommending that direct elections should not be introduced in 2007/2008.[244] This paved the way for the NPCSC to deliver the final blow to direct election in 2007/2008. A decision was made by the NPCSC on 26 April 2004 that the Chief Executive and all members of LegCo would not be directly elected by Hong Kong citizens in 2007/2008.[245] Nothing was mentioned about what will happen after 2008.

With the power to interpret the Basic Law, the most powerful resource in this constitutional game, the Beijing Government, can do almost anything it likes and all the other players can hardly put up any effective resistance, not

[241] *See* n 168 above.

[242] Interpretation by the Standing Committee of the National People's Congress on Clause 7 of Annex I and Clause 3 of Annex II of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China adopted by the Standing Committee of the 10th National People's Congress at its 8th Session on 6 Apr 2004.

[243] The Report on whether there is a need to amend the methods for selecting the Chief Executive of the Hong Kong Special Administrative Region in 2007 and for forming the Legislative Council of the Hong Kong Special Administrative Region in 2008. Available at http://www.cmab.gov.hk/cd/eng/executive/pdf/cereport.pdf (last visited 4 Aug 2007).

[244] The Second Report of the Constitutional Development Task Force: Issues of Principle in the Basic Law Relating to Constitutional Development. Available at http://www.cmab.gov.hk/cd/eng/report2/index.htm (last visited 4 Aug 2007).

[245] Decision of the Standing Committee of the National People's Congress on issues relating to the methods for selecting the Chief Executive of the Hong Kong Special Administrative Region in the year 2007 and for forming the Legislative Council of the Hong Kong Special Administrative Region in the year 2008 adopted by the Standing Committee of the 10th National People's Congress at its 9th Session on 26 Apr 2004.

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even the civil society of Hong Kong. All legal arguments for direct elections in 2007/2008 were just brushed aside to clear the way for the final outcome that the Beijing Government desired to see. Within five months, the Beijing Government had dashed any hopes of Hong Kong people to have direct elections in the near future that might have been aroused after the 1 of July Rally.

There were also some "soft" moves. Taking a political dream away from the Hong Kong people was compensated for by economic gains. The Beijing Government hoped that the introduction of CEPA[246] and the Individual Visit Scheme[247] would boost the economy of Hong Kong. It still believed that the greatest grievance of Hong Kong people was economic but not political.

It is not clear whether the resignation of Tung in early 2005 and the replacement by Tsang as the Chief Executive were within this series of moves of the Beijing Government in reacting to the Article 23 incidents.[248]

(h) Strategies of the Players in Hong Kong's Constitutional Game

Game strategy is developed by a player to maximise their chances to achieve their winning goals. A player utilises their game resources in a playing field according to a strategy that they have developed from their original perception of the possible actions and reactions of the other players. When other players act in a way different from their original forecast, the original strategy will have to be refined, changed or even abandoned and replaced by a new strategy. After actions and reactions taken by the players in Hong Kong's constitutional game, all players need to readjust their strategies.

If the original strategy of the Beijing Government is described as "One Country as premises and foundation of Two Systems in its passive voice", the new strategy adopted by the Beijing Government after the First of July Rally in 2003 can be described as "One Country as the premise and foundation of Two Systems in the active voice".

Since the handover, the strategy of the Beijing Government was not to directly interfere in the local affairs of Hong Kong. It has already reserved sufficient powers in the Basic Law and all it needed was to ensure that the Chief Executive was a trustworthy and competent person to manage affairs in Hong Kong on its behalf. To add an extra guarantee, the Beijing Government has also built a pro-government ruling coalition including the pro-Beijing

[246] CEPA stands for Closer Economic Partnership Arrangement between Hong Kong and the Chinese Mainland. It is a free trade agreement under WTO rules and gives preferential access to the Mainland market for Hong Kong companies and professionals. It was launched on 1 Jan 2004.

[247] The scheme allows citizens from selected cities in mainland China to visit Hong Kong on an individual basis. In the past, Mainland people could only visit Hong Kong using business visas or in group tours.

[248] *See* the analysis in Benny Y.T. Tai, "A Tale of the Unexpected; Tung's Resignation and the Ensuing Constitutional Controversy," (2005) 35 *Hong Kong Law Journal* pp 7–16.

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camp and the business camp in Hong Kong to support the rule of the Chief Executive.

The passive strategy is consistent with the constitutional position of the Beijing Government as this would give the world an image of an open-minded sovereign. Hong Kong could enjoy a high degree of autonomy to decide its own affairs. Even though it is very clear that the Beijing Government always considers that the proper understanding of "One Country Two Systems" must be "One Country" having primacy over "Two Systems", it had never explicitly stated this point.

However, the failure of Tung and the HKSAR Government to enact the legislation on implementing Article 23 caused the Beijing Government to realise that it would lose control over the development in Hong Kong if it continued to rely on its current strategy and the existing ruling mechanism in the HKSAR.

From the subsequent development of the First of July Rally, the Beijing Government discovered that on the one hand, Tung, though trustworthy, did not have the ability to lead the HKSAR Government effectively. On the other hand, the Liberal Party was not a very trustworthy partner, especially at critical moments.

A new strategy was needed. The Beijing Government had to reassert its authority within Hong Kong in a more direct and active manner. We have seen how the moves taken by the Beijing Government under the new strategy have achieved its objectives cleanly and clearly.

It may be that the Beijing Government has adopted this active application of "One Country Two Systems" to make it possible for it to resume a more passive position later. By removing any hope for direct elections in 2007/2008, the pressure upon the HKSAR Government was relieved. The Beijing Government hoped that the HKSAR Government could refocus its efforts towards reinvigorating the economy of Hong Kong.

This may also show a pattern of the Beijing Government's strategy in dealing with Hong Kong's affairs. A "hard" move must be accompanied by some following soft moves to balance the negative impact. However, one may also see that all the moves of the Beijing Government share the same objective which is to maintain stability and prosperity in Hong Kong. What strategies and moves are needed to achieve the objective may change over time and as the socio-political environment in Hong Kong changes. During a period of time, passivity might be the appropriate strategy but during another period, a hard line might be needed. At still another period, a soft approach will serve the purpose better.

From the consequences, the Beijing Government may see that a more active strategy in dealing with Hong Kong internal affairs is proper because it can successfully remove all factors of instability, at least on the surface. There is no guarantee that the Beijing Government will not adopt this active

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strategy again in the near future when it sees that there is a need. However, what it thinks to be a need may not be considered as one by the people in Hong Kong.

This is a unique feature of the constitutional game of Hong Kong. It is an unbalanced game in the sense that one player dominates the game. As the dominant player, the Beijing Government sets the rules of the game, giving it the most favourable position and maximum room to direct the flow of the game. It also has the most powerful game resources in the whole game, i.e. the power to interpret the Basic Law.

However, even with this almost unlimited power, there are practical concerns that the Beijing Government cannot ignore. If it still wants to set a constitutional game in Hong Kong and not just a purely political game, it must be constrained by the rules it had set.

In the incidents in which the Beijing Government took active moves, these were done through an issuance of an interpretation on relevant articles of the Basic Law by the NPCSC, together with other hard and soft moves to coordinate with this decisive move. The text of the Basic Law can be manipulated by the NPCSC to give meanings that conform to the objective of the Beijing Government's overall strategy. Though the Beijing Government has the power to give any interpretation, the actual interpretation given must be justified and legitimised by existing rules. The kind of legislative interpretation by the NPCSC is alien to Hong Kong's common law system, and the intrusion into legal interpretation using purely political concerns hurts Hong Kong's rule of law.

The active strategy must still be justified by using processes and reasoning that are more in line with the general principles that are acceptable in Hong Kong rather than just imposing the decision upon Hong Kong. Though the performance may still not be up to the Hong Kong standard, this reflects that the Beijing Government understands that this active strategy must only be used with caution. In the long run, if the Beijing Government becomes more active in its strategy, it will affect the degree of autonomy that Hong Kong can actually enjoy. These adverse consequences of the active approach may deter the Beijing Government from using the active strategy so casually.

Tung might not have had any concrete strategy at the beginning of his term other than to act in accordance to what he deems best for Hong Kong. However, when he encountered difficulties in governance, both internally and externally, he changed his strategy by rebuilding a strong image for himself and the HKSAR Government. We have already seen the actions taken by Tung to implement his new strategy but for a government that did not enjoy much legitimacy, Tung's new strategy might have caused his own failure.

When Tsang took up Tung's position as the "new" Second Chief Executive, he also needed to search for a new strategy to avoid the mistakes of Tung. There is speculation that Tsang only got Beijing's blessing because of

his civil service background and his popular support amongst Hong Kong people.

The Beijing Government has three main sources of support in Hong Kong: the pro-Beijing camp, the business camp and the civil service. Tung was a businessman, but he failed to handle the complex political environment within Hong Kong after the transfer of sovereignty. The pro-Beijing camp has no experience in running a government. The only choice seems to be the civil service.

The civil service was the ruling clique during the colonial times, and there is no question of its ability in governance. However, there are reservations as to whether civil servants can be trusted. One reason that the Beijing Government insisted that the term of the new Chief Executive could only be the remaining term of his predecessor and not a new term was that Tsang had to be put on probation to test his trustworthiness.

Another reason may be that the Beijing Government had to pacify the other pro-Beijing groups as they had already planned to send their representatives to run in the scheduled election for the Chief Executive in 2007.

Tsang may want to rebuild an image of a strong, efficient and effective government but any strategy to be developed by Tsang must address these background reasons for his rise to power. First, Tsang does not have the general support that Tung had within the pro-Beijing camp and the business camp. Second, Tsang's relationship with the Beijing Government is not as close as Tung's. The Beijing Government's support is totally based on his ability to rule Hong Kong effectively and to keep the development of Hong Kong within the boundaries set by the Beijing Government. However, there is one area in which Tsang is better than Tung; he continues to enjoy the support of Hong Kong people. This may also be his main bargaining chip with the Beijing Government.

Therefore, the primary strategy of Tsang must be to earn the trust of the Beijing Government by demonstrating his loyalty and ability. In the last two years, Tsang did convince the Beijing Government of his loyalty and ability. He passed his probation and was elected to be the third Chief Executive. During the next five years, Tsang will be on the same tightrope that every Chief Executive will have to walk. Balancing "One Country" and "Two Systems" well is the skill that a Chief Executive must possess. Leaning too far on either side will cause him to fall as Tung did.

The introduction of the POAS has introduced a group of accountable officials to the HKSAR Government. Even if they are from the civil service, their roles are different from both the era of colonial rule and the first term of Tung. They are accountable to the Chief Executive. Events before and after the First of July Rally make it clear that their accountability is substantial. Though Hong Kong people have no institutional power to remove them and Tung would have liked to shelter them from the intense public pressure, he

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was not successful in most of the cases. Even Tung himself could not stand the public pressure from the media and civil society and had to resign. Principal officials are within the eye of any political typhoon and they must face the storm. Unfortunately, each principal official has to face it by him or herself.

As illustrated above in the section concerning constitutional positions, the principal officials, the Executive Council and the civil service do not have any substantial constitutional positions and therefore they do not have any concrete strategy.

The first batch of accountable principal officials came from different backgrounds. Quite a number were from the civil service, the others were from the business sector, the professional sector, and the academia. The only thing that they have in common is that they were all willing to serve under Tung's leadership – but their reasons might have been very different. It is clear that there is no single policy vision that joins them, causing a lack of team mentality among the principal officials. As a result, whenever a principal official faces criticisms and challenges in his/her own policy portfolio, he or she would find himself or herself a lone fighter, hoping that other principal officials would not stab them in the back.

Under the new term of office of Tsang, he has included more principal officials with a civil service background. This may improve the past problem of principal officials as lone fighters but it is still not clear what independent roles could be played by principal officials and whether any strategy of their own could be developed. However, individual principal officials may use the coming five years to build up their personal reputations so as to enhance their chances of succeeding Tsang as the fourth Chief Executive.

Members of the Executive Council, like the principal officials, all come from different backgrounds, and there is no policy vision that joins them together. The political parties in the ruling coalition had already indicated their dissatisfaction; they could not have any significant input in policy making as all policy portfolios are in the hands of the principal officials. Even if they are members of the Executive Council, that privileged position very often gives them more burden than benefit. They have to defend government policies in LegCo and to the public and there may be policies that they do not really support.

Under Tsang's new leadership, the ruling coalition is maintained. All current non-official members remain in the Executive Council. It is not clear whether the reform to be introduced by Tsang will change the Executive Council such that it is more like a real cabinet or if it will continue to be an advisory body. Up to now, the Executive Council as a player has no independent strategy, though each of its members may have his or her own agenda.

The role of civil servants, especially those from the administrative officers rank, has changed substantially since the introduction of the POAS. They are no longer policy makers and in theory they should be responsible only for

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the implementation of policies decided by the principal officials. However, under the POAS system, they are also asked to fulfil the same political task as the principal officials to lobby support from LegCo and answer questions from the media and the public. The only difference between civil servants and principal officials is that the former need not resign for policy failure.[249] This change of role has substantially affected the morale of civil servants. How far this has affected the effectiveness of the HKSAR Government in governance still requires further study.

The recent appointment of Tsang as the third Chief Executive may give hope to some that the good old days of civil servants may return as Tsang himself was also a civil servant. However, bygones are bygones; the golden days of the Hong Kong civil service may never return. Unfortunately, it appears that the civil service does not have the capacity to formulate any coherent strategy to adapt to the new chapter other than to simply finish their assignments at hand.

The result of the election in 2004 did not change the nature of LegCo, though there are now more members in the pro-democracy camp. As stated above, under the existing institutional structure, LegCo does not have the capacity to position itself in any significant way other than putting up some form of opposition against the Government. Until the time the pro-democracy camp could form the majority of LegCo, LegCo cannot enforce an effective check on policy making and implementation of the HKSAR Government.

It is likely that LegCo will continue to be divided into the three camps. The DAB has made it clear that its ultimate aim is to become a ruling party. Tsang's taking over of Tung's position makes it clear that the Beijing Government may not believe that the DAB or the pro-Beijing camp in Hong Kong have the legitimacy and ability to manage the complicated political environment of Hong Kong. Therefore, the DAB is in rather a dilemma. To adopt a strategy which could help itself achieve its long-term goal may conflict with its short-term duty to support the Tsang administration. Like all other players, it is walking on a tightrope. If the political system of Hong Kong develops to become more democratic, even if the pace is going to be slow, the DAB needs the votes of the Hong Kong people. Receiving only around 25 per cent of the votes in the election in 2004, its road to becoming a ruling party is still long. Its coming challenge is how to obtain votes by supporting the HKSAR Government. Ironically, Tsang's growing support makes the DAB's stance easier to justify to the public but may also further delay its dream of governing Hong

[249] However, in the recent controversy concerning the Allegations relating to the Hong Kong Institute of Education, the then Permanent Secretary for Education and Manpower, Fanny Law, resigned after the Commission of Inquiry on Allegations relating to the Hong Kong Institute of Education found that she was partly guilty of the charges, but Arthur Li, the Secretary for Education and Manpower, could stay in office.

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Kong directly. The DAB has now adopted a strategy of maintaining the general impression of being pro-government but it may also try to keep a certain distance from the Tsang administration.

Business people are important to the governance of Hong Kong, but it seems that after the failure of Tung, the Beijing Government considers business people as a group of people who must be respected but cannot be trusted with the direct authority to govern Hong Kong. The Liberal Party's unfaithful track record has also put the Beijing Government on alert. The Liberal Party cannot be excluded, but how far it can be trusted is a concern that cannot easily be forgotten in the minds of the officials in Beijing. The Party's main support comes from the functional constituencies in LegCo, though it managed to get two seats from geographical direct election in 2004. Any change in the functional constituencies will weaken its influence in LegCo. Getting more votes in geographical direct elections must be its long-term objective if it wants to maintain its share in LegCo. The Liberal Party is in a similar dilemma as the DAB. It must strike a good balance between supporting and keeping a distance from Tsang's administration and it must also watch closely the reaction of the Beijing Government.

As for the pro-democracy camp, the chance that they could get the majority in LegCo in the coming years may still be rather remote. As the opposition voice in LegCo, they find it more and more difficult to win public support by opposing the HKSAR Government in light of Tsang's growing support. They must be able to show to the public that they can be more than just a group of oppositionists. They are also in a dilemma, though of a different nature from that of the DAB and the Liberal Party.

To demonstrate their ability to govern, they must take up any chance to show that they can maintain at least a working relationship with the Beijing Government and that they can propose some sensible alternative policies. Drawing themselves too close to the Beijing Government may affect their support from the public, but failing to at least communicate with the Beijing Government may cause them to lose votes. They must strike a balance, which is not easy to ascertain; they are also rather passive in this matter as the Beijing Government holds the key to the door of communication.

Internally, the pro-democracy camp includes political parties, political groups, and individuals of very different backgrounds. They differ quite widely in social policies and the only thing that joins them together is the same aspiration for democratic development in Hong Kong. It is very difficult for the pro-democracy camp to establish a joint policy platform. Also, as they are still in the minority and lack experience in governance, their substantial social policy proposals do not enjoy the same level of legitimacy as their demands for democracy or other institutional concerns. The HKSAR Government does not need to pay much attention to their concrete policy proposals, if any.

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The CFA has made a substantial change to its strategy. If one called its initial strategy aggressive as well as naïve by trying to assert its constitutional jurisdiction and positioning itself as the guardian of Hong Kong's rule of law, autonomy and human rights, then its later strategies have become much more pragmatic after its clashes with the Beijing Government and the HKSAR Government in *Ng Ka Ling*. There were several aspects to the new strategies adopted by the CFA.

First, after *Ng Ka Ling*, the CFA accepts the authority of the NPCSC to interpret the Basic Law even outside the framework of Article 158 of the Basic Law. Actually, the CFA does not have any choice. As the NPCSC is the highest constitutional organ within the Chinese constitutional system to interpret law and the HKSAR is an integral part of the Chinese constitutional system, the courts of the HKSAR must submit to the authority of the NPCSC. The CFA even agreed to revisit some of the constitutional principles again to re-confirm the supreme constitutional authority within the HKSAR enjoyed by the NPCSC.[250]

Second, in the case that there is a possibility that its decision may invite another interpretation from the NPCSC, the CFA will try to avoid the issue and decide the case without touching on any sensitive provision in the Basic Law.[251]

Third, the CFA reset its priority among the three guardianships. In order to protect Hong Kong's high degree of autonomy and human rights, the CFA must first preserve its judicial independence and judicial authority. This requires the maintenance of rule of law in Hong Kong. Therefore, the guardianship of Hong Kong's rule of law must come before the other two guardianships. As the greatest threat to rule of law in Hong Kong is perceived to be another interpretation by the NPCSC, the CFA must try to avoid any NPCSC interpretation even if this means paying the price of less human rights protection in Hong Kong.[252]

Fourth, if the possibility of interpretation by the NPCSC is remote, the CFA will still strive to fulfil its visions and decide the case accordingly. The CFA has not given up its constitutional position as the guardian of human rights if there is no conflict with its more important constitutional position as the guardian of Hong Kong's rule of law. The CFA is not slow in developing new legal principles and doctrines to provide more protection to Hong Kong people's rights.[253]

[250] *See* the decision of the CFA in *Lau Kong-yun*, n 153 above and the analysis in Tai, n 157 above.
[251] *See* n 157 above. *See* also P.Y. Lo, "Rethinking Judicial Reference: Barricades at the Gateway," a paper presented in the Interpretations and Beyond Conference organised by the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong, Hong Kong, 25–26 Nov 2005.
[252] *See* n 157 above.
[253] *See* the decision of the CFA in *Albert Cheng and Lam Yuk Wah v Tse Wai Chun* [2000] 1 HKLRD A15 and the analysis in Tai, n 157 above.

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Fifth, even in a case that may involve sensitive provisions of the Basic Law, the CFA will still try to achieve a sense of justice according to its understanding of the purposes of the Basic Law by developing some non-constitutional legal principles.[254]

Sixth, the CFA has developed better skills in balancing conflicting interests in constitutional disputes and can produce decisions that are considered to be legitimate by both parties to the disputes including the losing party.[255]

Concerning the performance of the CFA after *Ng Ka Ling*, Chen commented that it is "neither too proud nor too humble" in adjudicating constitutional disputes.[256] Ghai to a certain extent agreed with this comment as he sees that the CFA has "on the whole discharged its responsibility with wisdom and distinction."[257]

The active participation of civil society in 2003 was unexpected. The Beijing Government's main reason for adopting a more active strategy in Hong Kong affairs is the emergence of a much more politically-oriented civil society after the First of July Rally. Many moves of the Beijing Government were not only to reassert its institutional control over Hong Kong, but also to convince the civil society to abandon its political orientation and revert back to its traditionally more economic oriented mindset. The granting of CEPA status to Hong Kong and the Individual Visit Scheme were such efforts.

Civil society, by nature, cannot be directed, only moulded. Each association in the web of civil society has its own agenda and priority. The response of each of the associations to the strategy of other parties in the constitutional game is not static and will change over time. The sensitivity of each association to the political situation and the strategies of other players may

[254] In *Ng Siu-tung*, n 233 above, the CFA in facing the interpretation of the NPCSC barring giving any constitutional remedy to emigrant children from mainland China innovatively imported an English common law principle of substantive legitimate expectation to resolve similar disputes before the court as in *Ng Ka Ling*. Though the majority of the applicants still could not establish their right of abode, the new doctrine allowed a substantial number of applicants to have their right of abode applications be reconsidered by the Director of Immigration in light of the applicants' legitimate expectation that the Director had expressly promised to implement the decisions of the CFA in *Ng Ka Ling*. What could not be done via the route of constitutional law, the CFA achieved partially via the less politicised route of administrative law.

[255] *See* the decision of the CFA in *Leung Kwok-hung*, n 227 above. Leung wanted to challenge the constitutionality of the provisions of Public Order Ordinance concerning the power of the Commissioner of Police to disallow public procession and the HKSAR Government wanted to prosecute Leung Kwok-hung for breaching the requirements of the Public Order Ordinance. The CFA decided that a certain provision of the Public Order Ordinance was unconstitutional as the provision failed to satisfy the legal certainty requirement in limiting fundamental rights but the constitutionality of the overall regulatory mechanism on public procession was confirmed. Leung was therefore still found guilty but he was also partially successful in challenging the constitutionality of the Public Order Ordinance. Both parties were satisfied with the CFA's decisions in this case.

[256] Albert H.Y. Chen, "Constitutional Adjudication in Post-1997 Hong Kong," (2006) 15 *Pacific Rim Law and Policy Journal* 627, at 680.

[257] Yash Ghai, "The Legal Foundations of Hong Kong's Autonomy: Building on Sand," (2007) 29 *The Asia Pacific Journal of Public Administration* 3.

also vary. Some may not be too sensitive to any change and their response may also be rather slow if compared with other associations. The susceptibility of each association to pressure from other players in the constitutional game is not the same. Some can stand firm on their objectives against threats, pressures or benefits while some may easily change their stance. All these variables make civil society a very organic but unpredictable animal.

Associations in civil society may try their best to influence others so that civil society may act as if it is a united entity against the other players in the game along a favoured strategy. However, the other associations in the civil society may put up counter strategies to compete for the leading strategy for the whole civil society. This may end with the associations working for their own strategies making it impossible to have a coherent strategy for civil society as a whole. Even if they have such a united front, the people of Hong Kong may not respond as directed.

The other players in the game may also try to exert influence over the civil society; first through associations that are on more friendly terms, and then move to extend their influence to other associations further away from its relationship web. As the number of associations in civil society is so large, influencing associations would not be done through direct contact, except for a limited number of more influential associations. Mass media is the major tool that could be utilised to influence civil society.

There is hardly any indicator to tell as to what extent the moulding effort has achieved its purpose. It seems that there are no effective means to predict how civil society will react.

From the weak response from civil society in the controversy over the term of the Chief Executive and the third interpretation on the Basic Law by the NPCSC, it seems that the new strategy of the Beijing Government has achieved its objective to a certain degree. The small number of people participating in the rallies on the first of July in 2005, 2006 and 2007 confirmed this observation. The civil society is still more pragmatic than idealistic, more economic than political, and more cooperative than confrontational. Unless the HKSAR Government or the Beijing Government does something that will frustrate the civil society continuously, immediately and overtly, the participation of the civil society in the constitutional game will still be limited.

(i) An End for the Constitutional game of Hong Kong?

The Basic Law provides that the capitalist system and way of life in Hong Kong will remain unchanged for 50 years.[258] It is unusual for a constitution to provide its own end expressly and it is arguable that this provision means only that the systems in Hong Kong will not be changed within 50 years.

[258] Basic Law, Art 5.

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What will happen after 50 years is not provided and it is legally possible for the constitutional game of Hong Kong to continue to operate under the Basic Law after 2047.[259]

All the players do not want to see the constitutional game of Hong Kong end before 2047 – at least. The Beijing Government continues to voice its concerns that some people in Hong Kong still dream of independence for Hong Kong and considers this is a threat to "One Country Two Systems." Its insistence for the HKSAR to fulfil its constitutional duty to enact legislation to implement Article 23 and its reluctance to allow Hong Kong people to directly elect their Chief Executive and LegCo may arise from such a concern.

However, at the same time, demands in Hong Kong for further democratic development may also be out of a fear that the guarantee provided by the Basic Law on Hong Kong's autonomy can be arbitrarily and unilaterally terminated by the Beijing Government. By having a democratically elected Chief Executive and LegCo, some people in Hong Kong hope that these may be institutional checks against the Beijing Government so as to prolong Hong Kong's constitutional game.

Both fears may be unnecessary, as from the performances of all the players in the last 10 years the Basic Law is still respected by all players as a binding legal instrument making the game in Hong Kong still a constitutional game. Unless there is substantial change to the attitudes of the players, the game will remain as constitutional. One can expect the constitutional game will not end earlier than 2047 and one can reasonably hope that the constitutional game will continue beyond 2047.

5. Conclusion

One may be disappointed after reading this article that it is but only a brief summary of the many activities in Hong Kong's constitutional game in the last 10 years. This analysis may seem disorganised, as it is not structured according to major court decisions or legal principles that one may find in typical legal analysis. For those who have an interest in legal history, they may expect that the analysis will follow a chronological order. This is not a typical legal analysis; if it were to look too much like a typical legal analysis, it would not have achieved its purpose. Political scientists may also find that this is not an article applying typical methodologies and skills in political science.

[259] It has been reported that Deng Xiao-ping had once said that the Basic Law could be extended for another 50 years.

The reality may be fragmented and our analytical framework is often applied to force out a coherent picture of the reality which may not actually be "real". The analysis presented in this article may look fragmented because the traditional approaches under the legal and political paradigms of constitution are not used, but instead a more integrated paradigm. The reality that sees through this analytical framework may be a distorted picture of the reality but it may still have its value if it can expose some phenomena that other analyt-ical frameworks have failed to reveal.

Therefore, if this article has shed new light on traditional doctrines such that lawyers and political scientists can re-examine their doctrinal biases through the lens of the other, its objective has been achieved.

It is also hoped that readers may apply this game analytical framework to assist them in looking into the future either for game planning or just for forecasting what may happen in the playing fields of Hong Kong's constitutional game. However, one should never take the analytical framework provided by a constitutional game as a kind of crystal ball.

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