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FAIRNESS AS INTERPRETIVE DEVICE IN LAW? (AN ANALYSIS OF DISCURSIVE PRACTICES IN THE RECENT CONFLICT ABOUT VOTING RIGHTS IN HONG KONG AND THEIR ANCHORAGE IN ARGUMENTATIVE PRACTICES OF EAST ASIA)

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Abstract: Problems related to a conflict about the content of rights are analysed below from the legal-linguistic perspective in the context of the recent dispute about voting rights in Hong Kong. The central legal-linguistic problem that is also the starting point for the analysis of argumentative samples is the question whether legal and legally relevant, yet not strictly legal arguments in such disputes are actually cross-cultural. Furthermore, the question what role, if any, the culture-specific arguments and legal-linguistic devices play in such conflicts is considered as well. With this aim in mind, legal provisions relevant to the conflict and the argumentation used by the opposing sides are explored to find out the legal-linguistically relevant mechanisms that might facilitate the solution of conflicts about the content of rights.

Fairness as an interpretive device appears as the most appealing cross-cultural mechanism. Meanwhile, its application in conflict solution mechanisms shows the embeddedness of legal mechanisms in broader social structures that also set limits to the application of purely legal discursive devices. As a result, the analysed conflict appears as an amalgam of legal and extra-legal arguments and non-verbal signs that in their application are cross-cultural. Equally, fairness as an interpretive device in law is deemed cross-cultural, yet also limited in the scope of its application to discursive practices in which it emerges.

Key words: fairness; interpretation; legal discourse

LA GIUSTIZIA (FAIRNESS) COME STRUMENTO INTERPRETATIVO?

Abstract: La giustizia (fairness) come strumento interpretativo e come meccanismo di regolamentazione sociale posa le sue radici nel pensiero giuridico e sociale della Cina classica. Possiamo riscontrare tale principio nel pensiero confuciano e, nello specifico, nel concetto di armonia sociale e pietà filiale. Nei successivi scritti legisti tale questione sfocia nella dicotomia argomentativa tra stabilità sociale e le sanzioni relative all'infrazione di uno stato delle cose che viene percepito come armonico e pacifico da tutti gli strati sociali. Entrambe le argomentazioni sono caratteristiche fondamentali del dibattito sulla natura dell'attivismo sociale che abbia una rilevanza legale. L'efficienza di tale dicotomia argomentativa è riscontrabile nei dibattiti sociali sull'applicazione della legge. Alcuni di questi dibattiti sfociano successivamente in conflitti, come la recente disputa sul diritto al voto internazionalmente e costituzionalmente riconosciuto ad Hong Kong. I concetti giuridici utilizzati nel dibattito hanno subìto un'evoluzione semantica, in gran parte dovuta all'influenza di input intellettuali provenienti dall'estero i quali hanno ridefinito il concetto di stato di diritto e costituzionalismo ad Hong Kong e nella Cina continentale. Le argomentazioni giuridicamente rilevanti usate da entrambe le parti nel conflitto forniscono un campo argomentativo che riflette sia le strutture argomentative classiche che la loro evoluzione. Allo stesso modo, meccanismi di persuasione non-verbali sono stati utilizzati sia dal governo che dai dimostranti con una forza straordinaria. Questo potrebbe mettere in discussione il ruolo della comunicazione linguistica in tali conflitti sui diritti fondamentali. Ad ogni modo, rimane inesplorato se strumenti interpretativi omnicomprensivi come la giustizia (fairness) possano essere applicati per razionalizzare il dibattito sociale e mitigare perdite irreparabili per la società che, dopotutto, è costitutiva dello Stato.

Parole chiave: la giustizia; strumento interpretative; discurso giuridico

SPRAWIEDLIWOŚĆ JAKO SPOSÓB INTERPRETACJI? ANALIZA PRAKTYK DYSKURSYWNYCH W NIEDAWNYM SPORZE O PRAWO GŁOSU W HONG KONGU I ICH ZAKORZENIENIE W PRAKTYKACH ARGUMENTACYJNYCH WSCHODNIEJ AZJI

Abstrakt: Problemy związane z konfliktem dotyczącym treści praw analizowane są poniżej z perspektywy prawno-językowej w kontekście niedawnego sporu o prawa

głosu w Hong Kongu. Głównym problemem prawno-językowym, który jest także punktem wyjścia do analizy próbek argumentacyjnych jest pytanie, czy prawne i prawnie istotne, ale nie wyłącznie prawne argumenty w sporach są rzeczywiście międzykulturowe. Ponadto kwestia, jaką rolę, jeśli w ogóle jakąkolwiek, odgrywają argumenty specyficzne kulturowo i narzędzia prawno-lingwistyczne w takich konfliktach jest również brana pod uwagę. Mając to na uwadze, przepisy prawne dotyczące konfliktu i argumentacji używanej przez strony są badane, aby ustalić istotne mechanizmy prawno-językowe, które mogłyby ułatwić rozwiązanie konfliktów dotyczących treści prawa. Sprawiedliwość jako narzędzie interpretacyjne jawi się jako najbardziej atrakcyjny mechanizm międzykulturowy. Tymczasem jego zastosowanie w mechanizmach rozwiązywania konfliktów pokazuje zakorzenienia mechanizmów prawnych w szerszych strukturach społecznych, które również ograniczają stosowanie takich czysto prawnych narzędzi dyskursywnych. W rezultacie, analizowany konflikt pojawia się jako amalgamat argumentów prawnych i pozaprawnych i niewerbalnych znaków, które są międzykulturowe. Sprawiedliwość jako narzędzie interpretacyjne w prawie ma charakter międzykulturowy i ograniczony zakres zastosowania do praktyk dyskursywnych, w których się ujawnia.

Słowa klucze: sprawiedliwość; interpretacja; dyskurs prawny

1. Legal-linguistic implications in conflicts about the content of rights

Law as research subject becomes truly challenging when the application of a legal statute in a particular case, which is dominated by diverging opinions about its content, is at stake. In such a case, the quality of legal argumentation is the decisive factor in the battle about right and wrong between the competing propositions about the possible content of the disputed law. Therefore, legal argumentation is the main legal-linguistic operation that matters particularly when conflicts about the content of rights are approached from the legal-linguistic perspective. Doubtless, legal language is argumentative, yet the consequences of its argumentative nature remain largely obscure. In the comparative legal-linguistic research this aspect of legal language as well as language use that is closely related to it, is not sufficiently explored either. Moreover, when different legal cultures such as the Continental European and the Chinese are compared, the methodological problem of comparability imposes itself as an additional burden upon the researcher (cf. Husa 2015: 62). Until now,

the starting point for this sort of academic scrutiny has been the question whether the language used in the legal argumentation is ubiquitous or whether it displays characteristic features that contradict the thesis about homogeneous globalized legal argumentation that is rendered with the help of essentially equivalent argumentative speech acts (cf. Galdia 2014: 341). This question is particularly important for the development of comparative research into non-European legal argumentation that is undertaken in Europe and by Europeans.

Overall, in the comparative research into legal argumentation one may distinguish arguments of different origin. First of all, arguments typical of the specific legal culture may come up in relevant legal-linguistic speech acts and they may be supported by other traditional arguments of regional origin. Additionally, some legal arguments might be common to some legal cultures; some may appear in mixed forms in different legal cultures. Still others may be innovative in the examined legal culture and may have been implanted in the conscious or unconscious processes of legal transfers. What is more, argumentation is a practical activity. It is apparent that legal arguments are connected with other, for instance political, religious or social arguments. This linguistic regularity will be showed below. In terms of linguistics, arguments manifest themselves in speech acts. Therefore, in the following analysis, legal and social arguments will be illustrated in their immediate linguistic dress before they will be interpreted within the framework that displays their logical classification. The complexity of the argumentative structures that will be analysed below concerns also the use of interpretive devices in the argumentative text samples. They are doubtless multiple, yet for the purposes of this study the main stress will be laid upon interrelated argumentative devices such as *fairness*, *equity*, *justice* and the *rule of law*. These argumentative devices are in fact meta-arguments because they steer the detailed argumentation in legal texts. Jurists value them highly as they regularly assume that reference to such meta-arguments contributes to the solution of legal problems in situations where argumentative *deadlocks*, or *ties* in the Dworkinian sense (cf. Dworkin 1977: 359), emerge in fundamental debates about the content of rights.

2. Conflict in Hong Kong about Voting Rights

In the recent conflict about the voting rights in Hong Kong the range of these rights has been questioned by parts of the Hong Kong society and by circles closely connected to the Mainland Chinese power structures as well as by those who directly represent them in Hong Kong. The conflict emerged around the question whether Hong Kong people would be able to elect the Chief Executive in the upcoming elections in 2017 from a list of candidates agreed upon by a committee of selected 1200 citizens or to vote for candidates who present themselves directly. For the academic research, the conflict in Hong Kong is both revealing and informative. It uncovers complex argumentative structures whose origin and composition should be elucidated. Explicitly legal arguments have a role to play in the discourse about the content of the voting rights.

Legal sources that form the argumentative framework of reference for the conflict are multiple. To begin, the Basic Law of Hong Kong is reflecting the international obligations stated in the Joint Declaration, which has been signed by the British and the Chinese Governments. Meanwhile, like the Joint Declaration, the Basic Law of Hong Kong uses language that facilitates legislative drafting yet complicates the application of legal provisions. Unlike the Joint Declaration, the Basic Law is expressed in Chinese in its official version. It includes numerous provisions relevant in the settings of the conflict about the voting rights. The Basic Law of Hong Kong states in its Art. 15: "The Central People's Government shall appoint the Chief Executive and the principal officials of the executive authorities of the Hong Kong Special Administrative Region in accordance with the provisions of Chapter IV of this Law." The Basic Law includes also a lengthy provision about the modalities of the appointment of the Chief Executive[1]. It is less specific about the Executive Council of

[1]Art. 45 (I) The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government. (II) 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

Hong Kong as this administrative organ is of limited importance only[2]. Art. 45 (I) of the Basic Law is particularly vague in this respect as it provides an alternative for electing the Chief Executive. It frames this alternative as follows: "the Chief Executive…shall be *selected by election* or *through consultations* held locally and *appointed* …by the government." Art. 45 (I) describes a vast election programme that includes fundamental yet also contradictory procedures for the rule in Hong Kong. The alternatives *selection by election* and *appointment after consultations* represent the most distant contrasts in the political theory that focuses on elections. What is more, Art. 45 (II) adds another programmatic commitment to the above provision: "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 principles*." This programmatic provision clearly overburdens constitutional law and the election process. Political science and constitutional law would most probably suggest that the candidate be elected in accordance with democratic principles or selected by a nominating committee and appointed by the government, yet not cumulatively nominated by a committee, afterwards elected in universal suffrage based on democratic principles and finally appointed by the government. The language of the provision, which seems to reflect a political compromise and the tendency to avoid open conflicts, finally blocks any attempt at a coherent application of the provision. This language also preformatted the arguments that were advanced by the opposing sides in the conflict.

Furthermore, the Basic Law includes in its Art. 68 a provision about the election of members of the Legislative Council that is framed in analogy to Art. 45[3]. Thirty-six of sixty members of the

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accordance with democratic procedures. (III) 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".

[2]Cf. Art. 54 The Executive Council of the Hong Kong Special Administrative Region shall be an organ for assisting the Chief Executive in policy-making. Art. 55 (I) Members of the Executive Council of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive from among the principal officials of the executive authorities, members of the Legislative Council and public figures.

[3]Art. 68 (I) The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election. (II) The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special

Legislative Council are appointed, not elected. Specific procedures for the election are described in annexes to the Basic Law. Requirements for candidates are not determined in the legislative acts. The media reported the words of the Chairman of the Election Committee, Qiao Xiaoyang, saying that the nominee has to "love China"[4]. The regular claims in the conflict are based on references to constitutional provisions. Meanwhile, dealing with arguments such as '*Our constitution promised us that…*' clearly presupposes the existence of a constitutional act in the Hong Kong legislation. Protesters perceive the Basic Law as the constitution of Hong Kong. In turn, Mainland China's authorities claim that China has only one constitution and that the Basic Law of Hong Kong is a political paper without any legal binding force, be it constitutional or another (cf. Chan 2012: 137). Hong Kong itself regards the Basic Law as a '*mini-constitution'* (cf. Chan 2012: 137). Yet, constitutional law does not know any term such as 'mini-constitution'. The described constellation shows interpretive problems in legal orders that are uncoordinated.

The conflict includes also elements of a plebiscite. In June 2014 the members of the Occupy Central-movement organized a referendum where three alternatives for the selection of Hong Kong Chief Executive were proposed. They included direct nomination by citizens or political parties. The legislative acts, instead, speak about a nomination committee that appoints the candidates. Hong Kong authorities deemed this referendum as contrary to the Basic Law and therefore irrelevant in terms of law. The legal qualification given by authorities to the plebiscite was *expression of opinion*. The institutional element of law is visible in this transformation. A vote that is recognized makes part of a referendum and is legally binding, a vote that is deemed to be outside legal mechanisms is a private matter. It is at best the expression of a view of the voter that is not binding in any way.

Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of the members of the Legislative Council by universal suffrage. (III) The specific method for forming the Legislative Council 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".

[4]Mikko Paakkanen, Helsingin Sanomat, June 24, 2014.

3. Arguments and Counter-Arguments in the Hong Kong Treaty

The Joint Declaration signed by the United Kingdom and China in 1984, also called the Hong Kong Treaty, includes provisions that are relevant to the conflict. The textual basis that gave rise to the conflict is rendered in Art. 4 of the Joint Declaration from 1984 that provides in the part here relevant: "The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally. Principal officials will be nominated by the chief executive of the Hong Kong Special Administrative Region for appointment by the Central People's Government.[5]" This legal position is also documented in the popular formula *Hong Kong people rule Hong Kong* (港人治港 – *gangren zhi gang*), as stressed by Michael Yahuda (1996: 77). Meanwhile, it seems that the formula is equally vague as is the treaty provision. The treaty oscillates between *elections* and *consultations* as if they were equivalent means of expression of the general will. Significantly, the Chinese and the English versions of the treaty are as vague as are both linguistic versions of the formula that relates to the rule in Hong Kong. One might suppose that *rule Hong Kong*/*zhi Xiang Gang* indicates in the popular formula the democratic way of exercise of the political power. This is, however, the result of an interpretive approach that is based on the dominant Occidental tradition of the exercise of power. Even in Occidental democracies such as the United Kingdom the monarch *rules*, yet he does not *govern*. The treaty provision is therefore a typical example of an argumentative deadlock in law where at least two rationally founded interpretive alternatives compete in the process of the application of law (cf. Dworkin 1977: 279). The joint declaration is challenging from the legal-linguistic perspective as it drifts towards using general terms and formulations that potentiate interpretive problems. Thus, the document has the legal status of a declaration that may be perceived as

[5]Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong from 19 December 1984.

legally less binding than an agreement. Further, it describes its object as '*the question of Hong Kong'* instead of e.g. *'problems related to the international status of Hong Kong'*. The more general formulation made the British-Chinese agreement easier, yet the use of the linguistic device of avoidance or circumvention of addressing the regulated problem directly has consequences when application of the joint declaration is at stake. After all, prevarication in legislation rarely pays in the long term.

4. Traditional legal (and other) argumentation in China

The above legal materials that form the background of the conflict about the voting rights are embedded in legal-linguistic argumentative patterns and numerous legally relevant social mechanisms and practices that steer the strictly legal argumentation. Many of them are traditional and make part of the legal culture. Constitutive of such arguments is their reference to the idea of *justice*, which is linguistically expressed with the help of different concepts such as *equity* or *fairness* or more recently with the concept of the *rule of law*. For China, the last concept emerged in contradistinction to the *rule of men* (Husa 2015: 162). The process of its emergence is analogous to the shaping of the idea of the *rule of law* in ancient Greece (Galdia 2014: 54). In this sense, the meta-arguments of law appear as common for the East Asian and the European legal traditions. Other arguments, mainly those pertaining to constitutionalism might be of more recent origin. These recent legal arguments and social mechanism witness also to the process of the emergence of cross-cultural legal-linguistic rationality.

The traditional Chinese argumentation may be reconstructed with recourse to the historical discourse that was fixed in the ancient writings. For instance, Chinese historical writings as well as the contemporary reference to historical events in China emerge around and refer to the dynasty timeline. As a matter of fact, China has been ruled by a succession of dynasties that has been regularly interrupted by civil wars or territorial fragmentation. Therefore, in formal terms, the dynasty timeline as a frame of reference makes sense in historical

and cultural research. When properly understood as a chronological system of orientation the traditional dynasty timeline does not blur the retrospective upon historically relevant events that might have been dominated or determined by other than dynastic considerations. Meanwhile, the breaks in the dynasty timeline are particularly interesting for the argumentation research. Regularly, new rulers were aware of the necessity to establish legitimacy for their taking power and establishing a new dynasty or rather for terminating the rule of the previous dynasty. A structural constant in this argumentation that pertains to justification of the change of rule is the mandate of heaven (天命 – *tian ming*). The mandate of heaven is the notional basis for the exercise of power in China (Kalinowski 2011: LXXVII, Perry 2002). It is acquired by divine grace and not by people's choice. Therefore, new rulers claimed that the previous dynasty had displeased the gods and lost the mandate of heaven (Loewe 2004: 421-456). This, so the argument goes, became manifest in the very fact that the gods allowed this loss of power and its transfer to the new ruler. The transfer – the argument continues – would not be possible, would it not please the gods under the mandate of heaven. In terms of law, the mandate of heaven has been withdrawn from the disgraced ruler and attributed to the new ruler and founder of the new dynasty. Reference to and analysis of the argument in the classical Chinese literature, for instance in Ban Biao's *On Kings' Destiny* (王命论 – *Wang Ming Lun*) displays the conscious use of the argumentative structure beyond essentialist or religious contexts that are definitely also present in the classical Chinese discussion about the mandate of heaven. Another salient point in the structure of justifying and legitimizing argumentation is the unlimited power of the Chinese Emperor. Only the mandate of heaven as an argumentative narrative can provide such a type of power. Without the backing of the divine grace, the Emperor would be reduced to a citizen who would have to convince others about the range of his prerogatives and privileges that he claims in state and society. The mandate of heaven clearly does not correspond to the rule of law. It seems to be the most classical argument that protects the exercise of power in China.

A corresponding argumentative structure pertaining to order and social stability can be traced back to Confucian writings. Today, public perception of the Confucian teaching is largely limited to the concept of *obedience to authorities* that also clearly favours these

authorities, yet not the social doctrine later named Confucianism in the Occident. In the modern Chinese society its detailed knowledge should not be overestimated (cf. Cao 2004: 3), yet it survives in parallel and simplified narratives that underlie the daily action of people. The Confucian social doctrine is based on the dialectic of giving and taking, in casu, of the obedience that is recompensed by care. As a doctrine or theory it is also 'Aristotelian' in that it establishes a model that may or may not be evaluated with sociological parameters, as it in principle remains theoretical or more exactly doctrinal. For Confucius, a citizen has to obey the state as the state has to take care about him. That the state may not act according to his doctrine does not appeal to him as a theoretical argument. The wrong action is for Confucius purely practical. This fundamental prerequisite to understanding the Confucian thinking is frequently neglected nowadays and the doctrine is reduced to slogans that propagate law-and-order ideology.

Moreover, preservation of *social stability* (维稳 – *weiwen*) is the major argument in governmental argumentation. The frequently used phrase about 'constructing a harmonious society' and 'a new social management system' are the main rhetorical features in the Chinese public discourse. Language that oscillates between 'instability' and measures to counter 'social instability' abounds in Mainland China (Liebman 2014: 97). Meanwhile, already the classical Chinese social doctrine, for which *Xiao Jing* (孝经 – *Treaty on Filial Piety*) dating from 480 BC is fundamental, includes thoughts about remonstances to authorities in cases when they commit errors which distort the harmony between the ruled and the rulers. Therefore, doctrinally anchored forms of social criticism such as remonstrances and representations mentioned in *Xiao Jing* prove that criticism has not been perceived generally as a social action that would destroy social stability, at least within theoretical approaches to the formation of the Chinese society and its state. Therefore, social stability that the doctrine is expected to engender does not produce a deadly quiet society, as is frequently suggested in the argumentation relating to Confucianism.

Also the argument based on filial piety is not missing in contemporary argumentation. The argument as such is one of the most persistent remnants of Confucianism in the Chinese society. It is based on the somehow surprising idea that obedience to government, which at Confucius times equalled the person of the ruler, is based on the

initial relation between parents and their children as a source of moral inspiration for further socially relevant action such as government or obedience to it (cf. Maspero 1950). It is worth mentioning in this context that the Greek concept of *democracy* developed under different theoretical prerequisites.

Arguments of Occidental origin, especially those referring to constitutionalism, were incorporated into the Chinese culture under the slogan *Chinese learning for the essentials and Western learning for the practicalities* (中学为体，西学为用 *– zhong xue wei ti, xi xue wei yong*), (cf. Yahuda 1996: 35). The hybridity of legal argumentation is therefore a well reflected process in the Chinese culture (Husa 2015: 47). The *rule of law* as an Occidental concept that relates to democracy and not to law-and-order ideologies may be perceived as a relatively new argumentative structure in the Chinese law. Yet, as in the Occidental legal cultures the rule of law takes in East Asia frequently the shape of a bureaucratic principle that impedes rather than expands the framework of the legal argumentation. The following paragraphs will show the connection between the traditional arguments and the recent argumentative patterns, mechanisms and strategies.

5. Emergence of legal (and other) argumentation about the voting rights

In this paragraph, the argumentation typical of the conflict, which was brought up by both Mainland China and Hong Kong sources will be analysed. In order to narrow down the scope of the argumentation brought by both sides and to homogenize the collected data, the arguments raised by two influential actors in the controversy will be taken into consideration: Associate Professor of Law at University of Hong Kong Benny Tai (Dai Yaoting 戴耀廷) and the Deputy Director of the Research Centre for Basic Law of Hong Kong and Macau at Shenzhen University Prof. Zhang Dinghuai (张定淮). The first, in most of the cases, raised his arguments in the columns of the *Hong Kong Economic Journal* (信報財經新聞), a paper close to the

democratic cause, while the latter was present in several newspapers, official and scientific publications of the PRC. This paragraph will first examine the arguments concerning the relation between PRC and Hong Kong and subsequently the point of view related to the role of the Basic Law. Furthermore, the divergent points of view on the legitimacy of the universal suffrage as a means for the selection of the Chief Executive will also be taken into account. Before the first proposal in January 2013 by Benny Tai of the movement "Occupy Central" was advanced, the method of selecting the Chief Executive in Hong Kong has been, as mentioned above, a matter of controversy in the public opinion in PRC and Hong Kong. In these years, both supporters of the electing system by means of the Elective Committee and by means of universal suffrage have raised a considerable number of arguments, which led to passionate debates about the topic.

The topic pertaining to the relation between People's Republic of China and Hong Kong, has been debated in detail by Prof. Zhang, while there are few or no comments on the matter from Prof. Tai in his columns. Prof. Zhang defines the Special Administrative Region of Hong Kong as "an indivisible part of PRC" and the relations between the two parts "as central-peripheral", where the first confers the autonomy upon the other. This assessment is particularly evident in the below quote, where Prof. Zhang is firmly appealing to the contents of the "White Paper" published in June 2014[6]. The report of the Central Government discusses the political and economic development of Hong Kong since the return to the Mainland with a particular focus on the definition of '*one country, two systems*' (一国两制 – *yi guo liang zhi*). In his comment to the report Prof. Zhang stressed the importance of the role of the Central Government as regards the autonomy of the region:

> "白皮书就是要告诉香港社会，香港特别行政区的高度自治权不是固有的，其唯一来源是中央授权。高度自治权的限度在于中央授予多少权力，香港就享有多少权力，不存在'剩余权力。[7]"

> "The White Paper has been released to inform the society of Hong Kong that the right to a high degree of autonomy of the Hong Kong Special Administrative Region is not intrinsic, and that the only source of that right is the empowerment given by the Central Government. The limits to this high

[6]"一国两制"在香港特别行政区的实践.中华人民共和国国务院新闻办公室.2014.
[7]张定淮 in 罗旭.中央与香港的政治关系必须正视.光明日报.2014.4.

> degree of autonomy are based on the amount of power delegated by the central government; there is no such thing as the 'residuum of power'."

It is important to notice in this quote the use of the adjective "intrinsic" (*guyou de* 固有的), here referring to the supposed perception of the Hong Kong society about the autonomy that the former British colony enjoyed after its return to the Mainland. The adjective *guyou* – 固有 is defined in the dictionary *Xiandai Hanyu Cidian* as "existing since the origin" (*benlai you de* – 本来有的), "not coming from the external" (*bu shi wai lai de* – 不是外来的)[8], and is specifically used by Prof. Zhang to stress the fact that the autonomy that Hong Kong enjoys is granted and guaranteed by the Central Government. According to Prof. Zhang, the formal authority to grant autonomy to Hong Kong and its relation with the Central Government is regulated by the Basic Law (基本法 – *jiben fa*), which explicitly provides at the same time for a degree of freedom for the population, as stated in the following textual sample:

> "基本法不仅确定了香港特区所享有的高度自治权，也明确了香港居民的各种自由权利。[9]"

> "The Basic Law has not only determined the high degree of autonomy of the Hong Kong Special Administrative Region, but also clarified any kind of freedom and rights of the inhabitants of Hong Kong."

The Basic Law plays an essential role in the argumentation of Prof. Zhang as well as in the comments of the Central Government on the matter of the relation with the peripheral government. In this view, should the Basic Law not be sufficiently clear, the "White Paper" published in 2014 leaves no doubts about the nature of the above-mentioned relation. Since the nature of this relation is regulated by the Basic Law, and as it represents a key argument in the issue of the voting rights, it is our interest to contrast the opinion of Prof. Zhang about the status of the Basic Law with the position of Prof. Tai. In his column in the *Hong Kong Economic Journal* of June 2013, some indirect reference to the Basic Law and its application can be found. In the first instance, Prof. Tai uses arguments advanced by Martin Luther

[8]中国社会科学院语言研究所词典编辑室. 现代汉语词典（第六版）纪念版. 北京：商务印书馆. 2012. 470 页.
[9]张定淮. 面向 2017 年的香港政治发展.东方早报.2014.9.

King in order to define the difference between a "righteous law" (公义法律 – *gongyi falü*) and an "unrighteous law" (不公义法律 – *bu gongyi falü*):

> "歧視人的法律就是不公義的法律，歧視人的法律扭曲了人性，讓一些人享有一些虛假的優越地位，讓另一些人虛假地處於卑下的地位。[10]"

> "The law that discriminates people is an unrighteous law; the law that discriminates people distorts the human nature, and is allowing a group of people to falsely enjoy superior positions, while it places other people in an unjustified inferior position."

After having defined the meaning of *unrighteous law*, he proceeds to describe a third type of law, which one may call *falsely righteous law*:

> "有一些法律表面看來是公義的，但因它是用來保護那些不公義的法律，那麼他們就變成不公義了。[11]"

> "There are some laws that on their surface seem to be righteous, but because they are used to protect other unrighteous laws, they become unrighteous themselves."

In this last comment, Prof. Tai, thought indirectly, is indeed referring to the Basic Law and the regulation relating to the election system. Furthermore, he uses the previous argument to support the need of mechanisms of civil disobedience to oppose both unrighteous laws and "falsely righteous laws". Since using official channels to object implies to question the privileges of those who "falsely enjoy superior positions", he assumes that this would be a fruitless approach[12] (緣木求魚 – *yuan mu qiu yu* [13]).

The formalistic approach to the constitutional issue is supported above with reference to political reality. In this context, the argument of the balance of powers is very efficient, yet it is not necessarily a legal argument. It is grounded in the semantics of a right

[10]戴耀廷. 梁振英與馬丁路德金的超時空對話.信報財經新聞.2013.6.
[11] *Ibid.*
[12]耀廷. 公民抗命是否合理？.信報財經新聞.2013.6.
[13]The expression in brackets is a quote from the Chinese philosopher Mengzi (孟子 372-289 BC) in his *King Hui of Liang* (梁惠王上 - *Liang Hui Wang Shang*), literally means "climb upon the tree to catch fish". Its meaning of an unsuccessful approach to reach the aim is based on this image.

that might be or not be *intrinsic*. Meanwhile, the determination of what is in fact *intrinsic* to a right is undertaken with reference to the traditional argument of the hierarchy of legal sources. At this point, the argumentative sample fits perfectly the requirements of Occidental legal positivism. It goes without saying that counterarguments against this formalistic proceeding have to come from outside the argumentative system that is based on positivism. In such a situation in law, they will be, as a rule, incommensurable and they will come from philosophical conceptions that relate to the idea of *justice* rather than to formalistic legal doctrines. The contrasted argumentation displayed in above textual samples represents a classical type of a discursive situation related to differences about the content of rights.

6. Role of explicitly legal arguments in the conflict

Most explicitly legal arguments in the conflict are connected to the doctrine of constitutionalism. Its essence is the rule *of* law (法治 – *fazhi*) that is regularly confused in Chinese writings with the rule *by* law also called *fazhi*, yet written slightly differently 法制. The rule of law as a political and legal argument seems to be of Occidental origin. It is only loosely incorporated in the reality of the contemporary Chinese state. M. Yahuda (1996: 5) writes: "Communist ideology has lost such appeal as it once had and, in the absence of the culture of legality, it has not been replaced by the rule of law." Programmatically, the rule *of* law and the rule *by* law appear in Chinese discourses in a way of contrast to *anarchic chaos* (乱 – *luan*). This contrasting procedure reflects Chinese social values and fundamental ideas about formation and operation of state and society. Meanwhile, as long as there is no independent judiciary in China the establishing of the rule of law in the country, at least in terms of Occidental approaches to the issue, remains illusory (cf. Yahuda 1996: 9, Peerenboom 2002). Meanwhile, attempts to instrumentalize it lingustically as a slogan oscillate between reformist tendencies to loosen administrative controls (放 – *fang*) and to tighten them (瘦 – *shou*), cf. Yahuda (1996: 33).

Constitutionalism with its main formula of the *rule of law* (法治 – *fazhi*) is omnipresent in the social discourse in China. In the political discourse, the rule of law as a legal term appears embedded in broader argumentative structures and is broadened by non-legal vocabulary[14]. From the collected data, it appears very clearly that another fundamental point in Prof. Tai's argumentation is the need to maintain a certain separation of powers, especially between legislative and judiciary power. This would serve as a measure to restrict the power of the executive, which can be reached by two means: democratic elections and independence of the judiciary body. Therefore, Prof. Tai assumes that the democratic system would most effectively ensure that the rule of law (法治 – *fazhi*) will not be used as a mere instrument to pursue the aims of the governance and that the function of the law would not be limited to the maintenance of the social order. As stated in Prof. Tai's article published in the *Hong Kong Economic Journal* in August 2013:

> "[...]法治不只是要求公民守法，也不是只以法律為主要管治工具為目的；法律的功能不只是要維持社會秩序，法治更須要求法律限制政府權力和保障基本人權，最終追求的不單是管治，而是能夠達到限權和達義的善治目的。[15]"

> "The rule of law is not just requiring the citizens to abide by the law, and does not ground on the use of law as an instrument to serve the governance. The function of the law is not just to maintain social order, as the rule of law should require the law to restrict the power of the executive and guarantee the basic human rights. All in all, what is pursued is not just to govern, but to strive for the aim of a good government with limitation of power and general acceptance of the law[16]."

[14]The Chinese Vice-Prime Minister Ma Kai was quoted in *China Daily (European Weekly)* 24-30 April 2015 saying: "China is comprehensibly pushing forward the rule of law, and this will offer a legal environment featuring equality, justice and transparency for talent at home and abroad."

[15]戴耀廷. 民主選舉包含以法限權.信報財經新聞.2013.8.

[16]The term 達義 （*dayi* 达义 in simplified Chinese script）is translated here as "general acceptance" on the basis of the definition given in the *Han Shi Wai Zhuan* 韩诗外传, a commentary on virtue, education and other topics, dating from 150 BC. In this text also the definition of *dayi* as "common understanding of principles" is provided. Therefore it can be used in this context to indicate the general acceptance of the law.

About the separation of powers and the independence of the judiciary body, Prof. Tai says in the same article:

> “若要這種司法限權能夠發揮限制政府權力的作用，司法人員必須獨立於行政部門及其他政治力量而裁決案件，包括涉及政府部門、官員、權貴的案件，並享有足夠的憲法權力監察政府的權力。[17]”

> “If necessary, this kind of limited judiciary power will bring into play the limits to the power of the government. The judiciary should be independent from the organs of governance and, aloof from the power of the government, deliberate on the cases, even those which involve governmental departments, civil servants and influential persons, and at the same time enjoy constitutional rights to supervise the power of the executive.”

Finally, on the legitimacy of the democratic system to elect the Chief Executive, we read in the same article that since the aim of the rule of law is, among others, to guarantee the basic human rights and the right to democratic elections is one of them, it is for Prof. Tai both a legitimate request and a necessary measure for the citizens to supervise the power of the executive. On the other hand, the arguments brought by Prof. Zhang are in complete opposition to the above. According to Prof. Zhang, the current elective system by means of the Elective Committee will ensure that the government will represent the will of the majority in Hong Kong society, mostly because of its pluralist nature. Furthermore, the professor assumes also that the current election system would prevent the election of a Chief Executive opposed to the Central Government. Therefore it would also prevent the risk of a constitutional crisis. The current system will also avoid the appearance of populist phenomena in the society of Hong Kong. We read in an article published in the newspaper *People's Daily* that quotes Prof. Zhang:

> “张定淮强调，由提名委员会机构整体提名方式要体现集体意志[...]由于提名委员会的组成具有多元性，而产生的特首候选人必须为香港社会普遍接受，因此，坚持基本法规定的提名委员会制度，就是避免’政党提名’可能出现的严重的社会政治对抗风险，防范候选人不为中央接受而引发的宪制危机风险，以及避免使香港社会走向民粹主义。[18]”

[17] *Ibid.*
[18] 孙立极. 中央对于香港政改具有毋庸置疑的主导权.人民日报.2014.4.

> "Zhang Dinghuai stresses that by means of the elective committee the whole elective body should represent the collective volition. […] Thanks to the pluralistic nature of the elective committee, and because of the fact that the selected candidate will have to serve the Hong Kong society as a whole, to support the elective system regulated by the Basic Law is to prevent the risk that the 'nomination by political parties' could bring about a conflict between society and politics, and to prevent the possibility that the candidate will not abide by the guidelines of the Central Government, and consequently will cause a constitutional crisis. Furthermore it will also prevent the society of Hong Kong to turn towards populism."

We can observe from the quotations of the two protagonists that, from the point of view of Prof. Tai the selection of the candidate to the chair of Chief Executive by means of a democratic election is not only legitimate but also necessary. On the other hand, from the point of view of Prof. Zhang, the democratic elections could lead to an unfair representation of the people's volition, as well as to populism and conflict between society and government. Unsurprisingly, also the argument based on the *rule of law* is largely one-sided. It is contrasted with *political expediency*. *Political expediency* is frequently used as an argument in legal texts. Therefore its presence in the above argument appears as an expression of textual regularity in the argumentation that concerns the content of rights. Due to the argumentative contrast and due to the avoidance to commit their argumentation to the same framework of reference the protagonists again did not reach any agreement. Instead, they have proven that the argumentative deadlock cannot be overcome with arguments coming from restricted formal argumentative arsenals. Below we will ask whether this argumentative deadlock could be overcome with meta-arguments that would steer legal argumentation towards agreement. Meanwhile, before this issue will be addressed, some mechanisms that accompany the legal argumentation will be examined in order to better understand the role of explicitly legal arguments in the conflict.

7. Mechanisms accompanying legal argumentation

Legal argumentation takes place within linguistic forms that are adapted to the legal culture. For instance, the argument of *lack of contention* is based on the wording of protest that appears as supporting the government, and not as seeking confrontation with it. It apparently facilitates making concessions. Paradoxical pro-active strategies were present for instance in PRC in the Mao era where bottom-up rebellion against paternalistic state authority had been encouraged (Ching 2014: 125). This state of affairs may be linked to the traditional political and legalistic arguments that contrast and also bind together rights and obligations in the Confucian tradition, as stressed by E. Perry (2002, 2008). Lack of contention and obedience is stressed in *xinfang* petition procedure (信访) that avoids antagonistic argumentation. Positive images of protest are not absent from Chinese culture where protest was "not necessarily a subversive force against the state, but an integral element in the political imagination for both rulers and the ruled," as stated by Ching (2014: 126). Righteousness is the main structuring notion in these approaches to protest. Meanwhile, a cynical conception of law rather than the rule of law is strengthened by mechanisms that stress bargaining in legal settings.

Popular argumentation is often sceptical of legalistic solutions. Typically, this attitude is expressed in sayings such as *shang you zhengce, xia you duice* (上有政策，下有对策 – *above is politics, below is alternative*). The attitude mirrored in the phrase is favouring circumventing legislation that comes from above by using tricks of whatever sort. Next to it, neologisms such as *mainlandising the city* or *Occupy Central* were established and largely used, also abroad. Furthermore, *cyber protests* as a modern technological form of communication make part of the argumentation around the issue of the voting rights, yet they are largely based upon traditional argumentation.

A new element in the structure of protest is the bargaining element as such as it excludes the previously dominating form of a reaction from above, namely from the government, to what occurs at the grassroot level (cf. Ching 2014: 125). This is a totally new element in argumentation in the history of the Chinese statehood as negotiability is not a constant in Chinese social confrontation with

state structures. Ching assumes that this "commodification or monetization of state power and citizen rights" will have important implications as far as the durability of authoritarianism as a form of rule is concerned (Ching 2014: 125). Meanwhile, new forms of dealing with social protests emerged in China, especially in the aftermath of the Olympic Games of 2008 (Ching 2014). The main tendency in this approach is to use bargaining mechanisms and 'buy stability' from protesters, as is said frequently by governmental officials. In economically motivated protests the government bargains with protesters and finally makes some economic concessions, establishing a 'market nexus' between state and protest. Ching (2014: 124) also showed how such bargaining mechanisms may become instrumental in overcoming social protests. She however also stressed that the bargaining mechanisms might concern 'major types of social protest', which means by far not all. It is obvious that non-economical, human rights related protests may also be influenced by bargaining mechanisms, especially in parts concerning the leaders of such protests. The question whether such mechanisms might be efficient within the structure of the Hong Kong political movement remains open (cf. Khalat 2015).

By some foreign observers the Hong Kong protest movement has been termed *revolutionary* (cf. Khalat 2015). The term attributes to the conflict another discursive dimension, yet is not in use in the internal discourse among the opponents. However, argumentative activism in the debate was not limited to Hong Kong and Mainland China people. Foreign representations such as the Canadian, Italian, and Indian chambers of commerce in a joint statement distanced themselves from the students' movement. Some international financial and accounting firms operating in Hong Kong criticised the movement for threatening the position of Hong Kong as a reliable global financial centre.

The above textual features of argumentation are of Chinese as well as of Occidental origin. The element of economical bargaining in the disputes about the content of rights seems to be typical of post-modern societies, yet it is poorly researched due to problems with accessibility to sources.

8. Non-verbal elements of argumentation – persuasion through imagery

Equally, non-verbal mechanisms of persuasion have been used by the government and the demonstrators with overwhelming strength. This fact might put in question the role of language-based communication in this sort of conflicts about fundamental rights. Doubtless, linguistic argumentation does not take place in a vacuum. The focus on language use in this article may to some extent conceal other visible forms of protest and argumentation that might be even more efficient than is the linguistic exchange of legal and other arguments. This non-linguistic action is based on or accompanied by a swath of corporeal signs that mark the social discourse visibly. Language is a tool of explicit communication under such circumstances.

Street protests and blocking road traffic were the most visible forms of recent protests in Hong Kong that lasted some eighty days. They took the form of long term sit-ins, although also a series of shorter but regular protests or disruptive sit-ins have been envisaged by the protesters. 'Awareness campaigns' have been launched by the protesters. 'Yellow ties' as well as 'little umbrellas hanging on strings' were worn by protesters and their supporters. Use of umbrellas precipitated the coinage of *Umbrella movement* for the unrest. T-shirts with slogans such as *I insist to demand nomination*, in Chinese and in English, were worn by protesters.

In Hong Kong, also *tear gas attacks* took place. The legal basis for this sort of acts in stated in laws. The use of force is regulated by local law because Chinese national legislation principally does not apply in Hong Kong[19]. Meanwhile, the Basic Law includes in its Art. 18 an exceptional rule that is interesting in the context of protests[20]. After all, repression is another, classical strategy to react to

[19]Art. 8 The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinaces, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

[20]Art. 18 (I) The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in the Art. 8 of this Law, and the laws enacted by the legislature of the Region….(IV) In the event that the Standing Committee of the National People's Congress decides to declare

social protests (Ching 2014: 129). There, *force shall be used judiciously* as is regularly repeated in the Chinese media.

9. Fairness as overarching legal-linguistic argument

Fairness as interpretive device and as regulatory social mechanism can be traced down to classical Chinese social and legal thinking. In the Confucian thinking it is present at least in the concepts of celestial harmony and in filial piety. In later Legalists' writings the argumentation shifts towards the argumentative dichotomy of social stability and sanction for breach of a situation perceived as peaceful in society at large. Both argumentative patterns are characteristic of the discourse about legally relevant social action in contemporary China.

Fairness as linguistic device and as social mechanism emerged in traditional Chinese legal studies, mostly in the pre-imperial Confucian teachings. Later legalist and formalist approaches shifted the balance towards a more orthodox understanding of ethical and legal issues. This tendency stressed stability and necessity of sanctioning breaches of societal harmony rather than fundamental, subject matter oriented discourse about right and wrong. In the Occidental intellectual tradition J. Bentham's utilitarianism and legalism come argumentatively close to this structure. J. Bentham was relatively early translated into Chinese and his works have had a big influence upon the formation of the modern conception of the Chinese state[21]. The same concerns the works by J. S. Mill, especially his treaty *On Liberty* and famous translations by Yan Fu of works by Adam Smith, T. H. Huxley and others dating from the beginning of the past century. These works are generally perceived as catalysts in the subsequent social processes where the contemporary Chinese state and society were developed. Reception of Occidental legal thought

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a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.

[21]J. Bentham (2000) Daode yu lifa yuanli daolun, Beijing - Shangwu Yinshuguan.

was of course stronger in Hong Kong due to a century-long exposure to the British rule. The cultural contact may be a part of the explanation why East Asian legal argumentation follows in general terms the patterns of the Occidental legal reasoning. Legal concepts used in the discourse underwent a semantic evolution, largely also due to foreign intellectual input that reshaped the notions of the *rule of law* (法治 – *fazhi*) and constitutionalism both in Hong Kong and in Mainland China. Some of them reach the potential of conflicts, such as the recent dispute about the scope of internationally and constitutionally guaranteed *voting rights* in Hong Kong. Legally relevant arguments that were used by both sides in the conflict provide an argumentative field that reflects both the classical argumentative patterns as well as their discursive evolution. The efficiency of the argumentative dichotomy is visible in social discourses about the application of law. However, it remains unexplored whether overarching interpretive devices such as fairness could be applied in order to rationalize the social discourse and mitigate irreparable losses for society that, after all, is constitutive of statehood.

In the light of the above, conflicts about the content of rights appear as a legal-linguistically relevant type of legal argumentation that is connected to broader social mechanisms in which power is exercised in society. Legal texts, like those analysed above, and that give rise to such conflicts, often also provide argumentative alternatives that are either complementary or evidently contradictory. In such situations, purely linguistic mechanisms cannot contribute to the solution of such conflicts in any significant manner. It is also questionable whether semantically broad notions such as *equity* or *fairness* might contribute to an efficient way of solving deadlocks in legal argumentation. Meanwhile, it also goes without saying that fairness or equity as default mechanisms might be used discursively in situations of deadlocked interpretive attempts. This situation has been analysed above as a default mechanism that is applied when other means of interpretation cannot advance the process of conflict solution with regular legal-linguistic means. Yet, finally such interpretive devices that refer to overly broad philosophical concepts may also justify arguments that are contradictory, like the two positions typical of protagonists in the conflict, which were analysed in the foregoing paragraphs. It seems therefore that conflicts of the sort discussed above are finally solved in mechanisms of application of power that

are apt at overcoming the circularity of legal and extra-legal arguments. These mechanisms are primarily legal and therefore their efficiency in settling conflicts might be questioned. Equally, it might be questioned whether law is the best mechanism to establish social stability, as claimed in some of the analysed arguments. At least, the rule of law that is an argument constantly stressed in the analysed material, does not lead to better results. Its only advantage is to separate legal from extra-legal arguments, yet this result may ignite or entice rather than solve conflicts that emerge around fundamental rights. The Chinese legal culture as well as the European legal tradition include argumentative topics that strengthen the idea that social dialogue is more advisable in situations as those analysed above. Controversial issues that relate to conflicts about the content of rights might be efficiently solved in legal mechanisms, yet the substance of such conflicts remains as a part of public non-legal discourses and proves that the social conflict is actually not solved, notwithstanding its limited juridical dimension. This situation also illustrates the legal-linguistic dimension and its limits.

10. Conclusions

The particular case concerning the conflict about the voting rights in Hong Kong that provides material samples for the analysis of a more general legal-linguistic issue that is the ubiquitous character of legal argumentation can be perceived as a typical example of a conflict about the content of rights. Arguments used in it are either legal, such as those referring to international instruments, constitutional acts or other strictly legal sources or extra-legal, such as those pertaining to equity of fairness. Arguments used in the conflict by both sides are well rooted in the textuality of Chinese law and its philosophy. These arguments also correspond with main traditional European argumentative topics developed by jurists to cope with situations where argumentative deadlock can be solved only by power structures. The argumentative deadlock that emerged in the conflict is also typical of controversial situations relating to the application of law. More recent legal and extra-legal arguments that include the use

of modern technologies and the traditional non-verbal sign inventories functionalised in social protests strengthen the assumption that argumentation used in conflicts of the kind analysed here is ubiquitous. It appears furthermore that it is embedded in broader social mechanism of conflict emergence, conflict management and conflict solution than those generally perceived as legal.

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