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Legal Tax Culture from an Intellectual Perspective: A Starting Point for Comparative Research regarding Sweden and China

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Abstract

In this contribution, the author describes parts of the legal culture connected to the intellectual structures; i.e. the ideal of justice (law in minds) and the legal methods (law in action) used by Swedish and Chinese tax lawyers. Examples are given from a tax law perspective. A brief comparison between the legal tax cultures of the two countries as it is understood by the author is made throughout the article. A few remarks from a western lawyer perspective is also highlighted. This article can with preference be read in conjunction with two other articles, since the three together are part of the description and analysis of the legal culture of the two countries.

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1 Introduction – Getting Back on Track

1.1 The Topic, Purpose, Choice of Jurisdictions, and Outline

Legal culture means different things to different people and different scholars.¹ In its broadest sense it includes not only the legal setting (such as norm production and adjudication) but also legal discourse (how law is practised and how lawyers think and talk about the law), as well as the societal culture of the country (its history, political system and economic system).²

Choosing to study the legal (tax) culture of the two ‘radically’³ different countries, Sweden and the People’s Republic of China (China), can be fruitful in many regards. The study will not only satisfy my own curiosity about ‘the other’, but also give insight into the system used in my own country, and serve as a tool to promote greater understanding and inspire further studies of others. Such studies are essential if one wants to be able to grasp the laws of a country and try to apply them in a given scenario. The reason for

¹ R. Cotterrell, ‘Comparative Law and Legal Culture’ in: Reimann & Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (online publication 2019) 710-730. For an overview of previous research, see M.A. Livingston, *Tax and Culture: Convergence, Divergence, and the Future of Tax Law* (Cambridge, 2020) 5-7, S. Hua, *Chinese legal culture and constitutional order* (Routledge, 2019) 8-13.

² M. van Hoecke & M. Warrington, ‘Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law’ (1999) 47 *Int’l & Comp. L.Q.* 495 at 502; R. Cotterrell (n 1); M.A. Livingston (n 1); S. Hua (n 1); S. Koch, ‘The Outset – How to Learn Sailing the Ocean of Legal Cultures’, 17 and S. Koch, ‘Managing the Unmanageable – An Essay Concerning Legal Culture as an Analytical Tool’ 29, both in: S. Koch & J. Öyrehagen Sunde (eds.) *Comparative Legal Cultures* (Fagbokforlaget, 2020); K. Tuori, *Ratio and Voluntas – The tension between Reason and Will in Law* (Routledge, 2016) 23; J. Bell, ‘Legal Research and the Distinctiveness of Comparative Law’ in: M. van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford, Hart Publishing 2011) 169 in regard to the importance of understanding the society and not only the legal system. The Chinese scholar Fan Zhongxin calls these material and mental aspects of legal culture, see F. Zhongxin, ‘Major Concerns and Wisdom of the Chinese Legal Culture’ (2013) 1 *China Legal Sci* 4.

³ On ‘radically’ different legal systems and the concept of understanding, see S. Seppänen, ‘After Difference: A Meta-Comparative Study of Chinese Encounters with Foreign Comparative Law’, *The American Journal of Comparative Law*, Vol. 68, Issue 1, 186-221.

choosing these two countries is that China is an important trading and business partner of Sweden, with trade between them having been going on for thousands of years. This trade involves the movement of people and the exchange of competence between the countries, and thus several tax issues arise. To be able to address these, it is important to understand the beliefs and practices of tax practitioners and policymakers that is the background and context for tax decisions.⁴

Previous articles have discussed the societal culture, the understanding of the rule of law, and the institutional structure of Sweden and China.⁵ The purpose of this article is to describe and analyse the intellectual structure of the legal (tax) culture of these two countries.⁶ As used here, intellectual structure refers to the underlying beliefs, the *mentalitet* (mental aspects, law in minds), and implicit knowledge. In section 2 of this article, this intellectual structure has been subdivided into the ideal of justice (referring to principles and underlying thoughts, also known as ‘law in minds’) and the legal method (referring to legal sources and how these are used, ‘law in action’). Before proceeding with this analysis, a few clarifications are made in section 1.2. The article ends with concluding remarks (section 3), which can be seen as the starting point for others to conduct comparative research.

⁴ See also M. Livingston, ‘From Mumbai to Shanghai, with a Side Trip to Washington: China, India, and the Future of Progressive taxation in an Asian-Led World’, *Theoretical Inquiries in Law* 11(2) (2010) 547.

⁵ K. Cejic, ‘Understanding Sweden and China from a legal historical, political and economic perspective – brief overview,’ Uppsala Faculty of Law, WPS 2021:4; K. Cejic, ‘Rule of Law: a Fundamental Concept Without a Coherent meaning’, *European Journal of Comparative Law and Governance*, 9(3) (2022); K. Cejic, ‘Legal tax Culture from an Institutional Perspective: A Starting Point for Comparative Research regarding Sweden and China’, Uppsala Faculty of Law, WPS 2023:2.

⁶ M.A. Livingston (n 1) and Koch & Öyrehagen Sunde discuss these two parts as attitudes/intellectual structures and institutions/institutional structures. The Swedish scholar Frändberg discusses similar issues and explains the legal order by standing on two legs. See M.A. Livingston (n 1); S. Koch, ‘The Outset – How to Learn Sailing the Ocean of Legal Cultures’, in: S. Koch & J. Öyrehagen Sunde (n 2) 38 and Å. Frändberg, *Rättsordningens idé – en antologi i allmän rättslära* (Iustus, 2005). The biggest difference between the present contribution and that of Livingston is found in the scope of the attitudes. He uses an anthropological approach and focuses on behavior (tax compliance) and attitudes towards taxation.

1.2 Methodology, Perspectives, and Delimitations

This article aims to search for and try to understand the legal tax culture as it presents itself in Sweden and in China by systematizing prior research and applying it in a new context.⁷ In this case, the author (a Swedish scholar) has never set foot in China but has studied and worked with Swedish law for 30 years.⁸ This imbalance in pre-knowledge needs to be considered when reading this article. Accordingly, keep in mind that the author of this article does not claim to present *the* correct understanding of the legal intellectual tax culture of China, but rather to show how it is perceived and understood from the perspective of a European scholar.⁹

When addressing the topic of legal culture and the ideal of justice, an important aspect is the human rights guaranteed, for example, by the European Court of Human Rights.¹⁰ Respect for and protection of human rights can be found in both the Swedish and Chinese constitutions (chapter 2 of the Instrument of Government (IG¹¹) and Article 33 paragraph 3 Chinese Constitution (CC)). Although human rights have started to become an integral part of tax law discussion, this topic will not be addressed in this article.

⁷ A dogmatic method combined with some comparative elements is used.

⁸ Research trips to China in 2020 and 2022 were stopped by the Covid-19 pandemic.

⁹ K. Cejie (n 5) 2023:2, sec. 1.2 The question of whether a European scholar can conduct comparative studies of the Far East has been discussed in previous research. See M. van Hoecke & M. Warrington (n 2) 508; M. Bogdan, *Komparativ Rättskunskap* (Norstedts Juridik, 2003) 60; J. Husa, *A New Introduction to Comparative Law* (Bloomsbury, 2015) 162; T. Ruskola, 'Legal Orientalism', *Michigan Law Review*, Oct., 2002, Vol. 101, No 1, 179-234 at 184. See also A.Y.H. Chen, 'China's Long March towards Rule of Law or China's Turn against Law?', *The Chinese Journal of Comparative Law*, 2016,4,1-35, at 3 f.

¹⁰ K. Blasek, *Rule of Law in China, A Comparative Approach* (Springer, 2015).

¹¹ SE: *Kungörelse (1974:152) om beslutad ny regeringsform*.

2 Intellectual Structures

2.1 Introduction

The purpose of this section is to describe and briefly compare the intellectual structures of the two countries in the area of tax law. This includes the ideal of justice (attitudes and important legal principles, or ‘law in minds’) and the legal method used by tax law professionals (sources of law and working method, or ‘law in action’).

Section 2.2 discusses the ideal of justice. Several aspects of this ideal can be connected to the concept of the rule of law, and how this concept is understood in the two countries. Previous research has established that the concept of the rule of law is perceived and understood differently in the two countries.¹² In brief, in Sweden the rule of law (law-state thinking) is based on the separation of functions, independent authorities, the principles of legality and legal subordination, equal treatment, certainty, security, and legal accessibility to organizations. It also favours individualism and humanism. In China, the rule of law, often referred to as the socialist rule of law with Chinese characteristics, is characterized by the leading role of the Communist Party of China (CCP), a dynamic legal system, ruling the country by law as well as by virtue.¹³

This article will not go into depth about the rule of law concept but will highlight a few principles that are similar in wording but seem to have different content. The difference is to some extent explained by the fact that most of these principles have a ‘Western’ heritage and are given different content in China than in the ‘West’. The principles discussed in section 2.2 are the separation or concentration of functions, the supremacy of law, and the principles of legality, legal certainty, and legal equality.

¹² K. Cejic (n 5) 2022.

¹³ *Ibid.*

Section 2.3 attempts to identify at least some parts of the legal method, sources of law, and tools of interpretation used by lawyers in the two countries.¹⁴ The article ends with some concluding remarks and reflections on how the intellectual structure differs in the two countries, as well as compared to what are sometimes referred to as Western and Far Eastern legal cultures.¹⁵

2.2 Ideal of Justice – Law in Minds

2.2.1 Political Systems: Separation or Concentration of Functions?

The political systems of Sweden and China have been described in earlier papers.¹⁶ In brief, Sweden is a liberal democracy with a multi-party system. Whereas historically Montesquieu's thoughts influenced the separation of powers, it is now probably more correct to speak of a separation of functions.¹⁷ Legislative power is held by parliament,¹⁸ executive power by the government, and adjudication is done by the courts. This separation of functions is found in the constitution (Chapter 1 IG). One of the reasons for it is the belief that it limits misuse and violation of individual rights. It is primarily based on the idea of democracy and the existence of several different political parties, as well as voting rights for all adults.¹⁹ The system rests on the rule of law and the protection of the individual. In addition, there are several different controlling functions to make sure the parliament and government act according to their powers.

¹⁴ O. Ställvik, *Domarrollen – Rättsregler, yrkeskultur och ideal* (Uppsala Universitet, 2009) 40; S. Koch, 'Legal Culture and Comparative Law – Diving into the Ocean', in Koch & Öyrenhagen Sunde (n 2).

¹⁵ K. Cejic (n 5) 2023:2.

¹⁶ K. Cejic (n 5) 2021:4.

¹⁷ M. Hilling, *Skatteavtal och generalklausuler – Ett komparativt perspektiv* (Wolter Kluwer 2016); R. Croneberg, *Att motverka skatteflykt* (Lund 2021) 106. T. Bull, *Fundamental fragment – ett konstitutionellt lapptäcke*, (Iustus 2013) 15-27. On the complexity of terminology in this area, see C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford Online, May 2013) 43 f.

¹⁸ In addition, the parliament is responsible for state finance.

¹⁹ Governmental bill (prop) 1973:90 p. 91.

Similar controlling functions exist to make sure that different authorities comply with the law.²⁰

To understand the Swedish system, it is important to note that all executive authorities such as the Tax Agency are independent and separate from the ministers and ministries.²¹ For example, the Minister of Finance cannot give the Tax Agency orders in individual cases. A distinction is therefore made between the government and its departments (e.g. the Ministry of Finance) on the one hand, and the Tax Agency and the Swedish Social Insurance Agency on the other hand. The prohibition on intervention in individual cases applies to all ministers.

By contrast, China is a socialist democracy with a one-party system. Political power is centralized in one political party – the Chinese Communist Party (CCP), which is organized into several different congresses, committees, and bureaus.²² The state management runs in parallel with the Party with its congresses, committees, and councils.²³ These two parallel sets of power are closely connected since several politicians are also part of state management.²⁴ However, it is held that all power belongs to the people and the National People's Congress (NPC) and that all organs are accountable to the NPC. The power is concentrated, but the duties are divided.²⁵ However, the duties are not as strictly divided as the functions in Sweden. For example, there is not just one legislative power in China, but rather several producers of law (*see* section 2.3.2). The political party (CCP) and its leader Xi Jinping are involved in or

²⁰ See, for instance, Chapter 13 IG, on Committee on the Constitution (*konstitutionsskottet*), Parliamentary Ombudsmen (*Justitieombudsmän*) and the National Audit Office (*riksrevisionen*).

²¹ See T. Bull (n 17) 29–53 on the vertical separation of power.

²² CCP with its Party Congress every fifth year, the Central Committee, the Politburo and the Politburo's Standing Committee (PSC) and a Central Secretariat. See K. Cejic (n 5) 2021:4 sec. 4.3.

²³ National People's Congress (NPC), Standing Committee (NPCSC), State Council and various ministries.

²⁴ For example, the seven members of the Politburo are also represented in the NPCSC. It is widely held that the real power is held by the Politburo since it supervises the State Council, the Military Commission, the Highest Courts and the Procuratorate.

²⁵ P. Wei, 'Toward a Consultative Rule of Law Regime in China', in Suisheng Zhao (ed.) *Debating Political Reform in China: Rule of Law vs. Democratization* (Taylor and Francis Group, 2006) 18.

connected to all the different functions.²⁶ Even before Xi removed the term limits for the presidency, he was referred to as the ‘Chairman of Everything’.²⁷ The main reasons for this system are historical, and can be explained by the desire to achieve a harmonious society or socialist harmony. According to Confucian thinking, achieving this requires a strong leader (the Party). Political leaders regard the Western understanding of democracy and separation of powers as unsuitable for China.²⁸ Rather, duties are divided among several institutions in what is sometimes referred to as democratic centralism.²⁹ The CCP is very important in China, together with the people, the constitution and the law. These three are sometimes referred to as the three Supremes, of which the Party is held to be the highest.³⁰

2.2.2 Supremacy of Law

According to both the Swedish and Chinese constitutions, both countries are governed by law.³¹ However, they interpret the *supremacy of law* differently. Supremacy of law, sometimes referred to as constitutionalism or *legal subordination*, basically means that law-makers, those who apply the law, government officials, and citizens are bound by the law and must act in accordance with the law.³² This principle arose, in part, in reaction to the autocratic seventeenth- and eighteenth-century rulers of Europe and Sweden, who were regarded as ‘above the law’ or seen as ‘the law’.³³ In Sweden the outcome of this constitutionalism is found in the IG.

Studies of the legal history and legal philosophy of China describe a battle between Confucianism and Legalism. In brief, Confucianism was based on a hierarchy that placed the emperor above the min-

²⁶ See K. Cejie (n 5) 2021:4 section 4.3.

²⁷ K. Brown, *Nya Kina* (Pagina 2018) 36. See also R. Peerenboom, ‘The Battle Over Legal Reforms in China: Has There Been a Turn Against Law?’, *The Chinese Journal of Comparative Law* (2014) Vol. 2 pp. 188-212 regarding the prioritizing of economic reforms.

²⁸ However, not all Chinese scholars agree. See K. Blasek (n 10) 25-26.

²⁹ Article 3 CC.

³⁰ R. O’Brien, ‘Comparative law and China’s socialist legal system’, *Journal of South African Law* 2014 (2014) 137.

³¹ Chapter 1 § 1 IG, Art. 5 CC.

³² K. Blasek (n 10) 33.

³³ Å. Frändberg, *From Rechtsstaat to Universal Law-State: An Essay in Philosophical Jurisprudence* (Springer 2014) 96, K. Cejie (n 5) 2021.

ion, men above women, fathers above sons, the older above the younger. No one was above the emperor, meaning that the emperor was also above the law. Powerful but friendly persuasion was assigned a higher value than obligation. Relations and rites (*li*) were of great importance, and the goal was to achieve harmony in society. Legalists on the other hand fought for ‘rule by law’. Several aspects of the Chinese legalistic view resemble the view represented in Sweden; for example, the Legalists held that the state should be ruled by a legal code and they valued legitimacy and equality. They also believed that people were born self-interested and evil and that harsh punishments were therefore necessary.³⁴ Today, Confucian thinking is still present in China, insofar as people believe that law alone is not sufficient to govern a country properly and that a great man is needed for good governance. This great man is no longer the emperor, but the CCP.³⁵ Article 5 paragraph 1 of the constitution states that the country is to be ruled in accordance with the law, as further specified in Article 5 paragraph 4:

All state organs and armed forces, all political parties and social organizations, and all enterprises and public institutions must abide by the Constitution and the law. Accountability must be enforced for all acts that violate the Constitution or laws.

However, most Chinese legal scholars find this article to be in conflict with both the preamble to the constitution and other articles of the constitution,³⁶ indicating that the supremacy of law is perhaps not yet fully applied in practice. A solution to some of the resulting problems might be found in the opinion that the traditional attitudes of government officials need to be changed and that corruption needs to be addressed.³⁷ It should be noted that Xi

³⁴ W. Chang, Foreword, p. ix in: K.G. Turner et al. (eds.) *The Limits of the Rule of Law in China* (University of Washington Press 2015).

³⁵ K. Blasek (n 10) 40-41.

³⁶ K. Blasek (n 10) 40 with references.

³⁷ Corruption includes, for example, government officials using their power for private gain. See also World Justice Project (WJP) Rule of Law Index 2022, Factor Two – Absence of Corruption. China scored 0.53, Sweden 0.91 out of 1.0.

has launched an anti-corruption campaign. How successful this has been and will be is debated in the literature.³⁸

2.2.3 Legality

The *principle (or concept) of legality* has many different aspects.³⁹ However, its basic meaning is the application (including different forms of interpretation) of the law in compliance with the black letter law. It includes the idea that a legal rule must always be followed and applied if adequate operative facts are present. Conversely, if the facts are not present, the legal rule should not be followed.⁴⁰ To be able to apply the law in this legalistic manner, the law itself needs to be clear, ascertainable and non-retroactive (*see* section 2.2.4 on certainty and predictability).⁴¹ In the Western understanding of legality, the law also has to be sanctioned by representatives of the population in a democratically elected parliament.⁴²

In Swedish law, the main principle of legality is found in Chapter 1 § 1 paragraph 3 IG: ‘public power is exercised under the laws.’ The principle has a specific application in Swedish tax law: no tax can be levied unless stated in prior law (*nulum tributum sine legis*), as laid out in Chapter 8 § 2 paragraph 2 IG. The rule is accomplished by a prohibition on delegating taxing power (Chapter 8 § 3 paragraph 2 IG) and a prohibition on retroactive tax legislation (Chapter 2 § 10 paragraph 2 IG).⁴³ Another paramount principle in Swedish law is

³⁸ J. deLisle, ‘Law in the China Model 2.0: Legality, Developmentalism and Leninism under Xi Jinping,’ (2017) *Journal of Contemporary China*, 26:103, 74-75 with further references.

³⁹ Compare P. Pistone, et al., *Fundamentals of taxation: An introduction to tax policy, tax law and tax administration*, (IBFD, 2019), 36-38. For an in-depth analysis of the principle of legality in Swedish tax law, see A. Hultqvist, *Legalitetsprincipen vid inkomstbeskattningen* (Juristförlaget, 1995).

⁴⁰ For an in-depth analysis see Å. Frändberg (n 33) Chapter 4, and A. Hultqvist (n 39) in relation to tax law.

⁴¹ The IBFD Glossary defines *legality* as ‘A fundamental principle that requires the law to be clear, ascertainable and non-retrospective. The principle may be applied in a tax context, for example, to require that the rules imposing or providing relief from taxes be published in legislation.’ Up until 2010, some circulars issued by MOF and the STA were applied retroactively. See W. Cui, ‘What is ‘Law’ in Chinese Tax Administration?’ *Asian Pacific Law Review*, Vol 19 No 1 2011, 79.

⁴² F. Vanistendael, ‘China: Taxation, Tax Avoidance and the Rule of Law’, *Asia-Pacific Tax Bulletin* May/June (2010) sec. 3.2.

⁴³ R. Pålsson, ‘Principer eller regler? Legalitet och likabehandling i beskattningen’, *SkatteNytt* 2014 p. 554. An exception to retroactive legislation is found in Chapter 2 §

‘predictability’, which is closely connected to legality and certainty (*see* section 2.2.4).⁴⁴

Legality is an extremely important principle in Swedish tax law, as can be illustrated by a recent example from the pandemic. According to the ITA (Income Tax Act) a person has unlimited tax liability in Sweden if he/she stays in Sweden for six months or more. There is no exception to this rule. Hence, when borders were closed during the pandemic, some persons could not leave the country. Regardless of this force majeure situation, the Swedish Tax Agency had to tax these persons, since it is stated in the law.⁴⁵

In Chinese literature, legality is often connected to reforms and discussions regarding authoritarian legality. In simplified form, this can be understood as the black letter law exists, the institutions exist, and so on down the line. However, the independence of those applying the law is lacking. In authoritarian regimes there is often a gap between the law in books and the law in reality.⁴⁶ Under the Xi-era version of China, law is seen as significant and supportive of economic development, however, it is regarded as highly instrumentalist.⁴⁷ It has been said that: ‘The Xi leadership’s reinvigoration of Leninist-style notions of the Party portends more instrumentalist notions of law, given law’s traditional status and possible utility as a discipline-enhancing device within the Party-state and an organizational weapon wielded by the Party-state.’⁴⁸ In addition to the problems with law being highly instrumental, the law is also used unevenly across subjects and regions. Hence, the Xi-era notions of law (distinctively illiberal, Leninist, or limiting the rule of law) have faced remarkable resistance from legal intellectual elites in China. Their criticism has, among other things, led to documents

¹⁰ IG; however, it not discussed further in this context. Stefan Olsson, *Författningssprövning i skatterätten*, (Iustus, 2006) 58-71.

⁴⁴ A. Hultqvist (n 39) 86.

⁴⁵ See further on this topic, K. Cejic, ‘The Impact of Tax Treaties on International Mobility of Work in Sweden’, in: M. Lang et al., *The Impact of Tax Treaties on International Mobility of Work* (IBFD, forthcoming).

⁴⁶ M.E Gallagher, *Authoritarian Legality in China: Law, Workers, and the State*, (Cambridge 2017) 30 f.

⁴⁷ J. deLisle, (n 38) 79.

⁴⁸ *Ibid.* With references to the WJP and worldwide governance indicators, country data report for China made by the World Bank.

prohibiting the discussion and teaching of Western-style rule of law values.⁴⁹

2.2.4 Certainty and Predictability

Legal certainty and predictability (foreseeability) are two other important principles representing the ideal of justice in Sweden.⁵⁰ If one accepts predictability as a core part of the principle of legal certainty, a system is legally certain if it provides clear, concise, and reliable answers to questions of a legal nature. For legal certainty (with the prescribed meaning) to prevail, three necessary conditions must be met: 1) clear and adequate rules must exist, 2) the rules must be published and easily accessible (availability) and 3) the law-enforcing authorities must loyally and correctly apply the rules (reliability).⁵¹

In China, the demand for legal certainty is raised not only by foreign companies and institutions, but also by ordinary Chinese citizens and entrepreneurs. Uncertainty is often linked to corruption and the weak binding power of the law.⁵²

Previous studies have shown that many legal provisions in China are vague and that there is no provision for mechanisms or responsibility for enforcing them. The reasons for this vagueness are to some extent historical. It is said that Zhu Yuanzhang, founder of the Ming Dynasty, declared that ‘the decreed law (*lu*) shall not change’. It was believed that legislation should reflect universal and eternal principles and therefore should not change.⁵³ Confucianism was the most common school of thought in the Ming Dynasty (1368–1644), which was followed by the Qing Dynasty (1616–1911), the last dynasty before the Republic of China.⁵⁴ The vagueness encouraged by Confucianism is still present in contemporary

⁴⁹ J. deLisle, (n 38) 79–83.

⁵⁰ Å. Frändberg, ‘Om rättssäkerhet’, *Juridisk Tidskrift* 2000–01, 269–274; A. Peczenik, *vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation* (Norstedt Juridik, 1995) 89–100; P-H. Lindblom, ‘Tvekamp eller inkquisition’, *SvJT* 1999, 649; N. Jareborg, *Straffrättsideologiska fragment* (Iustus, 1992) 90; A. Peczenik, ‘Rätt och moral i olika juristroller’ in: F. Sterzel (ed.) *Rättsstaten – rätt, politik och moral* (Iustus, 1996) 42–63.

⁵¹ Å. Frändberg (n 50) 274–275.

⁵² K. Cejie (n 12) 2022; K. Blasek (n 10) 5.

⁵³ K. Blasek (n 10) 55.

⁵⁴ K. Cejie (n 5) 2021:4; B. Kjellgren, *Kinakunskap* (Studentlitteratur 2000) 58–67.

Chinese law. Two slogans are sometimes cited: 1) ‘Rough rules are more suitable than detailed rules’ and 2) ‘Crossing the river by feeling the stones’. The latter slogan was formulated by Deng Xiaoping (1904–1997). The slogans reflect the principles of generality and flexibility as well as the idea that legislation must reflect the unitary nature of the state while satisfying the need for regional diversity. This approach makes it possible to adapt to rapid changes in the development of China. This point was also stressed in a White Paper (2011) regarding the legal system: ‘China’s legal system is dynamic, open, developing, not static, closed or fixed ... It will constantly improve with China’s economic and social ... development’.⁵⁵

From a more critical perspective, it can be said that predictability in legal matters is lacking in China, for the same vague rule can be interpreted differently at different times.⁵⁶ In legal doctrine, it is concluded that the vague rules give the CCP more room to achieve its political objectives without breaking the law. This approach also provides for saving face, which is very important in China. Having vague rules ensures that rules do not need to be corrected but only amended. In other words, the original legislation was not wrong.⁵⁷

In conclusion, I will briefly comment on the three necessary conditions mentioned in the first paragraph of this section. The first condition is that *clear and adequate rules exist*. In both Sweden and China, there are rules. However, whether these are predictable and clear is debatable. In Sweden, several tax laws (for example) have been accused of being unpredictable and in conflict with legal certainty.⁵⁸ Another aspect of tax law in both Sweden and China is that the rules are constantly changing, even though the main principles are fixed.⁵⁹ As mentioned above, the laws in China are also often

⁵⁵ K. Blasek (n 10) 56–57.

⁵⁶ K. Blasek (n 10) 57–58.

⁵⁷ Ibid.

⁵⁸ See, for example, the rules on deemed residency in Chapter 3 § 3 p. 3 and § 7 Income Tax Act and K. Cejic, *Den utsträcktta hemvistprincipen – reglerna om väsentlig anknytning* (Iustus, 2015).

⁵⁹ For educational purposes, the tax laws are published in a book twice a year due to the many updates and changes.

very vague and sometimes poorly drafted.⁶⁰ Poor drafting results in uncertainty and gives leeway for authorities and public servants as they interpret and implement them. Even if some Swedish rules may be in conflict with the principle of legal certainty, they are not as vague as the Chinese rules.⁶¹ Even though the intention is that the laws in Sweden should be precise, there is often room for interpretation and difficulties arise in applying the law. There is room for improvement for both countries in this regard.

In addition, the laws in China are often accused of being inconsistent and in conflict with one another. There are inconsistencies with norms on the same level and on lower levels (regulations, administrative rules). Lower-level norms are often in conflict with higher-level legal norms such as the constitution or laws enacted by the NPC.⁶² This is probably because of the immense speed with which China has developed due to reforms in the economy and law since 1978.

As regards the second condition, *availability*, my experience as a Swedish lawyer is that the rules (as well as case law and preparatory works) are relatively easy to access via the Internet (in Swedish). The authorities are also obliged by the constitution to help people access and receive information. Twenty years ago, China used to publish its laws in newspapers and to announce them through national campaigns.⁶³ In recent years digitalization has led to new databases of case law.

In regard to the third condition, *reliability*, the World Justice Project Index measures how effectively government regulations are enforced and applied without improper influence. This measure can be connected to the principle of legal certainty, since it can be one way to indicate the level of reliability. In the index for 2022, Sweden scored 0.83, and China 0.48. However, as mentioned else-

⁶⁰ In 2002, it was concluded that they were also poorly drafted. See R. Peerenboom, *China's Long March Toward Rule of Law* (Cambridge University Press, 2002) 255, see also K. Blasek (n 10) 54 f.

⁶¹ Compare, for example, the length of the income tax acts of the two countries, see section 2.3 below.

⁶² A.H.Y. Chen (n 9 **Error! Bookmark not defined.**) 155-156; K. Blasek (n 10) 57 and R. Peerenboom (n 60) 256-259.

⁶³ R. Peerenboom (n 60) 245.

where, these scores are difficult to interpret due to the lack of comments in the report.⁶⁴ Sweden's high score may be related to the lack of corruption in Sweden.

2.2.5 Equal Treatment

Another important principle in legal matters is the principle of *equal treatment*, which has various meanings.⁶⁵ One often used meaning relates to equality before the law, meaning that no person is given advantages not allowed by the law (i.e. no one is above the law), resulting in uniform application of the law. In both Sweden and China, the principle of equality before the law is found in the constitution (Chapter 1 § 9 IG in Sweden⁶⁶ and Article 33 paragraph 2 CC). In Sweden, this principle applies to all courts and public authorities (*myndigheter*). Notably, the principle of equality before the law is not applicable when it comes to Swedish legislative activity, a situation that is somewhat unique in Western Europe. However, previous research shows that the difference is not as big in practice as one might believe.⁶⁷

In China, the principle of equal treatment cannot be used in courts to set aside statutes that would be deemed unconstitutional;⁶⁸ rather the principle is held to focus on equality in the legal process.

Legal equality can also mean that legislation is applied and enforced without improper influence. Rules on the independence of different legal institutions are found in the constitutions of both countries.⁶⁹ Corruption and transparency are often measured in international contexts. In these comparisons Sweden is often regarded as a

⁶⁴ WJP 2022 (n 37) 6. Regulatory enforcement.

⁶⁵ K. Cejic (n 5) 2022 section 2 and 3.2.3 with further references. Equal treatment can also mean protection against undue discrimination, or equality in the law and equality through the law.

⁶⁶ However, it is held that Chapter 1 § 9 IG also includes the principle of objectivity, see R. Pålsson, *Likhet inför skattelag* (Iustus, 2007) 48.

⁶⁷ See further, R. Pålsson, 'Principer eller regler? Legalitet och likabehandling i beskattningen', *SkatteNytt* 2014 p. 554 and R. Pålsson (n 66) 63–73. In the same research, the conclusion is made that the principle of equality and legality are legal principles and not norms, regardless that they are found in the constitution and in written EU law.

⁶⁸ F. Vanistendael (n 42) sec. 4.3.2.

⁶⁹ K. Cejic (n 5) 2023:2.

very non-corrupt country, whereas China is often somewhere in the middle.⁷⁰

One side of the equal treatment principle is the treatment of the subject (the individual). On the other side, it also relates to the performer (the state, judge, or government official). Courts, authorities, police officers, and other officials must be free from political control. This means, for example, that government regulations are applied and enforced without improper influence. Those responsible for maintaining legal equality are legal functionaries, for example, the legislature and those applying the law.⁷¹ In section 2.2.1, it was noted that several functions in China are strongly connected to the CCP, which indicates that the principle may not be as strong in China as in Sweden.

2.3 Legal Method – Law in Action

2.3.1 Sources of Law in Swedish Tax Law

In Swedish legal books, the sources of law are presented in a hierarchy. Black letter law (laws, regulations) is the most important, followed by case law from the highest courts (Supreme Administrative Court (SAC)), the preparatory work for legislation (*travaux préparatoires*) and legal doctrine.

However, this hierarchy of sources differs to some extent within different legal fields and disciplines. This is especially the case when discussing whether preparatory work (the so-called legislative intent) or case law is more important. Among tax law scholars, it seems that reference is first made to the case law of the SAC when interpreting legislation, prior to using the preparatory work.⁷² Furthermore, in the area of tax law, publications issued by the Tax Agency are important as well as the case law of the Board of Ad-

⁷⁰ Transparency International, Corruption Perspective Index 2020 p. 2, also WJP 2022 (n 37) 2. Absence of Corruption. See further R. Peerenboom (n 60) 295-298.

⁷¹ Å. Frändberg (n 33 **Error! Bookmark not defined.**) 98 and 106 f.

⁷² Lodin, S-O, Lindencrona, G., Melz, P., Silfverberg, C. Simon-Almendal T & Persson Österman, R., *Inkomstskatt – En lärobok i skatterätt* (Studentlitteratur, 2021) 584 and M. Tjernberg, *Skatterättslig tolkning*, (Iustus, 2018) 55 and 83.

vanced Tax Rulings.⁷³ Case law from the Court of Justice of the European Union is also important in regard to EU-related issues. For reasons of length, this article will not deal with the impact of EU law on Swedish legal tax culture (sometimes referred to as internationalization).

Thus, the law in books is the most important source of law. Due to the principles of legality and legal certainty, these laws are explicit and legislators try to avoid vague formulations. However, this is not always possible, and therefore the case law of the SAC is an important source of law. Lower courts and agencies (such as the Tax Agency) have to follow the outcome of a SAC decision in similar cases. The same applies to the SAC; however, there is no principle of *stare decisions* in Sweden. The opinion of the SAC is that it is up to the legislature to change unsatisfactory law.⁷⁴ The courts make an effort to give reasons for their judgments, openly and comprehensively. Consensus is sought, although judges are allowed to present dissenting and concurring opinions. To summarize, both tax law and the case law of the SAC are very important sources of Swedish tax law.⁷⁵

In practice the information published on the Tax Agency's website is also very important, especially its Legal Guidance (*rättslig vägledning*) and its Position Statements (*ställningstaganden*).⁷⁶ In the literature it has been argued that these publications have de facto impact as legal sources.⁷⁷ This author tends to agree.

In addition to the preparatory work and publications issued by the Tax Agency, legal doctrine is used as a source of law. In this regard, it is the strength of the arguments presented that are important, rather than who did the research or publication.

⁷³ See K. Cejje (n 5) 2023:2 sec. 2.1.2 and 2.3.3.

⁷⁴ See R. Persson Österman, 'The Swedish Supreme Administrative Court: Adjudication in Tax matters', *Bulletin for international taxation*, Jan/Feb 2016 p. 61 with reference to case RÅ 1993 ref. 16.

⁷⁵ Lodin (et. al.) (n 72) 594.

⁷⁶ See K. Cejje (n 5) 2023:2 sec. 2.1.2.

⁷⁷ See R. Pålsson, 'Skatteverkets styr signaler – en ny blomma i regelrabatten', *SkatteNytt*, 2006, 401-418.

Finally, since Sweden is a member of the EU, EU law is often relevant in cross-border situations. Simply put, EU law is above domestic law. Tax treaties, on the other hand, are implemented through laws and have the same status as domestic law.⁷⁸ Tax treaties can, however, only delimit the taxing rights of the state, which are prescribed by other domestic laws in Sweden.

2.3.2 Interpretation of Tax Law in Sweden

In Sweden the tax law is interpreted by tax practitioners, the Tax Agency, the courts, and the Board of Advanced Tax Rulings. In Sweden, in contrast to China, the interpretation and application of tax law go hand in hand. To be able to apply the law, it usually needs to be interpreted.

Several different methods of interpretation apply. The fact that the state has a strong position in relation to the individual taxpayer makes the principles of legality, legal certainty (*rättsäkerhet*) and predictability especially important when interpreting laws (see section 2.2). This means that a strictly objective interpretation of the letter of the law is preferred (and in most cases used). However, this is sometimes accomplished by a more subjective and theological method of interpretation, in which the intention of the legislature as well as the purpose of the legislation are taken into account. Sometimes a systematic interpretation is needed, meaning that such things as the outline of the law might be considered.⁷⁹

2.3.3 Sources of Law in Chinese Tax Law

Previous research on norm production and sources of law in China⁸⁰ has shown that there are several different sources of laws, regulations and the like enacted by different actors (the NPC, NPCSC, State Council, MOF, SAT and General Administration of Cus-

⁷⁸ Sweden is a dualistic country. The SAC usually uses material published by the OECD when interpreting tax treaties. See K. Cejic, 'The Commentaries on the OECD Model as a Mechanism for Interpretation with Reference to the Swedish Perspective', *Bulletin for International taxation*, Dec 2017 663-673.

⁷⁹ M. Tjernberg, (n 72).

⁸⁰ K. Cejic 'Polycentri i skatterättens källor – utifrån en kinesisk kontext', in: N. Dimitrievski, et al (eds.) *Festskrift till Robert Pålsson* (Iustus 2022). The author describes how norm production works and how different sources can be identified and classified.

toms).⁸¹ Moreover, these laws are enacted at different levels – state, regional and local – and may sometimes conflict.⁸² Briefly, the term ‘law’ (*fa*) has both a specific and a generic meaning. The specific meaning covers laws adopted by the NPC or NPCSC. The generic meaning includes other sources that have a similarly binding effect and are sometime referred to as legislation. In this paper, they are referred to as regulations and administrative rules.⁸³

As in Swedish legal methodology, the starting point is the legal norm. In contrast to Swedish law, Chinese law seems to be formulated in a more general and cautious way, making it possible for the administration to adapt its position by way of interpretation.⁸⁴ In both countries, tax laws are constantly changing, making it hard to keep up. From a Chinese perspective, it is held to be almost impossible.⁸⁵

If one approaches the legal sources used in Chinese administration of justice in a hierarchical way, the constitution (CC) has the highest status, closely followed by the Law on Legislation.⁸⁶ Second come the **laws** promulgated by NPC or NPCSC, for example, the *Individual Income Tax Law of the People’s Republic of China* (IITL). The NPC and NPCSC have sole competence to enact laws regarding taxation.⁸⁷ However, these laws are often very wide and vague. For example, the IITL and the Corporate Income Tax Law (CIT) are each only 10 to 15 pages long (whereas the Swedish ITA is approximately 300 pages in length).

Thirdly, the State Council publishes regulations or rules for implementation, provisions, and measures (often referred to as **Admin-**

⁸¹ As regards tariff law, there is a specific body, the Tariff and Classification Committee of the State Council, see J. Li, ‘Teaching Taxation Law in China’, *Bulletin for International Taxation* May 2008 184.

⁸² K. Blasek (n 10).

⁸³ J. Li., *International Taxation in China: A Contextualized Analysis* (IBFD, 2016) 29-31.

⁸⁴ F. Vanistendael (n 42) sec 4.4, J. Li (n 81) 184.

⁸⁵ J. Li (n 81) 189.

⁸⁶ Legislation Law of the People’s Republic of China, passed 15 March 2000, translation retrieved from the PRC Central Government Official Web portal on February 19, 2003 (retrieved 2 June 2021). See W. Cui (n 41) 77-81.

⁸⁷ *Legislation Law of the PRC* (March 15, 2000) and J. Dong, ‘An Introduction to Chinese Legal Culture’, in: S. Koch & J. Öyrehagen Sunde (eds.) (n 2) 763.

istrative Regulations).⁸⁸ These apply throughout the country. An example of such a regulation is the *Regulation on the Implementation of the Law of the People's Republic of China on Individual Income Tax* (IITR). However, the State Council also publishes notices, for example, the *Notice of the State Council on Issuing the Interim Measures for the Additional Special Deduction for Individual Income Tax*.⁸⁹ This publication explains which deductions are allowed, which means that it ought to be of great importance in the adjudication of tax matters.⁹⁰

Fourthly, administrative rules are issued by ministries (e.g. the Ministry of Finance (MOF)) and commissions under the State Council within their area of competence. Even rules created by the STA seem to fit into the category of **ministerial rules**.⁹¹ The rules often contain interpretations or explanations of laws or regulations.⁹² Sometimes they even fill in legislative blanks.⁹³ These rules have the status of legislation and the force of law.⁹⁴ Sometimes they are referred to as 'actions' or 'administrative decisions' if they are intended to explain some particular issue. The term 'order' is also used to denote rules issued by a government organization that intends to prescribe legal standards.⁹⁵ Similar administrative rules are created by authorities at the regional or local level within their jurisdiction.

Finally, there are also **informal rules** that are not binding but can give an idea of, for example, the STA's opinion or interpretation on various issues and provide guidance to local tax offices.⁹⁶ These informal rules also include resolutions that aim to show a common understanding or opinion in different contexts. Resolutions can be

⁸⁸ J. Li (n 83) 31-32; W. Cui (n 41) 77 (footnote 5).

⁸⁹ No. 41 [2018] of the State Council.

⁹⁰ In addition, regulations are sometimes published by regional or local authorities to be applied within their specific competence. J. Dong (n 87) 762.

⁹¹ J. Li (n 83) 32-34.

⁹² Sometimes referred to as *wizhe* or *xizhe*, see J. Dong (n 87)

⁹³ J. Li (n 83) 32. See examples in regard to EIT Law; W. Cui (n 41) 84-87.

⁹⁴ J. Li (n 83) 31 and section 2.1.2 on how to distinguish whether these have the force of law or not.

⁹⁵ Again, it can be noted here that translation problems arise. For example, regulation IITR is issued as 'Order No 707 of the State Council' in the English translation. However, it seems to me that what is being referred to here is rather the 'orders' that, for example, the STA publishes that are referred to in this context. For example, Order No. 19 of the SAT [2009].

⁹⁶ J. Li (n 83) 34, 37.

created by government organizations or by political parties and others.

If one compares this relatively clear division (hierarchy) of legal sources with the primary sources of law found in, for example, the Tax Research IBFD database, one can quickly become confused.⁹⁷ The database lists no fewer than 1749 in-force published legal sources.⁹⁸ Linking these publications to the hierarchy of sources of law described above seems next to impossible. In the literature (2014) it was stated that there are about four tax laws, twenty regulations, and about fifty ministerial rules. In addition, between 3000 and 5000 informal rules have been published by the STA or jointly by the STA and the MOF,⁹⁹ which may indicate that most of the publications in the database should be classified as informal rules.

In the literature associated with the IBFD database, documents jointly issued by the MOF and the STA are described as ‘circulars’ (*Chai Shui, Cai Shui, Cai Sui*).¹⁰⁰ However, in the database some of these are referred to as ‘notices’¹⁰¹ or ‘announcements’.¹⁰² The term ‘announcements’, according to the terminology used in the database, may also be used to refer to announcements from the STA only.¹⁰³ The same literature states that the STA often issues ‘public notices’ (*Gong Gao*)¹⁰⁴ with the aim of clarifying tax issues based on law or regulation.¹⁰⁵ If one considers the terminology used (*gong gao, gonggao*) and previous research on the STA’s guidance as to when a regulation is legally binding, these public notices might possibly have the same effect.¹⁰⁶

⁹⁷ W. Cui (n 41) 89-93 and K. Cejic (n 5) 2023:2 sec.2.1.2. and K. Cejic (n 80).

⁹⁸ The search was done on 16 May 2023.

⁹⁹ D. Qiu, ‘Interpretation of tax Law in China: Moving Towards the Rule of Law’, *HKLJ* 44(2) (2014).

¹⁰⁰ Sometimes the term *Cai Shui* is used when the MOF alone is the issuer.

¹⁰¹ See *Cai Shui* [2018] No 164, Notice of the MOF and the SAT.

¹⁰² Announcement [2020] No. 3 of the MOF and STA or Announcement [2021] No. 33 of the MOF and STA.

¹⁰³ Announcement [2018] No. 61 of the STA.

¹⁰⁴ Sometimes referred to as *Guo Shui Han, Guo Shui Fa, Shui Zong Fa*, etc.

¹⁰⁵ However, compare Ma, ‘China (People’s Rep.) – Country tax Guides – individual Taxation, Country Analysis’ (senast uppdaterad 15 maj 2021), IBFD databas, sec. 1.1.2. with Ma ‘China – (People’s Rep.) – Global Mobilitet, Country Tax Guides IBFD, sec. 1.1.2 (last updated May 15 2021).

¹⁰⁶ K: Cejic (n 5) 2023:2 sec 2.1.2.

Legal Tax Culture from an Intellectual Perspective: A Starting Point for Comparative Research regarding Sweden and China

Almost all substantive tax rules in China are found in documents issued by MOF and STA. As it is hard to decide whether they are ministerial rules or informal rules, the legal landscape has been described as ‘lawlessness in tax rulemaking’.¹⁰⁷

The question of whether publications from the STA and the STA and MOF are ministerial or informal rules needs to be studied more closely because of the inconsistent terminology used in the sources to which this author has access. However, the question of which publications are administrative and which are informal is of purely theoretical interest in light of how the sources of law are applied in practice (as described in the next section).

The status of legal cases as a source of law is somewhat debated and it is difficult to discern a clear line. Tentatively, it can be said that this appears to be related to what area of law one studies. Regarding case law, there is no doctrine of *stare decisions* in China.¹⁰⁸ In 2008 it was held that case law played no role in the Chinese interpretation of tax law. Few disputes were litigated, especially not on conceptual issues, and if they were, the decisions were almost never appealed.¹⁰⁹ However, today guiding cases are published by the SPC. The Guiding Case system is unique and has binding force as judge-made law.¹¹⁰

In my studies of China’s legal culture and tax system, I have found no evidence that legal doctrine would be considered a source of law in the same way as it is in Sweden.

When it comes to tax treaties, these are held to have a higher status in the Chinese hierarchy of legislation than domestic law.¹¹¹

¹⁰⁷ See W. Cui (n 41) 83-89, also in regard of the confusion in this area.

¹⁰⁸ J. Dong (n 87) 772.

¹⁰⁹ J. Li (n 81) 186.

¹¹⁰ S. Wang, ‘Understanding law in Contextual Pluralism: A Preface’, *The Chinese Journal of Comparative Law*, (2022) Vol. 10 No. 1, 91 and Q. Liu, ‘The Chinese Guiding Case System through the Lens of a CISG Case’ (2021) 51 *Hong Kong LJ* 339.

¹¹¹ J. Li (n 83) 102 f.

2.3.4 Interpretation of Tax Law in China

A distinctive feature of Chinese tax law is that the creator of a law, regulation or rule has the right to interpret it. Thus, the right to interpretation has been predominantly exercised by the administrative bodies (STA and MOF) due to their power to legislate.¹¹²

The legislature, the administration and the judges in China interpret the law.¹¹³ The interpretation is said to have the same authority as the original rule, since the original rules are often formulated in a general way. Furthermore, informal interpretations by local officials – on the spot – are explained by the distance between the officials at local levels and the central administration. They can also be explained by the old Chinese tradition of resolving problems through mediation with local authorities in order to avoid losing face.¹¹⁴

Previous research (2014 and 2016) has held that judicial interpretation (SPC) in China in regard to tax laws is marginal. The SPCs have not really offered any interpretations of tax law but have dealt only with procedural issues.¹¹⁵ The rationale for this is probably that the SPC does not have legislative power, and therefore has no power to interpret the law.¹¹⁶ However, what is interesting from the perspective of a Western scholar, is that the SPC can issue judicial interpretations independent of a hearing in a specific case.¹¹⁷ In addition, the SPC is only allowed to interpret laws by the NPC and NPCSC, not administrative regulations issued by the SC nor ministerial rules of the MOF or STA.¹¹⁸ Consequently, the MOF and STA interpret tax laws on a more regular basis than the SC, SPC, and the courts.¹¹⁹

In an adjudication process, the norms are applied to the facts of the case and deductions are often made to draw conclusions in the case.¹²⁰ In contrast to Swedish case law, there are very few tax law

¹¹² See D. Qiu (n 99) for an interesting article on this topic.

¹¹³ F. Vanistendael (n 42) sec. 4.4.

¹¹⁴ F. Vanistendael (n 42) sec. 4.4.

¹¹⁵ J. Li (n 83) 39; D. Qiu (n 99) 596.

¹¹⁶ J. Li (n 83) 38.

¹¹⁷ J. Li (n 83) 39.

¹¹⁸ J. Li (n 83) 40.

¹¹⁹ D. Qiu (n 99) 605–608.

¹²⁰ J. Dong (n 87) 770–772.

litigations related to interpretation of tax law. Those that do exist are related to procedural issues or the imposition of penalties.¹²¹

3 Concluding Remarks – A Summary or a Starting Point?

Comparing Sweden and China is a high-risk project for the two countries are very different. However, given the importance of the trade links between them, it is important to seek a better understanding of the legal tax culture of the two countries. This article can serve as a jumping-off point, for by others who would like to start to understand the legal (tax) culture of one or both countries. It is the third in a series of published articles that attempt to understand the different legal cultures of Sweden and China. The articles have focused on three vital parts of a country's legal culture, namely the rule of law,¹²² the institutional structure,¹²³ and the intellectual structure. Note, however, that it can be difficult to separate these aspects of legal culture as they all are integral parts of it.

The principle of the rule of law is important if people and authorities are to believe that the law does and should rule. However, it has been said that it takes time, even generations, to establish the essential elements of the rule of law in a culture. So, does establishing the necessary institutional structure of an independent judiciary and a legal profession and tradition committed to upholding the rule of law.¹²⁴ Yet another problem with the rule of law is that it is a powerful legitimating ideal, which cynical political leaders can wield as a two-edged sword. It is thus important to try to see through the words of the leaders and look at their actions, holding them responsible for their behaviour and not being fooled by what they say.

Transplanting the Western concept of the rule of law to Chinese soil will probably not be successful, since Chinese culture is very

¹²¹ J. Li (n 83) 40.

¹²² K. Cejie (n 5) 2022.

¹²³ K. Cejie (n 5) 2023:2.

¹²⁴ B.Z. Tamanaha, 'A concise guide to the rule of law', in: N. Walker, G. Palmobella (eds) *St John's Legal Studies Research paper No 07-0082* (Hart Publishing, 2007) 16.

different from the cultures in which the Western understanding of the rule of law evolved. This is probably why the Chinese themselves are dismissing transplants and prefer to speak of ‘socialist rule of law with Chinese characteristics’. These Chinese characteristics include concentration of power, support for the leading role of the CCP, and the absence of an independent judiciary and legal certainty. The Constitution of China requires adherence to the rule of law and the leadership of the CCP. Thus, the rule of law serves as a tool to create a democratic dictatorship – led by the CCP. The main goal of the rule of law in China is to create stability and economic growth. As a result, the Chinese economy has grown immensely since the opening up of China in 1978 and the introduction of a socialist market economy in 1993, and lifted hundreds of millions of people out of poverty. However, Western powers are insisting that the rule of law must be given a more Western interpretation if the Chinese economy is to be able to continue growing.¹²⁵ There are also demands that the government of China must transform itself into a lean, clean, transparent and highly efficient modern government that operates under the rule of law.¹²⁶ It is too early to say whether these demands will be met, for developing the legal culture (and the rule of law) takes time.¹²⁷ Even though China is one of the oldest countries in the world, the foundation of this path has only recently begun to be constructed.

Sweden, on the other hand, faces issues related to the concept of the welfare state and solidarity. The characteristic of the rule of law in Sweden (law-state thinking) is the separation of functions (public powers). These powers are to be exercised independently under legal rules. Individualism and humanism are favoured, and legal equality is very important, as well as certainty and predictability.¹²⁸ All this is similar to the Nordic legal culture described by Sakslin:¹²⁹ ‘Traditionally no difference in treatment is made based on the status or class of the person concerned. One important element is the

¹²⁵ K. Cejic (n 12).

¹²⁶ World Bank, ‘China 2030 – Building a Modern, Harmonious, and Creative High-Income Society’ (2012) 18 and EUCCC, ‘Business Confidence Survey’ (2012) 5.

¹²⁷ Actions taken by China in regard to Hong Kong in 2020–2021, indicates other possible paths.

¹²⁸ K. Cejic (n 12) 298-306.

¹²⁹ M. Sakslin, ‘The Concept of Residence and Social Security: Reflections on Finnish, Swedish and Community Legislation’, *European Journal of Migration and Law* 2: 157-183, 2000 at 160.

attitude towards the state. The state is seen as benevolent institution which uses the law in order actively to protect the individual and promote the development of society.’

In earlier publications the three patterns of law identified by Mattei as relevant for social constraints in legal systems has been explained – the *rule of professional law*, the *rule of political law* and the *rule of traditional law*.¹³⁰ If one considers these patterns today, I would say that contemporary China is now more influenced by the rule of political law than it was in 1998 when his paper was written,¹³¹ although the rule of traditional law still exists. The legal culture of China is in fact a hybrid of Western regulations (transplants), traditional Chinese legal culture (Confucianism) and a socialist system.¹³² This can be explained by the development and transitions of the last thirty years.

The pattern in Sweden is closer to the rule of professional law, with the separation of law from both politics and religion. It is held to be of great importance that the judiciary, police, and prosecuting authorities (i.e. the legal bodies) are independent of political and external organs or individuals. Independent courts are regarded as a cornerstone of the system. The analysis in this and the previous articles indicates that, like the citizens of other Western countries, Swedes (in general) believe in individualism and see the law as important in organizing society and the rule of law as an important foundation of society.

Politically, both Sweden and China regard themselves as democratic. However, from a Western perspective, the huge influence of the CCP in China creates such a concentration of power that the country can be regarded as a one-party state with no free elections¹³³ China, on the other hand, maintains that the duties are divided. From the perspective of a Western lawyer, this division can be problematic. For example, if one studies the legislative process in China, it is clear that the plurality of lawmakers and the polycen-

¹³⁰ U. Mattei, ‘Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems’, (1997) 45 *American Journal of Comparative Law*, 16–44., K. Cejic (n 5) 2023:2.

¹³¹ U. Mattei (n 130) See the picture on p. 44.

¹³² J. Husa (n **Error! Bookmark not defined.**) 140.

¹³³ P. Sevastik, ‘Folkrepubliken Kina’ in: A. Jonsson Cornell (ed) *Komparativ konstitutionell rätt* (Iustus, 2020) 301.

tricity of legal sources (different geographical levels of lawmaking as well as different hierarchical levels of lawmaking) make it hard even to identify the applicable law in some cases. However, there is also considerable polycentricity in legal sources in Sweden, often due to international obligations and the impact of EU law. However, this appears to be less problematic than it is in China.¹³⁴ In recent years, the lawmaking process in China seems to have changed and it is now more open, to some extent due to transplants. This leads to new problems due to differences in politics and traditions. In China, more conflicting views are found. The CCP seems to endorse a somewhat more collectivistic approach embracing the duties, obligations, and hierarchy favoured by Confucianism. Good morality seems embedded in the legal culture to a greater extent than in Sweden, where predictability and equality are favoured.

The principles of supremacy of law and legal subordination are found in the constitutions of both countries; however, the real meaning and impact of the article in the Chinese constitution has been questioned.¹³⁵

Moreover, the laws and regulations are often intentionally vague and open for interpretation, in China, which can be explained by historical reasons and the intention to prevent “loosing face”. In Sweden, predictability for the individual is a core element in law, which also include that the laws are easily accessible. Especially in the area of tax (and criminal) law, the principle of legal certainty and predictability is important. However, even though the intention is that the laws in Sweden generally aims to be precise, there are often room for interpretations and difficulties arises in the application of them.

A brief comment can be made in regard to my previous writings about Western and Far Eastern legal culture.¹³⁶ Sweden adheres to the civil law tradition in regard to legal sources and case law. However, due to its membership in the European Union, case law from the Court of Justice of the European Union has much the same status as common law. The Far Eastern legal culture embracing a

¹³⁴ K. Cejic (n 80).

¹³⁵ See section 2.2.2 above

¹³⁶ K. Cejic (n 5) 2023:2 section 1.4.

collectivistic approach and Confucianism can also be found in Chinese legal culture, for example, the great importance of the CCP (as a father over sons).

Both Sweden and China take legislation as the starting point. From the perspective of a Western scholar, the question is what counts as law or legislation in China. As has been highlighted in earlier publications, there are several ‘legislators’ in China,¹³⁷ and it is not always easy for an outsider to understand what material is regarded as law (see section 2.3.3).

In neither country are *stare decisions* used as a source of law. There are great differences in the use made of case law, stemming from different views regarding respect for judges and the courts. Previous research has held that judges and the courts are not independent in China and that corruption exists within the legal system as well as in other places.

When it comes to case law as a source of law, the SPC has recently started to give guiding cases. Similarly, in Sweden the case law of the SAC can be regarded as guiding, even though it is not legally binding for other courts or parties. Overall, I get the impression that the impact of case law as a source of law is greater in Sweden than in China. In China, case law does not play a role in the interpretation of tax laws, and few disputes are in fact litigated.¹³⁸ However, the SPC does issue judicial interpretations as well as guiding cases.¹³⁹ On the one hand, it is held that the interpretations made by the Chinese courts and prosecution are often of better quality than most of the rules they interpret. On the other hand, it is held that the court often exceeds its power by issuing interpretations that violate superior laws or regulations.¹⁴⁰ What is more, there is no joint publication of all relevant rules or case law, which makes the interpretation, application and possibility of complying with the laws difficult.¹⁴¹

¹³⁷ K. Cejie (n 80) and (n 5) 2023:2.

¹³⁸ J. Li (n 81) 186 and Wei Cui, ‘Fiscal Federalism in Chinese Taxation’, *WTJ* 2011:3. p. 461-467.

¹³⁹ J. Dong (n 87) 763 ff.

¹⁴⁰ K. Blasek (n 10) 29.

¹⁴¹ J. Li (n 81) 185–186.

Finally, one may note that conflict resolution in Sweden is usually done by courts. In China, on the other hand, conflicts, if they arise, are often solved by mediation.¹⁴²

When it comes to interpretation, the most interesting aspect to emerge from this research is that the one legislating the law in China is also the one who has the priority when it comes to interpreting it, and that this interpretation can itself be regarded as law.

It is hoped that the background presented in this article and in my previous research will provide other researchers with a starting point for their own legal research as and encourage more in-depth studies of the legal culture of the two countries.¹⁴³

¹⁴² K. Cejic (n 5) 2023:2.

¹⁴³ See also M. van Hoecke & M. Warrington (n 2) 513.

