Rule of morality versus rule of law? A Multi-method comparative study into the values that characterize a good civil servant in China and the Netherlands

Yang, L.

Citation for published version (APA):
Yang, L. (2015). Rule of morality versus rule of law? A Multi-method comparative study into the values that characterize a good civil servant in China and the Netherlands

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
“[N]o one doubts that the law would command and decide in the best manner whatever it could. But some things can, and other things cannot, be comprehended under the law, and this is the origin of the vexed question whether the best law or the best man should rule.”

Aristotle


** This chapter is based on an article that is currently under review. Please see page 195.
Abstract

This study investigates the Confucian and Western tradition specifically with regard to the relation between morality, law and good administration. It is argued that the common opposition between the rule of man and the rule of law as reflecting the basic difference between the two traditions is inadequate. Confucianism can be better characterized positively as the rule of morality. It should also be noticed that 'the rule of law' is increasingly being introduced in the Chinese administration. Similarly, even though the Western tradition can be captured in terms of the rule of law, it is acknowledged that 'the rule of man' cannot be avoided, and that morality is important. Both traditions oppose the rule of man, in as far as it refers to someone acting out his selfish preferences. It is concluded that, good governance requires officials of good morality who are respectful of the law, whether this is a kind of convergence is a matter of debate.

Points for practitioners

This article studies Confucian and Western administrative traditions from the angle of law and morality. What makes a 'good administrator' should be studied contextually, particularly in very different culture of evaluating good governance. The article points at the need to be careful in characterizing and understanding the two traditions, in particular the reference to the Confucian tradition in terms of the 'the rule of man' too easily results in dismissing ideas due to the association with a specific negative concept in the Western tradition.

Keywords

Confucianism, governance, law, morality, rule of law, Western tradition

Introduction

To oppose Chinese and Western thought in terms of the rule of man versus the rule of law is common, however, it has not received attention within the increasing literature on administrative traditions (e.g. Boyer, 1990; Smelser and Baltes, 2001; Bevir, Rhodes and Weller, 2003). This article focuses on the different normative starting points of these two traditions in relation to their ideas of good administration. It is concluded that the characterization in terms of rule of law versus rule of man hampers understanding of relevant differences

'Eastern' and 'Western', 'Chinese' and 'Western', or 'the East' and 'the West' are used as terms to indicate general distinctions in the geographical, historical and cultural sense (cf. Painter and Peters, 2010).
Abstract

This study investigates the Confucian and Western tradition specifically with regard to the relation between morality, law and good administration. It is argued that the common opposition between the rule of man and the rule of law as reflecting the basic difference between the two traditions is inadequate. Confucianism can be better characterized positively as the rule of morality. It should also be noticed that ‘the rule of law’ is increasingly being introduced in the Chinese administration. Similarly, even though the Western tradition can be captured in terms of the rule of law, it is acknowledged that ‘the rule of man’ cannot be avoided, and that morality is important. Both traditions oppose the rule of man, in as far as it refers to someone acting out his selfish preferences. It is concluded that, good governance requires officials of good morality who are respectful of the law, whether this is a kind of convergence is a matter of debate.

Points for practitioners

This article studies Confucian and Western administrative traditions from the angle of law and morality. What makes a ‘good administrator’ should be studied contextually, particularly in very different culture of evaluating good governance. The article points at the need to be careful in characterizing and understanding the two traditions, in particular the reference to the Confucian tradition in terms of the ‘the rule of man’ too easily results in dismissing ideas due to the association with a specific negative concept in the Western tradition.

Keywords

Confucianism, governance, law, morality, rule of law, Western tradition

Introduction

To oppose Chinese and Western thought in terms of the rule of man versus the rule of law is common, however, it has not received attention within the increasing literature on administrative traditions (e.g. Boyer, 1990; Smelser and Baltes, 2001; Bevir, Rhodes and Weller, 2003). This article focuses on the different normative starting points of these two traditions in relation to their ideas of good administration. It is concluded that the characterization in terms of rule of law versus rule of man hampers understanding of relevant differences

9 ‘Eastern’ and ‘Western’, ‘Chinese’ and ‘Western’, or ‘the East’ and ‘the West’ are used as terms to indicate general distinctions in the geographical, historical and cultural sense (cf. Painter and Peters, 2010).
and similarities. It should be noticed in advance that the aim is not to do justice to the wide variety and complexity of the two vast and long standing traditions, but to tease out deep-seated different starting points that underpin their outlook on what is at the heart of good administration. The focus is on juxtaposing the two traditions, rather than identifying convergences or ‘lessons’. Before doing so, some remarks on the nature of translation and tradition are required.

A specific problem is that we have to deal with concepts in many different languages when comparing the two traditions. This can result in similarities and differences that are a construct of translation into English. For instance, are the terms ‘civil servant’, ‘Verwaltungsbeamte’ and 公务员 simply cognitive equivalents denoting similar social (legal, political) phenomena? The more complex and culturally specific a concept is, the more likely it is to be problematic as Collier and Mahon (1993:848) illustrate when discussing the meanings of ‘political participation’. Translating Chinese concepts into English, and vice versa, is never straightforward.\(^{10}\)

Cultural differences are often captured in terms of traditions (Painter and Peters, 2010:4). There are many definitions of ‘tradition’,\(^{11}\) but for the purpose of this article we regard it as a normative orientation that can be expressed by means of a fairly stable basic set of ideas and values, which is relied upon both implicitly and consciously, is (at least partly) handed down actively and consciously, is protected, and brings with it moral and intellectual prestige.

In the literature, different administrative traditions have been identified (cf. Painter and Peters, 2010; Schwartz, 1999; Yesilkagit, 2010). In this article, the focus is on the two ‘great traditions’ that encompass a large cultural and historical area: the Eastern or Confucian tradition on the one hand, and the Western or ‘Socratic’ tradition on the other. The focus here is a bit more limited to primarily Chinese and European thought, as there are major distinctions between Confucian countries, as well as, within the Western administrative tradition (cf. Rutgers, 2000, 2001) that have to be largely ignored in the context of this article.

In the next sections we will first characterize the Chinese tradition. Despite the previously stated need to avoid specific sub traditions, the focus on the meaning of ‘law’ demands us to elaborate on the school of ‘legalism’. This discussion concludes with observations on developments in the last century up to the present. Next the Western tradition is outlined using the idea of the rule of law as a focus. Finally, we will discuss the characterization of either tradition in terms of their rejection of the rule of man.

\(^{10}\) There are different translations of this core Confucian text available, by Pinyin or Wade-Giles.

\(^{11}\) See for instance Shils, 2006; Bevir, Rhodes and Weller, 2003; Boyer, 1990.
Law in the Chinese Tradition

The dominant influence of Confucianism on traditional Chinese administration is generally recognized. It focuses on "teaching and moral guidance (rather than penal law) as instrument for the government of the people" (MacCormack, 1996:6). In order to highlight the starting points of Confucianism we start with Legalism as the opposing school.

Legalism insists on law as a prime tool for government or rule by law: "in rule by law,...law is amoral and an instrument of power" (Winston, 2005:313). Whether morality and law are conceptualized as mutually exclusive, or whether they are both characterized in terms of law, i.e. natural versus positive law (cf. Orts, 2001:51), in both cases law is "regarded as something vital to the existence of a moral order, something which—though created by man—stands and is regarded as a force in itself" (Michael, 1962:125). Winston (2005) points at a core issue: the difference between the rule by law in Chinese tradition and the Western rule of law is a matter of how the relationship between law and morality is conceived. In the Confucian ideal, morality is supposed to be the highest warranty to secure social order, whilst the role of law in China was, unlike in the West, not "above the quarrels of the day " (Michael, 1962:125).

To understand the role of law in traditional Chinese thought, both schools have to be investigated. To start with, in Confucianism, law has but a marginal function. Morality and the moral code li (rites) "took over much of the function filled by law in [the] Western tradition" (127). Nevertheless, Confucian ideology "provides the fundamentals for the substance of traditional law" (Ren, 1997:19). The Confucian conception of law shares many traits with the Western idea of ‘natural law’ (e.g. Greer and Lim, 1998; Orts, 2001). A main difference is that law is “inextricably intertwined” with personal and political morality in Confucianism (Greer and Lim, 1998: 81). Furthermore, Western natural rights theories do “regard society and the state as outcomes of a contract between rational individuals” (p.85), Confucian good government relies on ethical persons to maintain a social hierarchy and harmony to ensure the ‘natural order’. The social relationships and rules to govern are prescribed in the li, which are a matter of ‘moral codes’ rather than of formal laws and regulations. Confucianism regards regulation through laws essentially a matter of moral performance and makes no sharp distinction between morality and law in terms of li (rites) and fa (laws). This pair reflects the different values of Confucianism and Legalism regarding government: Confucianism is founded on the moral qualities of the political elites, while Legalism is founded primarily on law or fa.
The main origin of Chinese legal administration is Legalism, also called the school of *fa* (law), and it provided “the important framework of the traditional legal system” (Ren, 1997:19), with the central idea that a ruler should rely on standard rules and severe penal codes to maintain social order.

Linguistically, the word *fa* in Chinese does not relate to fairness or justice (Liang, 1989:59), but is more close to *fá* (\(\text{fa}\)),\(^{12}\) which means penal punishment, and *lü* (\(\text{lü}\)), which means written laws. The earliest Chinese Legalist author Guanzi (c. 720-645 BC) defined laws as standards for measurement (Guanzi, 1985:128); government should rely on laws to manage the state by balancing punishment and reward without bias. However, Guanzi did not ignore morality and asserted the Four Principles (*siwei*) with which to run the state: *li* (rites), *yi* (justice), *lian* (incorruptibility) and *chi* (sense of shame). Morality here refers to socially shared morals rather than personal virtue, and it exists within the framework of law. Guanzi points to a link between law and morality in general: “Legal statutes, regulations, and procedures must be patterned on the moral way, the orders must be publicized and made clear, and the rewards and punishments must be made reliable and absolute” (Guanzi, 1985:256). Although law comes prior to morality, the latter is still important for society and its ruler.

Perhaps the most famous legalist is Han Fei\(^{13}\) (ca. 280–233 BC), who took a different stance when he argued that “moral considerations should be rigorously excluded in the conduct of government” (MacCormack, 1996:4). Han Fei began from the conviction that human beings are self-interested (Cao, 1948:33), and therefore a ruler should not expect people to automatically act in a good way: acceptable behavior needs to be enforced by means of laws and severe punishments. Han Fei objected to the Confucian ideal of the moral sage governing the state: “men with literary learning should not be employed in the government, for employing them means throwing the laws in confusion” (Han Fei, cited by Denecke, 2010:304). Han Fei’s political thought can be captured by three complementary concepts—*fa* (laws), *shu* (tact) and *shi* (position)—which constitute the core of Legalist thought (cf. Jiang, 2000:55-56).

*Fa* is “the law as codified in books, kept in governmental offices, and promulgated among the hundred surnames [of the masses]” (Han Fei, 1959:188). This is in line with the Western notion of positive law, and does not include moral principles, codes or customs. *Shu* refers to statecraft: the skill or techniques to rule in order to ensure that the king’s authority is maintained. Finally, *shi* denotes the ruler’s authority, i.e. the power status he should maintain in order to avoid being weakened or usurped by his ministers and officials.

---

\(^{12}\) All Chinese text in this article is noted in Mandarin Pinyin.

\(^{13}\) Also known as Han Feizi.
The Legalist notion of *fazhi* is commonly translated as the rule of law, although this is not quite accurate as the concept exclusively applies to ruling a state (Liang, 1989:80-81). There are also some aspects of the Western (formal) notion of the rule of law that are included in Legalism, such as the demand that law cannot be made in hindsight, that it should be open, clear and stable, and should be applied regardless of social status (cf. Raz, 2009:183). However, regarding the latter, the ruler is exempted as the ultimate authority of the law.

Morality and law are linked in Legalism to the extent that punishment and reward are employed to stop wickedness and encourage merit. Legalism therefore tries to codify rites into law. The Legalist aim is to arrive at government by laws and not by persons, although the “authority of the law comes from the authority of the king” (Liang, 1989:83). What is more, legalists realize that the law has to be executed correctly by people, requiring them to emphasize that a person has to do the right thing. It therefore appears, as we shall see, that Legalism objects to the rule of man, and is rather a rule of morality. This brings us to Confucianism as such.

**Confucianism: Li**

Confucianism was the core teaching for all bureaucrats over two millennia of Chinese imperial bureaucracy (Ren, 1997:3). Confucianism was, however, not static, and came to incorporate ideas originating in, for instance, Taoism and Buddhism. From the very beginning, public administration was a major concern; many of Confucianism’s major scholars, were themselves officials. But not like legalism, law is not regarded as a major concern. What is central is the concept of *li* or rites, which could perhaps acquire “the force of law” (Lee and Lai, 1977:1326). Orts (2001:77) points at similarities between the concept of *li* and the Western law. A major difference, however, is that (positive) law concerns human, social norms, while *li* is considered part of the natural order (Zhang, 2002:44-45). Xunzi therefore combines the concepts of law and rites into ‘law-rule’, which guides both administration and social life according to Confucianism:

“[Kings and lords should be] Sincere about justice in their intentions, encapsulating justice in their laws, rules, standards and measures, and practicing it in their administration of affairs” (Xunzi, see Zhang, 2002:45).

The preceding views show that in classic Chinese texts, *fa* (laws) and *li* (rites) have no simple equivalent in the Western concept of law (or morality, for that matter). Legalism or Confucianism contains fundamental difference with the rule of law: Legalism/Confucianism primarily refer to the use of law as a tool for political control. As Peerenboom (2002:33) suggests, “it is better understood as rule by law”. Furthermore, the enforcement of laws relies on “man’s, especially
the ruler’s, capability in administering law” (Ren, 1997:3): this is where the rule of morality comes into the picture.

It was only in the early brief Ch’in dynasty (221-206 BC) that Legalism was the dominant administrative philosophy in China. Thereafter it was rejected, and over the ages, with Confucianism, li became dominant over fa (cf. Lee and Lai, 1977:1325). As noted before, li has the regulatory power of law, but it is not law. It “is supposed to be the basis for an orderly society and the ideal basis of government” (Shun, 1993:457-458), providing “a unified moral code” for the cultivation of virtues (Cheung, 2010:32). Rites and moral virtue are thus intrinsically linked, which is something is absent in Western ethics.

Confucianism also includes a close connection between personal morality and state government, in the form of the rule of morality. The ideal ruler is a sage-king (内圣外王); and good government requires “the Confucian intelligentsia” (Cheung, 2010:39), i.e. a circle of persons of complete virtue: the Junzi. This constitutes the moral basis of Confucian political thought (cf. Tu, 2000; Shun, 1993; Hwang, 1999). The prime Confucian classic The Great Learning, states the moral cultivation of rulers: “Wishing to order well their states (......) they first rectified their hearts” (Confucius, 2009:357). Yao captures this as “the fundamental Confucian belief that the peace and harmony of the world cannot be achieved by force of arms, nor by power of law, but only by moral virtues and moral influence” (2003:xiii).

The link between personal morals and good governance constitutes an integrated moral system linking individuals and society, as well as society and government. The rule of morality amounts to an interconnected set of ideas for self-cultivation, dealing with interpersonal relationships according to rites (li), providing moral education for the common people to become junzi, and engaging in government with humanity (ren) in order to enable self-cultivation, thus completing the circle. The focus is entirely on morality and learning: “Confucian learning therefore lays emphasis on self-cultivation, rather than the building of institutions” (Yao, 2003:xiv).

Modern China: Western Influences

The revolution led by Sun Yat-sen and the foundation of the Republic of China in 1911 ends the millennia old imperial era, which brings Western ideas and values. Pioneers had already argued for constitutional monarchy and new

---

14 On the contrary, Mencius argued that “coercive laws, or fa, should reflect a proper and correct understanding of rites, or li” (Orts, 2001:55).
15 The era since 1912 is comprised of two phases: The Republic of China (1912-1949) and The People’s Republic of China (1949-present).
16 Such as Kang Youwei (or K’ang Yu-wei, 1858-1927) and Liang Qichao (or Liang Ch’i-ch’ao, 1873-1929).
interpretations of Confucianism and Western political ideals, including Communism. Yuan Shikai (1859-1961) was arguably the first to infuse Confucian ideals of government with Western political notions (Jenco, 2010:185). Ideas on constitutions and democracy were influential among young Chinese students and scholars, and resulted in “the final dissolution of old Chinese tradition and the birth of a true Chinese nation” (Chen, 1971:6).

Scholars and politicians such as Zhang Shizhao (1881-1973) advocated for impartial laws and emphasized the responsibility of citizens instead of sages (Jenco, 2010:198). Nevertheless, the period from 1911 to 1949 was comprised of “foreign invasions, native uprisings (such as the Christian-inspired Taiping and anti-Western Boxer rebellions), and the effects of global and internecine warfare” (Orts, 2001:56-57), all of which hampered legal development. After the Communist Party took over in 1949, Marxist and Soviet models of law as instruments for party rule were applied to establish a Socialist legal system. In the first years of new People’s Republic of China, there was a vast improvement in the legal system: Civil Law, Penal Law, Marriage Law and the Constitution became effective (Liang, 2011:24). This did not, however, imply a rejection of tradition for, as Zhang and Schwartz (1997) argue, Communist China needed the “Confucian tradition of deference and hierarchy” to legitimate government policies (195). Confucian philosophy was even emphasized by Mao and other communist leaders in the early phase. However, legal developments stalled during the Cultural Revolution (1966-1976), when Communist Party actively tried to eliminate traditional Confucian ideas (Zhang and Schwartz, 1997:200), and disrupted, as Orts (2001) puts it, “any ordinary concept of law in China” (57), making it “virtually a lawless nation” (58).

After this episode, the development of law once again enjoyed a rapid growth (Chen, 2007:692), and in the light of economic development significantly improved in the 1990s. Amongst the major improvements was that citizens, as well as party members and government officials, became principally equal before the law. Nevertheless, the legal system is still far from the ideal of a law state, especially as legislation and judiciary are under direct rule of the Communist Party. Furthermore, a major deficiency is embedded in the Constitution itself, which declares everyone as being subject to the law, while at the same time privileging Maoist-Leninist political theory and Communist Party leadership (Orts, 2001:68).

A restoration of Confucian li and virtues was begun during Deng Xiaoping’s regime (1977-199717). There was no desire to legitimize the regime as a pre-Cultural Revolution state, but “to dignify and stabilize a backward society seeking a place in the modern world”, whereby Confucian thought was used to reinforce

---

17 The regime of Deng was complex, but the most influential period is from 1977 till he passed away in 1997. Deng promoted China developed a huge step forward, including the Open Policy and diplomatic interaction with the West. More on Deng’s political life, please see Deng Xiaoping Dictionary (1994).
a new moral order (Zhang and Schwartz, 1997:202-203). This revival of the rule of morality seems to imply a remedy: Party members and administrators should morally self-regulate, and the people should advocate for leadership of a moral Party for a harmonious society. The revival also embraced the elevation of law as providing external, legal constraints on the abuse of power in cases morality fails. Jiang Zemin, the president of China from 1993-2003, explicitly called for the complement of law and morality, uniting them with the rule of morality as statecraft for the purpose of “ruling the country according to law” (Chen, 2007:724).

Law seems a dominant theme, rather than morality, to Chinese governance lately. It has announced in the fourth plenary session of the 18th CPC Central Committee to make effort on “comprehensively advancing the rule of law”, a “socialist rule of law with Chinese characteristics” (The State Council of the People’s Republic of China, 2014). The latter implies, on the one hand, strengthening law-abiding government, and, on the other hand, keeping the leadership of CPC as the first principle. As Shen puts it, laws and institutions in China “would strengthen, rather than limit, party leadership” (2000: 25). A Confucian focus on the moral individual is also present: where laws do not constrain Party members, their personal morals should do so. The traditional Confucian ideal of moral officials, combined with a Western notion of legality legitimates CPC’s authority. This might be considered distinct ‘Asian values’; a term often used in the context of authoritarian government in the East Asian region (cf. De Berry, 1998; Cheung, 2000; Rozman, 2014). In many Asian countries, Confucian administrative ideas are a profound cultural force distinct from a “Western-style democracy” (Cheung, 2000: 4), and the rule of law tradition.

The Rule of Law (Rechtsstaat)

The Western tradition also originates around 2500 years ago, and despite vast variations and disjointedness, it can be regarded as a continuous tradition (cf. Tamanahsa, 2004:3).

At an abstract level personal morality and virtue are also at the heart of Western thought. However, morals and politics are treated as much less unified, and the role of rites is (almost) absent: in its place there is a strong reliance on “settling disputes in a regular manner according to rules [that] have already been laid down” (Lyons, 1984:194), i.e. a tradition focusing on law.

The Foundations of Morality and Law

The importance of law in thinking about society, politics and morality, surfaces in the earliest philosophical treatises. Thus Plato narrates how Socrates, having
been sentenced to death, refuses to escape as it would amount to a betrayal of his agreement with the law as the stable basis of the state (in his work Crito; cf. Licht e.a., 2007:660). In The Republic, Plato (1980a) is concerned with the ideal state and laws are regarded as the heart of good government. Where Confucianism has the sage-king, Plato argues for a wise philosopher-king (1980b: 1509) who is described as lawgiver and rules by just laws. In The Laws it reads: “The first-best society, then, [is] that with the best constitution and code of law” (Plato, 1980a, 739b/c:1324). The other founding philosopher, Aristotle, asks in his Politics, “whether it is more advantageous to be ruled by the best man or by the best law” (2000:136/1286a.III.15). A virtuous monarch is perhaps superior, but, “the rule of law is preferable to that of any individual” (139/1287a.III.16.3). What is more, contrary to the good man, “the law has compulsive power” (1980:272/1180a15). Aristotle also closely links politics, ethics and law: “The true student of politics, too, is thought to have studied virtue above all things; for he wishes to make his fellow citizens good and obedient to the laws” (1980:24/1102a13). By means of laws, the state brings people to virtue and happiness. Aristotle even argues that moral training should be regulated by law so as to ensure that it is accomplished. Plato and Aristotle, as founders of Western philosophy, thus take a fundamentally different position regarding the relevance of law and a person’s morality compared to Confucianism.

The classic Western philosophers regard laws as a way to link personal virtue and the state, and the state as the encompassing moral sphere is primarily a legal entity. An important argument for the reliance on laws is that they are based on reason and wisdom, and do not dependent on individual’s desires. A contemporary of Plato, Democritus, already formulated the notion of the subjugation of all government and administration under the law (Owens, 1959:143-4). The rule of law was established as a moral guide, albeit in a very broad but fundamental sense. A specific issue was, as also surfaced in the discussed on Legalism, whether the monarch was subject to his own laws. In medieval practice, the monarch’s rule, became regarded as restrained by natural or divine law, as well as, by customary law (cf. Tamanaha, 2012:237). The Influential thirteenth century philosopher Thomas Aquinas’ argued, for instance, that it is logical for a monarch to adhere to his own good laws, and that it is at the same time wise to do so in light of God’s final judgement (Aquinas, 1274/1978:50). However, here it should be noted that in the Western tradition moral thought became a matter of the Christian religion (in all its variants). Also in the Middle Ages, the first steps towards the protection of subjects or citizens against monarchical and state power by means of law were taken: in particular the English Magna Carta of 1215 is the (symbolic) big step in this development.
**Constitutions and the Reliance on Law**

Since the Renaissance (i.e. 1500 AD onwards), political theory, constitutional thought and the development of legal theory have gone hand in hand. In the practice of government, the importance of law increased, and legal knowledge and skill became a requirement for civil servants (Raadschelders and Rutgers, 1999). The pervasive importance of law is reflected in Grotius’ influential *The Law of War and Peace*, in which he discusses lawful war: “Law here signifies nothing but what is just ... a lawful thing is what is not unjust” (Grotius, 1625/1949:18).

In political thought, the relationship between social order, law and morality remained central. Avoiding strife and discord was, for instance, Thomas Hobbes’ (1651/1979) main reason to argue for an absolute monarch. However, John Locke, as the founder of liberalism, stressed that all laws require the “consent of the society” (1698/1988:356), and that “Where-ever Law ends, Tyranny begins” (p.400).

An important development was the rise of (moral and political) pluralism. The belief in Christian moral monism started to waver. Machiavelli’s treatise *The Prince* can be regarded as a major example and exponent of this (e.g. Berlin, 1998). He argued there are different moralities in existence; one for the people and one for those in government (p.324). Over time, “many philosophers turned away from the classical search for the ultimate good, rejecting the view that any such single good exists” (Tamanaha, 2004:41). Nevertheless, from the early nineteenth century onwards, the search for a rationally founded morality was strong, be it in terms of Kantianism, Utilitarianism or a renewed interest in (Aristotelian) virtue ethics.

Another important development concern ‘constitutional principles’, one of the most prominent being the separation of powers. Montesquieu in *De L’esprit des Lois* (The Spirit of the Law) refers to “political virtue” (1748/1994:728) and regards laws as present everywhere in the universe and a necessity for social life (p.234).

The previous anecdotic overview illustrates the long roots of what is nowadays referred to as ‘the rule of law’ as a core concept in Western thought. Especially since the rise of constitutionalism and codification in the eighteenth century, law became regarded as the source of freedom and justice.

**The Rule of Law in International Debate**

Although the rule of law can characterize Western thought, it is also “an exceedingly elusive notion” (Tamanaha, 2004:3). A brief reflection on the contemporary debates can illustrate this.

To start with, there has been increasing effort to promote the rule of law in international praxis (cf. Mooney e.a., 2010:838,840). It has been put forward to
promote the alleviation of poverty, to create ‘administrative justice’, and most recently to enable a transition to a market economy and democracy (842-4). It is regarded as closely linked with the notion of ‘good governance’, as promoted by the World Bank and other international institutions (Licht e.a., 2007:660). What is more, empirical studies indicate a positive relationship between the rule of law and economic prosperity (cf. Haggard e.a., 2008:205). However, others argue that the rule of law cannot simply be introduced into any culture (cf. Grindle, 2007:571; Mooney e.a., 2010). The problem seems to be in the very notion of the rule of law itself; not only does it have ideological and thus cultural connotations, but its meaning has been broadened, as Kairyst (2003:309) indicates, from requiring basic legal limits on government to including all kinds of demands for laws and rules, a legal apparatus, democracy, and so on. As a consequence, the list of characteristics attributed to the rule of law is extensive (cf. Mooney e.a., 2010:838), and results in an all-inclusive definition such as it is provided by the United Nations. This is rejected by, for instance, Tamanaha (2012:236), as it confines the concept’s meaning and usefulness for, boldly put, it will only fit a liberal democracy. It is also too specific to comprehensively characterize Western thought. Tamanaha therefore propose a more limited and inclusive definition: “the sovereign, the state and its officials, are limited by the law” (2012:236; cf. Kairyst, 2003:318).

There are demands linked to the achievement of the rule of law; for instance, that laws should be stated in general terms, must be generally known, should be realistic, known in advance, and the like. Furthermore, “There must be mechanisms or institutions that enforce the legal rules when they are breached” (Tamanaha, 2012:233); in other words, there has to be a functioning administration and legal system. At the heart of all this is the aim to make justice and governmental action completely transparent, rational and fully predictable.

Arguably, the most strict appearance of the rule of law is the Continental-European idea of the ‘Rechtsstaat’ (Morlino and Palombella, 2010:7), the core of which is that government relies on “a very strong and all-encompassing body of public law governing every administrative sphere” (Painter and Peters, 2010:22) and “the legality of administrative actions” (Schram, 1971:33). Administrative action is thus ideally limited to the execution of law, i.e. the application of general rules to particular cases. It represents the ultimate attempt to eradicate any personal factors (the rule of man) in administration. This brings us to what Tamanaha (2012:236) refers to as the third characteristic of the rule of law: next to government limited by law and formal legality, the rule of law entails the traditional command: ‘rule of law, not man’.

---

The social scientific turn

The traditional image of a good ruler is that he (or she) is rational and able to control passions and emotions. The opposition between law as reason and personal rule as arbitrary and subjective has appeared in many guises over time. Essentially, the idea is that law can protect against human weaknesses, for the actions of monarchs, judges, bureaucrats, and fellow citizens may well be the result of prejudice, malice, or ignorance, rather than reason and justice. This, however, seems to presuppose that personal influence can be annihilated by the rule of law.

To ensure the objectivity of the law there are to begin with formal criteria, such as the demand that laws are neutral with respect to specific individuals. The laws should also be considered legitimate by the people. This concerns both the legitimacy of the political system that makes the laws, and the administration. The former requires constitutional principles, such as the separation of powers, to safeguard against misuse of political power. The demand for neutral administration or execution of the law brings us to the troublesome nature of the classic distinction between the rule of law and the rule of man: can get rid of personal influences? Traditionally, this primarily concerned the need for unbiased and unpartisan judges. Montesquieu famously captured this by presenting the judge as the neutral ‘mouth of the law’ who delivers the verdict by applying general laws to a particular case. The issue of ‘man’ being involved in executing law became more prominent with the growth of state activity. More and more governmental social tasks and responsibilities could not be regulated by law in every detail, with the inevitable result that there was more room for discretion by civil servants in the execution of the law. Around 1900 it was argued that there was a decline in the rule of law due to the call for distributive justice (cf. Tamanaha, 2004:68). Clearly the law is not simply neutral and self-executing, as it is impossible to annihilate “the human element in decision-making” (Kairyst, 2003:319). The extent to which public functionaries can be regarded neutral (or partisan to the public interest) is a major debate within public administration. The ideal, nonetheless, has been a guiding principle throughout the history of Western thought: from Plato’s guardians, to Hegel’s objective class, and Weber’s ideal-type bureaucrat. However, the rise of the social sciences in particular in the second half of the twentieth century resulted in an increasing empirically, rather than legal-normative, arguments. A vast literature developed on the realities of discretionary power and the conjured nature of neutrality. In particular in the study of public administration this turn from law toward a social scientific stance is preeminent; the idea that

---

19 Such as the separation of powers, and arguably also the distinction between politics and administration (Overeem, 2012).

20 Although it should be noted that an ideal-type is not a political ideal to be strived for.
administration is just the execution of law has long gone. Exemplary is the ongoing debate on the politics-administration dichotomy (Overeem, 2012). As with Western thought in general, within the study of public administration there are vast differences with regard to the importance adhered to law (especially in the USA the call to (re)incorporate law into the study of public administration is ongoing, cf. Beckett, 2007). Empirically a strict dichotomy of rule of law and rule of man seems untenable, for, as Kairyst states, “the rule of law is not self-executing” (2003:327). Cerase (2002:148) points at the debates in the study of public administration starting in the late 1960’s, rejecting administration as just instrumental, with efficiency as its value, and calling to incorporate justice and social equity as values. The tension between normative starting points and empirical reality is nowadays hardly disputed: interestingly, it hardly impacts on the ideal of the rule of law. By the turn of the twenty first century, there is kind of a constant fight against an instrumental approach to public administration in legal or managerial terms (cf. Jun (2002, xiv), and there is a booming interest in public ethics and public values (cf. Beck Jørgensen & Rutgers, 2015).

To conclude this very brief exposé of the Western tradition: the rule of law, in the end is not just a legal issue, but it is an ethical and political ideal concerning the behaviour of public functionaries and citizens alike.

Discussion: Man, Morality and Law

At the beginning of this article, the question was raised as to whether the Chinese and Western traditions can be adequately captured in terms of rule of law and rule of man, as is common both in the West and East (cf. Jenco, 2010:181). It can be concluded that using the Western, primarily negative notion of the rule of man to characterize the Confucian ideal of rule by exemplary moral persons is a distorting and misleading. Confucianism favours good officials, concerning not simply any ‘man’ but ideally a moral exemplary person (cf. Frederickson, 2002; Yang, 2014).

The Confucian ideal to arrive at a good society is not primarily focussed on institutionalized and depersonalized law, but starts with individual morality; this does not, and never has, excluded a reliance on laws and regulations in practice: rule by law. Similarly, the Western tradition does not discard morality and is much more nuanced than a simple opposition of an objective ‘rule of law’ versus a subjective ‘rule of man’. The increase in attention for civil servants morals and public service ethics in the past decades underlines this. But, the underlying, traditional, predisposition is to prefer legal, institutional arrangements, rather than individual moral development in an administrative (and political) context. On a very abstract level, the two traditions have opposing starting points for

---

21 As claimed by Hayek (Tamanaha, 2004:58).
understanding what it means to be a good administrator or to ensure good governance.

It implies that a distinction between the two traditions in terms of rule by law versus rule of law is more accurate perhaps. The former refers to an instrumental conceptualization of law in a context where morality is supposed to be anchored in the notion of rule by morality. The concept of rule of law on the other hand starts from the perspective of institutional warranties, and in that context requires officials to have prudence and moral consideration. Both great traditions can be captured by positive concepts; the Western tradition in terms of the rule of law, and the Confucian tradition in terms of the rule of morality. Rule of man, understood as a person aligning his or her behaviour as a public functionary with private, selfish, as such, unreflected, (morally) uninformed, un-enlightened and subjective preference and urges is, and always has been, rejected in both traditions.

There are nevertheless fundamental differences, especially regarding the intricate links between concepts and values. This does not imply that there are no good reasons why, for instance, a kind of rule of law is relevant to China (cf. Kairyst, 2003:307). At the same time, authors such as Rajkovic (2012) understandably challenge the optimism (naïveté) of applying the rule of law within global governance, in particular a single all-encompassing form. There are two kinds of warning: first, that the very notion of the rule of law lacks adequate reflection, resulting in a lack of awareness of its political and practical meaning; and second, that the rule of law is embedded in culture and tradition, and presupposes a “robust legal tradition” (Tamanaha, 2004:58) whereby “people must believe in and be committed to the rule of Law” (246). In other words, it is or requires a specific morality (a tradition) to begin with. This explains why Grindle (2007:571) wondered whether the rule of law is a precondition for good governance, or if it is the outcome (cf. Haggard e.a., 2008; Mooney e.a., 2010). These authors show that the rule of law is not just a technical, legal issue, but that “complex systems of historical, social, political, and economic factors directly impact all rule of law reform efforts” (Mooney e.a., 2010:849). China is actually regarded as an anomaly due to the fact that it has a growing economy but no strong rule of law (Allen, Qian and Qian, 2005:58; cf. Tucker, 2011). Finally, Licht e.a. (2007) conclude that some cultures are more easily suited to the rule of law than others, as they have different kinds of social institutions. One may wonder whether this also applies to a culture’s openness to the rule of morality. Despite the need for caution when it comes to the transferability of ideas, there is possibly a universal, pretty abstract ideal to be identified: good governance requires people of good morality, as well as a shared, objective22 and respected set of laws and regulations. It thus seems problematic to require either the rule of law or the rule of morality to stand alone to ensure justice; both traditions

22 Not apolitical but generally available, equally applicable to all, and so on.
have a one-sidedness that must be compensated for, both in the theory and praxis of government. The two traditions are at the same time complementary and fundamentally different.
Reference


Aristotle (1880) *The Nicomachean Ethics*. Oxford: OUP.


Cao Q (1948) *Han Fei Fazhi Lun [Han Fei’s thought of the rule of law’]*. Shanghai: Chung Hwa Book (Zhonghua Shuju).


