

What Comes After 'Critique'?

Poul F. Kjaer

Department of Business Humanities and Law

Copenhagen Business School

Final version available here:

<https://transformativeprivatelaw.com/what-comes-after-critique/>

'Critique' seems to have run out of steam, increasingly being reduced to a ritualized performative act. 'Of course, I am critical' one says and goes on with everyday practice. This is most visible in the gradual fading out of the Frankfurt School of Critical Theory. Surprisingly few read Habermas today. [The US-American critical legal studies movement, essentially a lightweight version of Frankfurt School insights adjusted to the US-American context and to law and combined with a dose of French poststructuralism, has suffered the same fate.](#)

That is a curious development as 'critique' has been with us ever since Kant posed the question '[What is Enlightenment?](#)' in 1784. Of course, there was 'critique' before including in Kant's own earlier writings. But in Kant's short manifest critique took center stage both as a philosophical doctrine and as a 'way of life'. [Hegel, topped up with an approach to society where 'critique' as a social practice was seen as systematically woven into the societal structure of modern society.](#) Since then, 'critique' became omnipresent until our time.

[One reason for the fading away of 'critique' is that conceptually more refined and epistemologically more powerful theoretical alternatives are out there now.](#) That does, however, not seem to be the main reason. Rather large parts of the scholarly space and public imagination have fallen prey to group logic and identity thinking representing the antithesis to Kant's insights and that irrespective of whether it comes in a left- or rightwing version. In both cases 'identity' has become the mantra in a hyper-individualized way while contradictory referring to group categories such as 'class, gender and race' if left-wing or 'nation, religious heritage and traditional gender roles' if right-wing. Considering that [the concept of the individual emerged in the moment society became characterized by persons gaining multiple social roles](#), the most presumable reason for all the talk of identity is however that it serves as a 'cover up' of the increased emptying of the subject. One talks of identity in the absence of it.

The storm we are currently entering and where the worst is likely yet to come, will however end one day. Out of the wreckage of the symbolic and literal burning down of the cathedrals of reason a phoenix might however appear from the ashes in the form of a new theory of society and its progress towards reason. 'Progress towards reason' are big words and it is hardly possible to write them without a certain degree of irony. The day the cathedrals of reason are burning for real the irony is, however, likely to disappear.

But how could a new theory look like? And what role would law play in it? Essentially it would be a renewed and transformed theory of modernity. 'Modernity' is another big word and possibly the least

fashionable word of our time. The least cool person at the party is likely to be the one still believing in 'modernity'. Possibly an economist who works for the IMF.

[Modernity has its dark side. The holocaust was also part of modernity as Zygmunt Bauman made clear.](#) The extension of logics of [modernity through colonialism](#) is another clear example, just as [Kierkegaard's exploration of existential fear](#) reflected a modern way of life. Hence, the concept of modernity, as already argued by Hegel, should include its own self-reflection concerning its dark side. A self-reflection that could be used as a springboard to recast the concept. 'Modernity in the Twenty First Century' could be the title of the book.

First, the key would be to have the concept of society at the center. [The dominant structural liberalist legal and non-legal discourses of the past 50 years did not have a concept of society, only of individuals. The twin epistemes of 'human rights law' and 'law and economics' are here the cases in point.](#) Ditching this epistemic setup would be the first step. But it would have to be replaced with a theory of society which has coherency as its core focus point. Georg Simmel's classical sociological question concerning ['how society is possible?'](#) would have to be front and center. Questions of coherency between those with higher education and those not, between cities and rural areas or between generations, planetary boundaries and so forth. This does not mean that the concept of the individual has no relevance, only that individuals are considered social beings and that their fulfillment primarily is to be found outside and not inside themselves. Hence, a change of perspective is needed as today's mental health pandemic tend to be treated as a primarily psychological rather than a sociological issue.

Second, a society which only can be conceived of as a [world society \(Weltgesellschaft\)](#) or in English parlance a global society. [The core element of practical regulation would often be one of regulating global public goods, be it in relation to artificial intelligence, climate, pandemic responses or value chains or any other matter with global relevance.](#)

Third, the semantics of class linked to the economic system would have to be replaced by a study of [inclusion/exclusion](#) into the broad variety of social roles individuals find themselves confronted with as citizens, consumers, employees, nature-lovers, partners of intimacy, social media users and so forth. Social roles which all have their different logics, forms of capital and values. Consumer law, labor law, environmental law, family law, digital law etc. would have to find ways to conceive of the particular social role they seek to regulate in a sustainable way.

Fourth, the concept of rights would have to be reformulated. [The dominant narrative of political, economic and social rights is one of private rights. The right to property is here the case in point. While the individual dimension is certainly important the broader societal function of rights is equally important.](#) Property rights not only aim to secure individual freedom but also demarcates the private and public spheres of society. [While the private/public distinction can be considered as artificially constructed, volatile and factually full of contradictions and grey-zones and in need of constant renegotiation it nonetheless serves as an ordering principle.](#) Taxation, a condition for public institutions to thrive, would for example not be possible without the demarcation of private property through rights as it's the granting of private rights which makes them taxable.

Fifth, the only overarching 'currency', i.e. capital, in society would be time. Sustainability implies durability over time. But social processes always move and there is always fluidity of time. The battles to be fought are largely battles over time. Digital time, working time, time for intimacy and so forth. The family lawyer deals with how much time separated parents should enjoy with the child caught in-between, the environmental lawyer with the time of decomposition of a chemical substance in the

ground and the human rights lawyer with the maximum detention time of a person withheld by the authorities.

Sixth, departing from the insight that [social processes and society at large consist of time and nothing else](#) means that law only can be transformative. Law upholds normative expectations and is as such 'conservative' in nature. [But norms move too. They also change over time.](#) They only do so at a slower pace than the cognitive stirred social processes such as economy, science and technology driving society forward through constant creative destruction. [Transformative law](#) is therefore confronted with the task of simultaneously stabilizing and changing social processes in the same operation.

Seventh, the focus on time and the fluidity it implies means that the notion of 'identity' would have to be ditched altogether. In the modern world there is no such thing as a stable identity. Life rather consists of a constant juggling of a multitude of partly overlapping and partly contradictory expectations and social roles with those roles themselves being constantly renegotiated. Hence in contrast to the idea of law merely stabilizing expectations and social roles the law should rather be conceived of as a facilitator of constant redefinition and realignment both acting as a stable framework and as a catalyst for change in the never-ending processes of individuals and social formations reinventing themselves on a day-to-day basis.

Eight, the idea of 'groups' and group rights would have to be sidetracked as well. [The disaster which grew out of the interwar period was intrinsically linked to the atomizing of society along group lines in the form of 'social classes', 'races', 'religious congregations' and so forth.](#) Today's left- and right-wing categories of 'class, gender and race' and 'nation, religious heritage and traditional gender roles' threatens to lead society down a similar track. Legal scholarship needs to avoid the temptation of contributing to the construction of such groups. One way of doing so is to advance the study of the legal history of the instrumentalization of law for group building purposes and that both in regard to the capture of law by powerful groups and the use of law for marginalization purposes through the exclusionary construction of disadvantaged groups.

Nine, in an overall manner, [the social world consists of two worlds the factually existing world and the contra-factually, equally real, normative world. Bridging the gap between them is the function of constitutions, public or private, state or societal.](#) Constitutions are drift anchors. Not anchors lowered to the seabed to fixate the ship in a specific position but anchors that drift with the societal ship as it moves in order to stabilize it in the process. [Hence a new concept of constitutionalisation is needed with constitutionalisation understood as a continued process not fixated in a singular constitution or constitutional moment.](#)

Ten, all this will however not be possible without [a profound recasting of the legal discipline and legal education.](#) Doctrinal law skills, while necessary, provide an insufficient toolbox for addressing the problem constellations of the 21st century. In the constant battle of hegemony between professions, theologians, philosophers, lawyers and in the last fifty years economists have all had their peak period. Without change the still ongoing strategic downgrading of the centrality of the legal profession in society will continue. In scholarly terms that means that a far more offensive approach is needed. Over the past fifty years insights from other disciplines, especially economics but also anthropology, political science, psychology and sociology among others have invaded legal scholarship. Law and economics, for example, ask how legal problems can be solved with (micro-)economic methods. [But maybe one should also ask how economic problems can be solved with legal methods?](#)

On the above background one might return to question of the future of 'critique'. The Frankfurt School of Critical Theory and the US-American critical legal studies movement are now defunct and will not

come back to life. A new theory is needed. One where the concept of critique is integrated playing its role as a part of a broader theoretical architecture.

In its broader societal form, critique as a constant act of reflexivity of society also needs to be brought back to a constructive form with mass media law and regulation here playing a central role. Following Kant, critique is an art form requiring skills, education and utmost levels of self-discipline. [Hence, performing critique is the opposite of ideology.](#) Critique is not about pushing through a particular policy program, set of values or the furthering of the interests of a particular group. Rather critique is about continued self-reflection, the empathy involved in seeking to understand 'the other' and most importantly to engage in the cool and necessarily distant and non-emotional process of obtaining knowledge in an objective form as possible. A strive for objectivity which never can be fully reached but which one can come closer to by taking as many epistemological points of observation as possible into consideration. Constant epistemological alteration rather than [one-dimensionality](#) is the key approach. Sapere aude! Dare to know as Kant put it.