Concerned about China’s future, a panel of Chinese legal scholars invited Professor Duncan Kennedy to discuss legal transplants and the rule of law. This commentary contextualizes their ideas and concerns and aims to clarify some concepts and arguments that underlay their discussion. At times though using the same words the participants were talking about different things. By legal transplants, the Chinese scholars were initially speaking of specific laws, while Duncan Kennedy was referring to legal thought. By law being political, Duncan Kennedy largely meant the distributive and discretionary nature of adjudication, while the Chinese participants were criticizing the interference by the Party and the government with judicial practice. Yet through this encounter, much was exchanged and debated. Regarding the triggers of legal transplants, the Chinese participants emphasized the law’s quality and the donor’s power, while Duncan Kennedy was more interested in chance and the recipient’s strategy. Among the multiple ways of defining the rule of law, both sides agreed that it should be an institutional framework within which an independent judiciary checks the executive power. Nonetheless, each side had their own hopes and reservations on how this institutional framework can enable judges to faithfully apply the law.

INTRODUCTION ..................................................................................................................... 561
I. THE THEORY OF LEGAL TRANSPLANTS ........................................................................... 562
A. Drawbacks of Classical Comparative Law ........................................................ 563
   1. Critiques of a Social Functionalist Conception of Law ................................ 563
   2. Critiques of a Social Functionalist Conception of Legal Transplants ...........565
B. Chinese Comparatists And Kennedy On Legal Transplants ........................... 566
C. Contributions of Three Globalizations ............................................................... 567
   1. Parole and Langue: Law and Legal Thought ................................................ 567
   2. The Interest in Actors and Their Strategies ................................................... 568

II. THE RULE OF LAW ............................................................................................. 570
A. Kennedy’s Critique of the Rule of Law ............................................................. 570
   1. The Distributive, Political Nature of Private Law ........................................ 570
   2. The Illogicality in Law and Ideology in Judging .......................................... 573
   3. Kennedy’s Understanding of the Rule of Law .............................................. 575
B. Kennedy and the Rule-of-Law Advocacy in China .......................................... 575
   1. Consensus: The Rule of Law as Judicial Independence ............................... 575
   2. Clash, Irrelevance, or Uncertainty: The Critique on Adjudication ...............577

CONCLUSION ......................................................................................................................... 581

INTRODUCTION

The Harvard-Renmin Virtual Workshop was an intellectually stimulating encounter between Professor Duncan Kennedy and a panel of legal scholars from Beijing, China. Duncan Kennedy is the Carter Professor of General Jurisprudence at Harvard Law School and a founder of the Critical Legal Studies (CLS) movement in U.S. legal academia. The Chinese panelists are scholars in jurisprudence, comparative law, civil law, constitutional law, and corporate law. The participants discussed Duncan Kennedy’s article, *Three Globalizations of Law and Legal Thought: 1850–2000* (Three Globalizations hereinafter), and from there other issues regarding China’s legal development. Two major themes emerged from this encounter: the theory of legal transplants and the notion of the rule of law.

China has been on a century-long journey of legal reform and as such has also been engaged in extensive legal borrowing. A central preoccupation for Chinese lawmakers and legal scholars is: since traditional Chinese law no longer guides modern Chinese life, where can we find a good law to regulate this or that issue? To what extent can a borrowed law function on Chinese soil? Why do we borrow Western law; is it a matter of prestige or Western imperialism? Seen in this light, it is not surprising that in reading Kennedy’s *Three Globalizations*, an article discussing the global diffusion of European and U.S. legal thought from 1850 to 2000, several Chinese scholars at the virtual

---

workshop challenged Professor Kennedy on the issue of legal transplants.

The second issue, the notion of the rule of law, bears no direct relationship with the *Three Globalizations* article. Yet it can be viewed as an important derivative from the issue of legal transplants. Professor Zhang Qi asked at the workshop, “Is the rule of law a phenomenon of the Western legal tradition? If so, how can developing countries adapt the rule of law to our own local contexts?”

In 1997, the Chinese State, headed by the then President Jiang Zemin, called for *yifazhiguo*, literally meaning “rule the country according to the law” and *jianshe shehui zhuyi fazhi* (法治) *guojia*, literally meaning building a socialist state ruled according to the law. This political initiative invoked a nationwide debate on the differences between *fazhi* (法治) and *fazhi* (法制), the latter of which literally means “a legal system,” as well as between *fazhi* (法治) and *renzhi* (人治), the latter of which literally means “rule by man” (or with a feminist twist, “rule by person”). As Professor Zhang Qi mentioned at the workshop, *法治* in this context was understood by both the legal academia and the public at large as the Western notion of the rule of law. Against this politico-legal background, how Chinese legal scholars understand legal transplants will have profound implications on the rule-of-law discussion in China. If the rule of law is a Western product, can China successfully establish it through legal transplants?

Due to the time limit, many related issues were not discussed at the workshop. This article takes on what was left at the workshop, contextualizes the ideas and concerns of the participants on both sides, and aims to clarify some concepts and arguments that underlay the discussion.

I. THE THEORY OF LEGAL TRANSPLANTS

Three Chinese scholars, Li Jun, Zhu Yan, and Zhai Zhiyong raised the issue of legal transplants: What triggers a legal transplant? Is it that the recipient country voluntarily adopts a foreign law due to the latter’s good quality, or is it that the donor country uses its economic, political, or military power to impose its normative order on a weaker country? Does the recipient social environment have to be “suitable” for the transplanted law? Li Jun stated that the good quality of the law and the suitable social environment are the two key factors in legal transplants. Zhu Yan argued from a normative perspective that the good quality of the law *should* be the dominant factor in legal transplants, even though power plays a role as well. By contrast, Zhai Zhiyong, in summarizing Duncan Kennedy’s analytics in *Three Globalizations*, provocatively asked if legal diffusion is ultimately a result of power and capital and if law is power and capital by other means.

For Chinese legal scholars, particularly comparatists with European or Chinese-Marxist educational backgrounds, the questions mentioned above are fundamental to thinking about legal transplantation. It might have surprised the three
Chinese scholars that in a heroic effort to map the diffusion of various waves of legal thought, Duncan Kennedy does not address these fundamental issues. To put it bluntly, is he, Professor Duncan Kennedy, missing the point?

The Chinese scholars might have been slightly disappointed with (albeit hardly surprised by) Kennedy’s response: “My idea is to look at the globalization of law and legal thought as a product of the strategies of actors...to focus not only on colonial power and the power of economy, but also on prestige.... I am not in favor of a simple power or capital thesis. It (the reason for legal transplantation) is some complicated mixture of all of these things.” This difference in interests can be partly explained by the drawbacks of classical comparative law.

A. Drawbacks of Classical Comparative Law

1. Critiques of a Social Functionalist Conception of Law. — As Kennedy expressed at the workshop, according to classical comparative law, law fulfills social needs and legal transplants are successful because the law at issue is suitable to the local place. Kennedy associates classical comparative law with Social Legal Thought and more specifically, with a crude functionalist conception of law embedded in the Social. Examples of Social functionalists are Ernest Rabel and Roscoe Pound. Social functionalism views law as a response to society’s needs, serving social functions which are (or by evolution or development, can become) universal across different societies.

As early as the 1930s, Karl Llewellyn attacked Roscoe Pound’s neat, rationalized framework for domestic relations law. Llewellyn contends that the formal law of marriage has conflicting social purposes some of which it fails to serve, informal norms such as prostitution or cohabitation fulfill some of these purposes, and what makes legal marriage important is not these supposed social functions, but the enforceable exclusive property rights. From a Critical Legal perspective, Llewellyn’s critique shows that functions could be inconsistent, and there is no singular deterministic link between rules and functions, or between functions and effects.

---

2 It was with such a universalist view of law that Rabel endeavored and to a large extent managed to unify commercial law in Europe and that Pound diligently studied foreign laws in the hope of finding the universal character of law. Of course it is not only comparatists from the pre-World War II era who held this view. A significant number of post-World War II and contemporary comparatists also share this view to various extents. For example, the joint work by Konrad Zweigert and Hein Kötz, An Introduction to Comparative Law, reflects a Social functionalist view of law and is considered one of the most authoritative comparative law textbooks in Europe.

3 According to Pound, rights in domestic relations served specific interests of the husband, wife, and child, and social interests would put proper limits on these individual interests. Roscoe Pound, The Individual Interests in the Domestic Relations, 14 Mich. L. Rev. (1916).

4 Karl Llewellyn, Behind the Law of Divorce, 32 Colum. L. Rev. (1932).

In the 1960s, Max Gluckman and Paul Bohannan opened the debate in legal anthropology on whether Western legal concepts can accurately describe law and social norms in non-Western countries, and ultimately whether law is universal or embedded in local culture.\(^6\) Four decades later, a similar debate took place between Alan Watson and Pierre Legrand in comparative law on whether legal transplants across national boundaries are a frequent and major force in legal change and legal similarities or whether law is embedded in national culture and legal transplantation is theoretically impossible.\(^7\) Looking back, it is fair to say that to a large extent the participants in both debates were talking at cross-purposes; neither does Gluckman deny the socio-cultural aspect of law, nor does Watson ignore local interpretations of transplanted rules, concepts or institutions. Still, these “first-generation” debates open the door to more nuanced studies on the nature of law, culture, and society and their relationships with each other.

Within the comparative law world, scholars have increasingly exposed the historical context, underlying presumptions, contributions, and limitations of functionalism.\(^8\)

To be clear, social functionalism was an earlier functionalist approach in comparative law. Later functionalists have taken a more contextualized approach and considered the importance of history, politics, religion, and culture in understanding the meaning and effect of law.\(^9\) Meanwhile, critiques within the fields of law, anthropology, and sociology have informed comparatists that law, culture, and society are not monolithic wholes, but are dynamic, riddled with contradictions and individual strategies, and mutually constitutive.\(^10\) As such, in legal transplants domestication in the recipient social “habitat” is as important as the prestige of the transplanted law.\(^11\) It was essentially in this spirit that Professor Li Jun raised the issue of suitable social environment in legal transplants.

---


\(^9\) Id. Nicola; Id. Mattei; Id. Cotterrell, at 710–11.


\(^11\) Id. Cotterrell; Id. Riles; Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 Theoretical Inquiries in Law, 693, 697 (2009).
2. Critiques of a Social Functionalist Conception of Legal Transplants. — “A social functionalist conception of legal transplants” is of course an anachronism. The term “legal transplants” was coined by Alan Watson in the 1970s, while social functionalism was largely, although not exclusively, in the first half of the 20th century. Although social functionalisists discussed, and many of them did, what later comparatists would call “legal transplants,” their discussions and doings were avant la lettre.

A most forceful criticism of social functionalism is Alan Watson’s account of legal transplants.12 Given the frequent occurrence of legal transplants across time and systems, Watson refutes the idea that legal rules are “peculiarly devised for the particular society in which they now operate.”13 Law can develop independently from social forces, and differences in legal rules may be due to a series of accidental acts rather than differences in historical or social conditions.14

The three Chinese participants were eager to debate with Duncan Kennedy regarding the most important factors in legal transplants. Kennedy, however, largely followed Watson’s account. According to Watson, there is no simple, deterministic theorem that good law and identical social functions (or suitable social environment) lead to a successful legal transplant. Legal transplants happen for a million different reasons in a million different ways.15 The reasons may be, inter alia, “non-legal historico-political factors” such as war, nationalism, prestige, colonialism, climate, economic conditions, and religious outlook, and “what a plain lawyer might well call sheer chance” (recall Kennedy’s example of a legal transplant as a result of a random airport encounter).16 The fact that the law is written, the language in which the law is written, and the work of influential jurists in elaborating the law, also affect the likelihood of its transplantation.17 Contrary to Zhu Yan’s normative position, Watson argues that authority (reputation and authority of the law’s model or of the promulgator) is more influential than quality (objectively excellent rules) in producing a legal transplant.18 Watson would also add accessibility and prior sources of legal borrowings to the list of potentially important factors.19

However, suitable social environment would not be on Watson’s list. His numerous examples suggest that a transplanted rule can adapt to a very different system constructed

---

12 See Watson, fn. 7.
13 Id. Chapter 16, at 96.
14 Id. Chapter 5, 34; Afterword, 114–15, 117–18; Chapter 15, at 82–87.
15 Id. Chapter 4, at 30.
16 Id. Chapter 7, 50–51, Chapter 16, at 97.
17 Id. Chapter 15, at 93–95.
18 Id. Chapter 15, at 89–90.
19 Id. Afterword, at 112–13.
under very different principles than its original one.\textsuperscript{20} In fact, in many legal transplants, whether the rule was suitable in the recipient social environment was not even considered by the borrowers.\textsuperscript{21} Of course, Watson does not deny that the social context of the recipient country is important for understanding the extent of transformation and the effects of the transplant.\textsuperscript{22}

\textbf{B. Chinese Comparatists and Kennedy on Legal Transplants}

Despite the difference in emphasis, Chinese comparatists would have no difficulty echoing Watson and Kennedy that legal transplants result from a complex mix of power, prestige, strategy, and chance. For example, at the turn of the 20\textsuperscript{th} century Western powers beginning with Britain insisted that China either establish a “modern” legal system or endure extraterritoriality. This triggered the law reforms of the late Qing and early Republican era. Yet, the prestige of the German legal system, the successful example of Japan in abolishing extraterritoriality by adopting European law, the influence of Japanese jurists in translating European, particularly German, legal concepts into the written Chinese and introducing them to China, etc. all played a crucial role in China’s adoption of German civil law. Later on, one should not forget the contribution by John C. H. Wu (Wu Jingxiong) to the new legal system of the Republic of China. His close relationships with the leading neo-Kantian German jurist Rudolf Stammler, legal realist Oliver Wendell Holmes, and social functionalist Roscoe Pound (who later became a legal advisor to the Republican government), may very likely have influenced his decision to adopt a German-spirited civil code and a constitution with noticeable traits of legal realism and social legal thought.\textsuperscript{23}

In China, some legal scholars argue that the legislature should adopt a Western rule/concept/institution because it is a logical necessity or it spurs economic growth or it respects fundamental citizen rights. Some contend that law is local knowledge and Western law does not fit Chinese soil or is ineffective or produces unintended consequences. Still some warn that Western law is “a Trojan horse” promoted by Western

\begin{itemize}
\item \textsuperscript{20} Id. Chapter 7, at 50–51, 55.
\item \textsuperscript{21} Id. Afterword, at 109–10.
\item \textsuperscript{22} Id. Afterword, at 116.
\item \textsuperscript{23} William P. Alford \& SHEN Yuanyuan, “Law is My Idol”: John C. H. Wu and the Role of Legality and Spirituality in the Effort to “Modernise” China, in R. St. J. Macdonald eds. Essays in Honour of Wang Tieya, Springer (Berlin), at 43–54 (1993). Of course, John Wu’s relationships with the three jurists were only one of the many factors that shaped the Republican civil and constitutional law.
\end{itemize}

Legal transplants have happened in China between 1949 when the Communist Party took power and 1979 when the Communist Party initiated the reform and open door policy. In the early years of communist China Chinese lawmakers borrowed substantially from Soviet Union law. Soviet Union influence lasted well into the reform and open door era. In addition to Soviet Union law, Europeanized Japanese law and Chinese Taiwan law are major legal sources for Chinese mainland jurists and lawmakers as well.
powers with ulterior political purposes.

Professors Li Jun, Zhu Yan, and Zhai Zhiyong raised the issue of legal transplants because they, like their colleagues concerned about building a legal system for modern China, are seeking advice from all sources on what law to import and how to import it successfully. However, Professor Duncan Kennedy’s *Three Globalizations* is a *description* of what happened in large parts of the world, rather than a *prescription* on how to make things happen the way we want. In this regard, the three Chinese scholars and Kennedy were talking about different things in this Harvard-Renmin encounter. On the one hand, the Chinese participants were looking for answers to a problem which Kennedy had neither the intention nor the ability to provide. On the other hand, it would be erroneous to direct Kennedy’s critique at the three Chinese scholars, for the latter were strategic legal actors framing the issue of legal transplants with the specific goal to improve China’s legal system. To the limited extent in which the two sides did meet, *Three Globalizations* conveys that there is no *right* law or legal thought to adopt; neither is there a right meta-policy regarding legal transplants. Law and legal thought cannot put existing struggles to an end. On the contrary, they provide another venue for conflicting ideologies and positions to compete for dominance.

C. Contributions of *Three Globalizations*

The originality of *Three Globalizations* lies in two contributions it makes to the existing comparative legal scholarship. First, it uses the langue/parole metaphor to describe the relationship between legal thought and law and emphasizes the langue (legal thought) in which the parole (law) is spoken. Second, it is a systemic effort to bring to the fore the strategy and choice of legal elites in legal diffusion.

1. Parole and Langue: Law and Legal Thought. — *Three Globalizations* shifts the focus of conventional legal transplant literature, which has been on the specific rules, concepts, arguments, and institutions, to a much grander level: the overarching legal thought, the hidden legal consciousness, the typical modes of legal thinking, which underlie these specific rules, concepts, arguments, and institutions. Kennedy draws the langue/parole analytics from the Swiss linguist Ferdinand de Saussure.24 For Kennedy, these waves of legal thought and legal consciousness are the *langue* (language) that gives grammar to, and make sense of, the specific rules, concepts, arguments, and institutions — the *paroles* (the utterances). While conventional comparative law literature compares law, *Three Globalizations* compares waves of legal thought and specific instances of law enacted or adopted under their influence. Professor Kennedy’s remarks at the virtual workshop regarding the langue/parole metaphor are explanatory:

---

“The Three Globalizations article...is not (a) comparative law (article) in the sense of comparing the positive law of different jurisdictions. Instead, it is a comparison of legal thought. The globalization I am studying and trying to represent is not about, for example, Roman law, but more about Roman legal thought.... In gross terms, the globalizations are about the langue versus the parole, that is, the language versus speeches or utterances in the language. So the idea was to compare a way of thinking, which includes vocabulary, a set of concepts, legal arguments, and it could be existentiated in an infinite variety of ways, just as learning French is subject to a set of constraints of the French language but you can say a million things in French. Classical Legal Thought as a language provided an infinite set of particular positive norms to be put forward or formulated in that language. The same was true with the other two globalizations.”

2. The Interest in Actors and Their Strategies. — Kennedy’s Interest in Actors and Their Strategies. An overview of Duncan Kennedy’s oeuvre reveals that he emphasizes the individual choice and strategy in the making (including borrowing), use, and application of law. This emphasis can be traced to the legal realists, particularly Oliver Wendell Holmes, Karl Llewellyn, and Robert Hale (and perhaps further back, to Max Weber as well). Part II of this article further explains this point.

In Three Globalizations, what Kennedy finds interesting about legal diffusion are the choices and motivations of the actors who adopted foreign law and legal thought. For example, in the Classical Legal Thought, Siam (now Thailand) adopted the system of capitulations in order to avoid a total colonization by the West. In the Social era, many post-colonial states adopted the Social model, claiming that their traditional values reflected (and were better than) the Social. In the contemporary era, feminists in many countries use the rights rhetoric to advance women’s interests.

● Others’ Interest in Actors and Their Strategies.

Duncan Kennedy is not alone in studying the strategy of actors. Citing the terms borrowed by Mark Tushnet from Levi-Straus, many contemporary comparatists are interested in these “legal bricolages” and “legal bricoleurs.” They call for a study of

26 Karl Llewellyn, Behind the Law of Divorce, 32 Colum. L. Rev. 1281 (1932).
27 Robert Hale, Bargaining, Duress, and Economic Liberty, 43 Colum. L. Rev. 603 (1943).
29 See Kennedy, fn. 1.
30 Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 Yale L. J. 1225 (1999). Much of Tushnet’s (especially earlier) scholarship reflects CLS thinking. By bricolage, Tushnet means selectively borrowing discrete pieces of law from other jurisdictions, and the actors who do such legal borrowings are bricoleurs. A bricolage has a make-do and highly selective and creative character; the bricoleur must make do with whatever limited resources available to him, selecting one thing from one resource for this use and another thing from another resource for that use. See Claude Levi-Strauss, the Savage Mind, 21 (1996).
31 For an incomplete but still substantial list of comparatists studying legal actors, see Riles, fn.10 at 806–11.
micro-level actions and interactions of individuals in the transplantation process and of the knowledge produced by legal elites. Gunther Teubner, whom Professor Zhang Qi quoted at the workshop, views law as legal actors’ discourse “built on normative self-reference and recursively.”

Neither is this interest a unique phenomenon in the field of law. Max Weber was interested in purposeful social action and endorsed studying how the actor understands the subjective meaning and goal of the action. Bronislaw Malinowski, although a founder of functionalism in anthropology, also provided fodder for this train of thought. He argues that the Trobriand Islanders did not abide by customs spontaneously out of a Durkheimian notion of mechanical solidarity, but out of a deliberate, rational calculation based on self-interest. Starting in the 1970s, a growing number of legal anthropologists have focused on the choice and strategy of individuals in both maintaining peace and order in local communities and resolving legal disputes when order is breached. They argue that individuals strategically deploy formal law and informal/local norms in their pursuit of specific goals, and they select those rules and arguments that they perceive to be advantageous.

Although Kennedy is not alone in studying the choice and strategy of legal actors, what makes him stand out is that he makes a systemic effort to emphasize this point. In *Three Globalizations*, his emphasis is on a much bigger level, covering countries on multiple continents in a long historical span of 150 years.

At the workshop, Professor Zhu Jingwen asked how Kennedy sees the phenomenon of three globalizations from a Critical Legal perspective. By mapping out the three waves of legal thought, their diffusion, and the strategies of legal actors in the context of particular international and domestic politics, *Three Globalizations* exposes the constructed and manipulable nature of each legal thought. By using the Social to critique the Classical and the Contemporary to critique the Social, it shows the emphases and shortcomings of each wave of legal thought and thus takes off from them the aura of absolute truth installed by lawyers and politicians in donor as well as in recipient countries. Now we live in a “post-apocalyptic” world: law is not purely a

---

32 See Graziadei, fn. 8.
33 See Riles, fn. at 804–12.
35 See Weber, fn. 28.
science, or a tool for social engineering, or politics; it is a complex mishmash of all three — and more.

II. THE RULE OF LAW

Strictly speaking, the rule of law is not part of the *Three Globalizations* article. Yet, as it is a fundamental issue for modern China, it occupied a large part of the discussion at the virtual workshop. Professor Kennedy and the Chinese participants agreed that law and politics are intertwined, and that an institutional conception of the rule of law is indispensable to a modern state and especially to China. However, due to the time limit, many related issues were not discussed at the workshop. For example, when talking about politics or law being political, did Kennedy and the Chinese participants mean the same thing? What does Kennedy mean by an institutional rule of law? Why does Kennedy oppose a substantive rule of law, or as Professor Zhang Qi describes, “a thick definition of the rule of law”? What are the implications of Kennedy’s critique for rule-of-law advocacy in China?

In the meantime, Dr. Xiong Binwan pointed out at the workshop that the thoughts of Duncan Kennedy and CLS are quite often misunderstood by many Chinese scholars. In fact, they are misunderstood in the U.S. legal academia as well. What thoughts are often misunderstood and what are these misunderstandings? This section attempts to address both sets of questions.

A. Kennedy’s Critique of the Rule of Law

In his book, *A Critique of Adjudication*, Kennedy argues that the conventional Western notion of the rule of law has a serious downside. It suppresses: (1) the distributive, political nature of private law and, (2) the illogicality in law and the ideological influence in judging.38

1. The Distributive, Political Nature of Private Law. — The public/private distinction critiqued by Duncan Kennedy refers to a particular way of looking at society, the state, and the legal system that regulates societal and state action. It is largely a construction by Classical Legal Thought: There is a distinction between the public and private spheres and accordingly a distinction between public and private law. State power is absolute within the public sphere, while the will of the individuals has absolute power within the private sphere.39 Public law is political in that it entails choices regarding how to distribute resources and entitlements among competing groups, while private law is

apolitical and essentially deducted from universal principles.\textsuperscript{40} According to Kennedy, this view is still influential in contemporary U.S. legal culture.\textsuperscript{41}

The public/private distinction has been criticized on various grounds both in and outside the United States. At the workshop, Professor Wang Yi argued that law in contemporary societies consists of mixed norms, private law such as the civil code has taken on many public law features, and thus judges have to consider elements from both public and private law in deciding cases. Professor Wang’s critique is on an \textit{empirical} level. His argument is that many statutes now possess elements of both public and private law. The “hybridization” is so complex that it is sometimes impossible to determine whether a legal rule is public or private. Consequently, the institutional distinction between public law and private law no longer holds for many specific pieces of legislation. This is a powerful critique. Professor Kennedy’s critique differs from that of Professor Wang in that it is on a \textit{conceptual} level, that the public/private distinction as a legal concept is circular reasoning. Kennedy does not deny the empirical practice that the state carves out a private sphere upon which it promises not to infringe.

Kennedy speculatively suggests six stages through which the public/private distinction declines from its heyday to its dissolution.\textsuperscript{42} He cites Robert Hale to describe the third stage, the stage of collapse. It is worthwhile to use Hale to explain part of Kennedy’s analysis for two reasons: Hale emphasizes the distributive and thus political nature of private law, and contemporary CLS scholars have made important use of Hale’s observation. To highly summarize Hale’s arguments, the law of property shapes the parties’ bargaining power in, and thus the outcomes of, contract negotiations. By granting the property owner control over property, the state is complicit in shaping the bargaining power of market players.\textsuperscript{43}

Inspired by Hale’s critique, CLS scholars such as Duncan Kennedy, Kerry Rittich, and David Kennedy argue that the conventional distinction between coercive public law and freedom-facilitating private law is false.\textsuperscript{44} State power is complicit in the so-called “private law” and consequently in the outcomes of the so-called “voluntary private ordering.” If the state draws and can redraw the boundaries between the public and the private, nothing is inherently private, and as a result it is confusing the cause with the

\textsuperscript{40} Id. at 829–30, 835.

\textsuperscript{41} Duncan Kennedy, \textit{The Stakes of Law, or Hale and Foucault!}, 15 Legal Stud. F. 327, 348–49 (1991).

\textsuperscript{42} Duncan Kennedy, \textit{The Stages of the Decline of the Public/Private Distinction}, 130 U. Penn. L. Rev. 1349 (1982).

\textsuperscript{43} Robert Hale, \textit{Coercion and Distribution in a Supposedly Noncoercive State}, 38 Political Science Quarterly 470 (1923). See also Hale, fn. 27.

effect to say that the state should not regulate something because that something is private. If what counts as private is a work of state power, private law is distributive and political just like public law.

It is important to note that the CLS reading of Hale is not the only possible reading. For example, Frank Michelman, a close colleague of Duncan Kennedy at Harvard Law School, holds a different view. Michelman agrees with Kennedy that the public/private distinction is methodologically arbitrary and culturally and politically contingent. Nonetheless, he views the public/private distinction as in dispensable for societies with proto-liberal (pre-modern liberal and for Michelman, good liberal) inspirations. Without public power to keep peace and order, we would fall into a Hobbesian state of nature, of war of all against all; without a private sphere checking public power, citizens would be vulnerable to the tyranny of the state. For Michelman, what matters is not where the line is drawn, but that it be drawn. Differing from Kennedy, Michelman understands Hale to be calling for redrawing the public/private boundaries: By exposing the role of state power in the law of property and contracts, Hale shows that what is conventionally defined as “private” (“acts of corporations and other players in the so-called ‘private’ sector”) turns out to be public, and the state should regulate property use and contract negotiations in these now public areas.

Going back to the discussion on the notion of the rule of law, Kennedy asserts that private law does not provide a level playing field for individuals to freely pursue their goals. Instead, it empowers some individuals at the expense of others. In upholding and applying the fundamental principles of private property and freedom of contract, the courts (and thus the state) become “an author of the distribution even though that distribution appears to be determined solely by the ‘voluntary’ agreement of the parties.”

Then the question is: Does the law necessitate a particular way of distribution and thereby set judges and legislators apart, or can judges choose among multiple ways of

---

46 Id. at 305–06.
47 Id. at 311.
48 See Kennedy, fn. 41 at 329 (citing Samuels). Yet, it is important not to overestimate state power in interpreting Kennedy’s critique. First, even though the state could in theory regulate every aspect of life, given the limited resources and the nature of bureaucracy (and also of human beings), the state is unable to regulate, and should not be held responsible for, every aspect of life. Second, deriving from Foucault’s theory on power, the state is only one of the many powers at play in determining the outcome of a dispute or resource distribution; most importantly, the individual parties strategically play legal (and other) cards in pursuit of their own interests. Third, factors other than state power can intervene and make the effect of a legal rule unpredictable.
distribution much in the same vein as the legislature? This goes to Kennedy’s second critique of the Western discourse on the rule of law.

2. The Illogicality in Law and Ideology in Judging. — Kennedy contends that the second down side of the Western discourse on the rule of law is that it suppresses the gaps, conflicts, and ambiguities in law and the influence of the judge’s personal ideology on judicial decision-making. Kennedy builds his critique essentially on the work of previous critical thinkers such as Oliver Wendell Holmes, Wesley Hohfeld, Henry Terry, Felix Cohen, Robert Hale, and most importantly, Karl Llewellyn, a full account of which is included in A Critique of Adjudication.49 It is illustrative to select Llewellyn’s critique of law and adjudication to explain in a highly simplified and thus much less nuanced form a small part of Kennedy’s critique.

Llewellyn argues that in hard cases there are opposing authoritative premises that would lead to contradictory judicial outcomes,50 and in selecting and interpreting precedents judges and lawyers can strategically use contradictory methods to reach opposite results.51 As such, Llewellyn endorses a skeptical attitude toward appellant judgments, viewing them not as a description or an explanation of how the decision was made, but as “trained lawyer’s arguments made by the judges (after the decision has been reached), intended to make the decision seem plausible, legally decent, legally right, to make it seem, indeed, legally inevitable.”52

Kennedy expands Llewellyn’s contradiction is theory about legal doctrine and legal interpretation to policy arguments: For every policy argument, there is a mirror image of a contradictory but also valid counter argument. For example, the argument of no fault no liability is contradictory to the also valid argument that between two innocents the one causing the damage should pay.53

From here Kennedy develops the theories of false necessity and the ideological influence on adjudication. Judicial reasoning lacks legal necessity that conventional legal theory expects it to have, for the outcome could have been otherwise had its mirror image, the conflicting but also authoritative doctrine or policy argument, been adopted. As such,

“Given that there is no apparent basis within law for choosing between opinion and mirror image, and given that the two opinions represent opposing ideological positions on

49 See Kennedy, fn. 38 at 82–92.
50 Karl Llewellyn, Some Realism about Realism — Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1239 (1931).
51 Karl Llewellyn, The Bramble Bush: On Our Law and Its Study, Quid Pro, LLC (Louisiana), at 68 (1930).
52 See Llewellyn, fn. 50 at 1238–1239.
an issue of group conflict, it seems plausible to suppose that ideology influenced the judge’s choice.\textsuperscript{54}

The influence of ideology is inevitable especially when the law does not point to “the right answer” or “the right answer” is enormously unjust. The judge, in applying the principle of justice as she understands it, cannot but let liberal or conservative ideologies come into play, decide on which side her sense of justice falls, and through legal work “present the outcome as fully determined by the materials and by her reasoning.”\textsuperscript{55} If a legal decision lacks logical necessity and the judge is influenced by personal ideology, she is essentially choosing among a variety of prospective ways to distribute resources, much like a legislator.

There are several important caveats to Kennedy’s theory on judging. First, when he asserts that policy arguments come in opposite pairs, he understands that in any particular case, one argument is almost always stronger than its matching pair.\textsuperscript{56} Second, Kennedy does not assert that judges are ideologues or partisans; he merely claims that judicial decision-making is more comprehensible if outside analysts interpret it as influenced by the liberal or conservative ideology.\textsuperscript{57} Third, Kennedy does not object that for any given judge, there are easy cases in which the rule is clear and hard cases in which the rule is not. Nor does he deny that judges may feel compelled to reach a particular decision and judgments can possess an appearance of closure.\textsuperscript{58}

Fourth and the most important, Kennedy does not argue that judges are omnipotent in interpreting and changing the law. The original critique by Llewellyn (contradictions in law and rationalization of judgments) only refers to appellate cases rather than all cases that go to court. To de-radicalize (and inevitably oversimplify) Llewellyn’s position, it is common sense that if the merits of a case are completely one-sided (assuming there is no flagrant misapplication of the law) the losing litigant will not appeal (unless the litigant is acting irrationally). When Kennedy exposes the strategic behavior in judging, he admits that strategic behavior, although possible, is not necessary or always successful.\textsuperscript{59} It requires “legal work” (strategic legal reasoning), which is constrained by preexisting legal materials, the facts of the case, the judge’s skills and preferences, and time, and judicial strategy comes at substantial legal, political, social, and psychological costs.\textsuperscript{60}

\textsuperscript{54} See Kennedy, fn. 38 at 90–91.
\textsuperscript{55} Id. at 194, 204.
\textsuperscript{56} Kennedy, Freedom and Constraint in Adjudication, 535.
\textsuperscript{57} See Kennedy, fn. 38 at 195–96.
\textsuperscript{58} Id. at 87.
\textsuperscript{59} Id. at 40, 181–82.
\textsuperscript{60} See generally Kennedy, fn. 56. A similar and much more recent critique is A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation, in Duncan Kennedy, Legal Reasoning, Collected Essays, 155–72 (2008).
3. *Kennedy's Understanding of the Rule of Law.* — An Institutional Rule of Law. Kennedy denies that the rule of law can eliminate politics from law and re-install a neutral legal system for the country, or eliminate judicial strategy and ideology. For Kennedy, the proper rule of law is an institutional arrangement with three characteristics: (1) The law delineates the limits on private and public action; (2) the judiciary is independent from the executive, the legislature, and the political parties; and (3) the judge is committed to interpreting law according to what she perceives to be its true meaning. 61 Among the three, an independent judiciary is the essence of an institutional rule of law. 62 This instrumental rule of law does not relate to substantive political values regarding how a polity or society ought to be organized (e.g. representative democracy, constitutional judicial review, a constitutional property clause, etc.); substantive values ought to be assessed on their own merits. 63

- An Independent Judiciary Checking Arbitrary Executive Power.

The purpose of an independent judiciary, as Kennedy explained at the workshop, is to reduce the arbitrariness of the executive power. Importantly, despite his emphasis on choice and ideology in judging, Kennedy does not deny that there are a significant number of cases in which the law is clear and the government has demonstrably violated it. An independent judge not subject to executive influence will rule against the government and protect the interest of the affected citizen(s).

As mentioned earlier, although Duncan Kennedy critiques the public/private distinction conceptually, he does not deny its empirical existence. In fact, Kennedy understands the rule of law to be an institutional guarantee that the state take seriously the public/private boundaries it has drawn and that if the state wants to redraw the boundaries it follow the proper institutional procedures.

**B. Kennedy and the Rule-of-Law Advocacy in China**

1. *Consensus: The Rule of Law as Judicial Independence.* — Since 1997, Chinese society and the legal academia have been increasingly concerned about the unchecked, quite often arbitrary and predatory, power of the government in a wide variety of areas, from rural taxation and family planning, to land expropriation and housing demolition, to restrictions of free speech, association, and demonstration. This concern manifests as a nationwide cry for an independent judiciary to check the power of the government. Although Professor Zhang Qi optimistically suggested that the judiciary is becoming more and more important in China’s legal life, Chinese courts are still subject to external intervention, particularly from the Communist Party and the government (*zhengfu*). To establish the rule of law in China means to eliminate such political influence on the

---

61 See Kennedy, fn. 38 at 13.
62 See Kennedy, fn. 41 at 349.
63 See Kennedy, fn. 38 at 14.
judiciary.

However, this kind of political influence differs sharply from the kind which Kennedy argues is inherent in judging. For Kennedy, adjudication is political because the judge has to make ideologically motivated choices regarding resource distribution. For the Chinese participants, adjudication is political because the Communist Party or the government intervenes in the regular judicial process. As Dr. Xiong Bingwan explained at the workshop, the political influence attacked by Chinese rule-of-law advocates is external and comes from the Party or the government, while the political influence in Kennedy’s critique is internal and comes from the judge’s personal ideology.64

It is important to clarify that from the perspective of substantive (rather than procedural) justice, not all political intervention in China is harmful or requires the judge to violate the law. Dr. Guo Rui and Professor Zhang Qi revealed that the institution of guiding cases recently initiated by the Supreme People’s Court was in fact a brainchild of the Law and Politics Commission of the Central Committee of the Chinese Communist Party. This suggests that a crucial force in China’s judicial reform is the Party itself. Sometimes political intervention may effectively counteract the arbitrariness of local political power or the power of the much stronger litigant. At other times, the government or the Party intervenes so as to appease public opinions that overwhelmingly demand a fair result. For these two reasons, not only the more powerful litigant and her lawyer seek political intervention, but the weaker litigant, her lawyer (if she has one), and even the judge may also seek political intervention.65 In recent years, with the wide use of the internet, smart phones, and other media, public opinions have increasingly called for political responses and affected the judicial process of numerous cases.66

As Dr. Charles Wharton commented, although political connections are not unique to China and the rule of law cannot eliminate politics from law, both China’s top leadership

---

64 Of course, the discussion on a lack of judicial independence in China does not mean that in the U.S. judicial independence is free of problems. For example, many state jurisdictions select judges via popular elections backed by political parties. This puts tremendous pressure on the elected judges to follow popular opinions and more importantly party lines.


and legal academia would like to see the arbitrariness of the executive power reduced and the accountability of the government established. Using Professor Zhang Qi’s expression, the rule of law for China should be a structure in which the law, including the Constitution, is followed. Echoing Dr. Wharton and Professor Zhang, Dr. Xiong summarized that the call for the rule of law in China is to have the judge rather than a Party or government official decide the case. In this regard, the Chinese participants were in agreement with Duncan Kennedy that an independent judiciary would be more able to hold the Party and the government accountable for violating the law and thereby reduce the arbitrariness of the partisan and executive power.

2. Clash, Irrelevance, or Uncertainty: The Critique on Adjudication. — Professor Zhang Qi suggested in his remarks that being freed from external political influence, judges under a rule-of-law regime can decide cases neutrally and faithfully to the letter of the law.

“In this period of rapid development and social transformation, Chinese society needs the judiciary to be a neutral authority to try cases independently in accordance with the law as well as with their expertise and experience. Judges discuss politics more frequently in China than in other countries. But such discussion should be mainly through law rather than other, opportunistic political actions. In the current social situation, the independence and neutrality of the judiciary is necessary not only for the establishment of the rule of law and constitutionalism in China but also for maintaining the stability of the Chinese state and ensuring the stability and sustainable development of Chinese society.” (Italicized by author)

As Professor Zhang said, his view is shared by many rule-of-law advocates in China. However, this view seems to be in sharp contrast to Professor Kennedy’s critique of adjudication. According to the latter, in “hard cases” where the judge’s sense of justice disagrees with the outcome initially determined by the letter of the law, she works on the factual and legal materials and allows her personal ideology to guide her in producing a just and legally convincing result. Once ideology comes in, she loses the neutrality among conflicting interests as well as the loyalty to the letter of the law.

Here it is important to clarify that the “politics” and “neutrality” in Professor Zhang’s remarks differ greatly from those of Professor Kennedy. As explained earlier, politics in Zhang’s sense means government or Party intervention in adjudication, while politics in Kennedy’s sense refers to the judge’s liberal or conservative ideology regarding which social groups should get what resources. Accordingly, neutrality in Zhang’s sense is synonymous to independence; the judge is neutral in that she is subject to the power of neither the litigants nor the Party or government. Neutrality in Kennedy’s sense requires a completely passive stance toward the outcome initially determined by the letter of the law. There is no place for “legal work” or personal ideology.

The real debate between Kennedy and many Chinese rule-of-law advocates seems to
be on whether the rule of law will make judges faithfully apply the letter of the law, with the former saying nay and the latter yea. If we apply Kennedy’s critique, are Chinese advocates committing the same mistake as conventional Western rule-of-law advocates: believing that the rule of law can rid politics from law? If they are committing this mistake, is it because they are trapped in Classical Legal Thought, believing that law is logic and not politics, or because they are in “bad faith,” knowing law is political but pretending it is not in order to gain legitimacy? If they are not committing this mistake, is Kennedy’s critique irrelevant to the Chinese context? Further still, is it possible that the question itself, whether these Chinese rule-of-law advocates are committing this mistake, is unfair and misleading to begin with?

- Clash?

Professors Zhang Qi, Wang Yi, and Zhai Zhiyong argued that the Chinese legal academia is simultaneously introducing all the three waves of legal thought to China. It is too soon to tell if they were challenging Professor Kennedy’s periodization analytics, for China was not really in Kennedy’s purview, and Kennedy defines the Contemporary Legal Thought as a combination of remnants from the Classical and the Social. Nonetheless, it is true that in China the work of Friedrich Karl von Savigny to some legal scholars is just as authoritative as the work of Roscoe Pound (or Richard Posner) to others. The ideas of an apolitical, ideally logical and complete private law and of judges correctly applying the law through logical reasoning, particularly deduction, are appealing to a good many legal scholars, judges, and lawyers in China. One of the common arguments against political influence from the Party or the government is that such influence prevents judges from faithfully applying the law. If, as according to Kennedy, judges are making political choices just like the government or the Party, the argument that judges freed from governmental or Party influence will faithful apply the law no longer holds.

Once this argument falls, it opens the door for opponents to attack the rule of law. They might argue: Even if we endorse judicial independence, judges can insert their own political preferences in legal decisions in the name of the law! If either way the case is decided under political influence, it is a lie to argue that we should get rid of political influence over the judiciary. If the judiciary is politics by other means, what justifies separating the judicial power from the executive and Party power, other than perhaps that the judiciary wants it?

Applying Kennedy’s critiques, one might respond that since we cannot rid politics from law, what really matters is whose politics gets to decide a particular case. The politics of the Party or the government differs from the politics of the judiciary, the politics of a Party or governmental agency differs from that of a court, and the politics of an official from either the Party or the government differs from that of a judge. For ordinary citizens, the plurality of politics empowers them to strategically engage one kind of state power (judicial) to confront another kind of state power (executive or Party).
Even though judicial power as manifested in a particular case may not side with the litigating citizen(s), it creates a counter-power against the executive power, forcing the latter to be less arbitrary.

In line with Kennedy’s analytics, one might also suggest that rule-of-law advocates in China act in “bad faith” (in Sartre’s sense). Although they are aware of the political, distributive nature of law and of adjudication, they can deceive the Party and other relevant political actors by strategically arguing that the rule of law means neutral law and neutral judges.67

- Irrelevance

It is possible that the question — whether many rule-of-law advocates in China are committing the same mistake as their Western colleagues — is an unfair and misleading one. It is possible, as Professor Kennedy admitted at the workshop, that the kind of problems he was attacking in the U.S. do not exist in contemporary China, and as such his critique is irrelevant to the Chinese context.

First, as Professors Zhai Zhiyong and Zhang Qiat tested, Chinese legal scholars are all aware that law is deeply intertwined with politics and that politics play a critical role in the law making and judicial reform in China. The idea that private law is distributive and political will likely not surprise them as “revolutionary.” After all, Chinese legal scholars have been trained in the Marxist theory of law as a tool for the ruling class to dominate the ruled. In addition, China largely adopts the civilian model in which the legislature, a political power organ, enacts the laws of property, contracts, torts, family, personality rights, and intellectual property. Most important, Chinese courts encounter systemic political intervention by the government and the Communist Party.

Second, truly pernicious political influence occurs when the government or Party orders the court to illegally decide a clear case and reach a specified result. It is against this kind of intervention that Chinese legal scholars argue the rule of law can make judges faithfully apply the law. A genuine belief in Classical Legal Thought is much less the motivation for this argument than an outright repulsion to external political influence in “clear cases.”

Third, even if Classical Legal Thought is relevant, not all Chinese legal scholars

67 This speculation is based on two sources of evidence. First, in his article A Critique of Rights in Critical Legal Studies, Duncan Kennedy exposes the indeterminacy of the concept of rights and consequently a profound loss of faith in rights in the U.S. legal world. However, for Kennedy this conceptual critique does not mean that we should get rid of or reduce the amount of rights that have been recognized by the state. On the contrary, we should still mobilize the normative force of the rights rhetoric to improve the wellbeing of disadvantaged groups such as tenants, women, Latinos, and African Americans. The conceptual critique is to make us more self-conscious of what we are arguing in the rights discourse. Second, as explained earlier, Kennedy emphasizes the importance of legal work and endorses activist judges doing legal work to reach politically desirable outcomes.
accept it as a matter of genuine belief. As China is eager to build a new legal system to catch up with its rapid socio-economic changes, many laws and regulations are poorly drafted. Many provisions are ambiguous, inconsistent or incomplete. The poor quality may come from a lack of expertise and experience on the part of the lawmaker or from conflicting interests within the politico-economic world. Chinese legal scholars may use Classical Legal Thought, particularly its conception of law as a logical and complete system from which judges derive rules for individual cases, to criticize poorly drafted laws and the abuse of power in legislating.

Fourth, unhappy with the current situation, many Chinese lawyers and legal scholars are pushing for legal and political reforms. Well informed of China’s overall political environment, they may deliberately choose not to talk about politics in law in order to protect themselves and advance their causes. The “naïveté” of Classical Legal Thought may come as a useful strategy in their discourse.

● Uncertain Effects of Kennedy’s Critique on the Legitimacy of Party Influence

It is possible that Kennedy’s critique of adjudication could be used to legitimate Party influence on the judiciary, even under an institutional framework of the rule of law. Since judges have their own politics and most judges are Communist Party members, the Party could legitimately use its internal educational and disciplinary mechanisms to indoctrinate and shape the subjectivity of the judges (Kennedy highly values Michel Foucault’s theory on education and subjectivity). After being so inculcated, Chinese judges would “freely” and “voluntarily” decide cases in the interest of the Party. Chinese jurist Zhu Suli poignantly argues that judicial independence as commonly understood in the West is inappropriate for studying and evaluating China, in part because it is empirically difficult to distinguish the Party’s personnel and preference from those of the court and the government, and consequently it is empirically difficult to identify Party influence on the judiciary. Even when Party influence can be identified, as long as it is not directed at the adjudication of individual cases, there is nothing in Professor Kennedy’s toolkit to attack such influence. After all, an important message of Kennedy’s Three Globalizations is that law and legal thought can be used by actors with opposing interests.

---

68 For example, the struggle between the political forces that wanted to enforce stringent anti-pollution laws and the coal mines that wanted to have weaker regulations on pollution resulted in a highly compromised, broad, ambiguous, and internally contradictory Air Quality Law in 2000. See William Alford, et al., The Human Dimensions of Pollution Policy Implementation: Air Quality in Rural China, 32 Journal of Contemporary China, 495, 509 (2002).

69 See Kennedy, fn. 41.

70 It is perhaps fair to say that this is a major avenue from which U.S. judges form their political preferences. Of course, neither the Democratic nor the Republican Party has the same kind of intense educational or disciplinary mechanisms as the Chinese Communist Party.

71 See ZHU, fn. 65.
interests in any country, including China.

However, Kennedy also believes that with legal work everything could be flipped. The flip side of this disappointing use of his critique would be that since the rule of law is a medium through which various political forces compete for power and resources, there is no need for the Party to oppose or fear the rule of law. Whether the rule of law will prevent Party influence on the judiciary cannot be answered abstractly; it is a question for detailed institutional design, from “grand questions” such as whether China should endorse an institutional rule of law and whether judges should be Communist Party members, all the way down to small issues such as what technical procedures are required for filing a lawsuit and what technological devices are permitted in the courtroom. The rule of law does not provide a once-and-for-all solution to the miscellany of undesirable Party (or in the same vein governmental) influences on the judiciary.

**CONCLUSION**

Concerned about China’s future, the Chinese participants invited Professor Duncan Kennedy to debate on themes that are of tremendous importance to China. This is an encounter, not only of scholars from two different countries, but also of scholars looking at issues on different levels and in different political and historical contexts. Understandably, at times though using the same words the participants were talking about different things. By legal transplants, the Chinese scholars were initially speaking of specific laws, while Duncan Kennedy was referring to legal thought. By law being political, Duncan Kennedy largely meant the distributive and discretionary nature of adjudication, while the Chinese participants were criticizing the interference by the Party and the government with judicial practice. Yet through this encounter, much was exchanged and debated. Regarding the triggers of legal transplants, the Chinese participants emphasized the law’s quality and the donor’s power, while Duncan Kennedy was more interested in chance and the recipient’s strategy. Among the multiple ways of defining the rule of law, both sides agreed that the rule of law should be an institutional framework within which an independent judiciary checks the executive power. Nonetheless, each side had their own hopes and reservations on how this institutional framework can enable judges to faithfully apply the law.

More issues are waiting to be addressed. If the notion of a rational, logical, and apolitical judiciary is false, how will the Chinese legal scholars and practitioners prevent the Chinese judiciary from corruption, favoritism, and even collusion with the Party or the government? How will they stop the judiciary from becoming a bureaucracy that is just as internally hierarchical and disciplinary as the Party or the government? As Professor William Alford concluded, the Harvard-Renmin Virtual Workshop was just the beginning of a long intellectual encounter.