

Fall 2021

## Critical Legal Thought: The Case for a Jurisprudence of Distribution

Paulo Borrozo

Follow this and additional works at: <https://scholar.law.colorado.edu/lawreview>



Part of the [Jurisprudence Commons](#)

---

### Recommended Citation

Paulo Borrozo, *Critical Legal Thought: The Case for a Jurisprudence of Distribution*, 92 U. COLO. L. REV. 1043 (2021).

Available at: <https://scholar.law.colorado.edu/lawreview/vol92/iss4/8>

This Article is brought to you for free and open access by the Law School Journals at Colorado Law Scholarly Commons. It has been accepted for inclusion in University of Colorado Law Review by an authorized editor of Colorado Law Scholarly Commons. For more information, please contact [lauren.seney@colorado.edu](mailto:lauren.seney@colorado.edu).

# CRITICAL LEGAL THOUGHT: THE CASE FOR A JURISPRUDENCE OF DISTRIBUTION

PAULO BARROZO\*

## ATTAINING CRITICAL LEGAL THOUGHT

Critique is the standard model of legal scholarship. The typical article or book circumscribes an aspect of the legal order, redescribes it as policy, criticizes the policy according to efficiency or axiological criteria, and proposes some minor or moderate improvement to it.<sup>1</sup> This critical ethos is not surprising—the modern mind is restive.

This standard model of legal critique and improvement is politically stabilizing, practically effective, and intelligible only because it is set within a powerful paradigm of law and legal thought. I have named this paradigm *The Great Alliance*. It is *great* because of its intellectual brilliance and political resilience. It is an *alliance* because it brings together three of the main forces in thought and politics in modern times: historicism, rationalism, and democracy.<sup>2</sup>

---

\*Of Boston College Law School. Newton, MA.

1. Ronald Dworkin analogized the most self-conscious version of this form of interrogative attitude about the law to the emergence of an “interpretive attitude” within a culture of conventionalism (a normative culture theretofore stagnated at the stage of “taboo,” as he put it). See RONALD DWORKIN, *LAW’S EMPIRE* 46–49 (1986). Looking in from outside, Jürgen Habermas makes a similar point. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 5 (William Rehg trans., Polity Press 1997) (1992) (“[T]he received concept of practical reason also acquires a different, more or less heuristic status. It no longer provides a direct blueprint for a normative theory of law and morality. Rather, it offers a guide for reconstructing the network of discourses that, aimed at forming opinions and preparing decisions, provides the matrix from which democratic authority emerges. From this perspective, the forms of communication that confer legitimacy on political will-formation, legislation, and the administration of justice appear as part of a more encompassing process in which the lifeworlds of modern societies are rationalized under the pressure of systemic imperatives. At the same time, such a reconstruction would provide a critical standard, against which actual practices—the opaque and perplexing reality of the constitutional state—could be evaluated.”).

2. Paulo Barrozo, *The Great Alliance: History, Reason, and Will in Modern Law*, 78 L. & CONTEMP. PROBS., 235, n. 1–2 (2015).

Ultimately, only through *The Great Alliance* has liberalism become operative in legal thought and concrete in legal institutions and practice. *The Great Alliance* has afforded legal actors justificatory powers<sup>3</sup> in a form of knowledge and discourse—legal doctrine—sufficiently capable of efficient problem resolution steered by values prevalent in modern liberal legal systems. Seen in this light, legal doctrine enhances both the relative effectiveness and the relative legitimacy of legal orders. Enframed by *The Great Alliance*, structural components of liberal public life claim justification as having passed the historicist as well as the rationalist tests for institutional evolution: historical authenticity and an intrinsic rational core. This serious claim to justification solidified liberalism and unleashed its vast normative and practical affordability. With considerable institutional stability, liberalism afforded everything from the emergence of the welfare state and the United Nations to generations of individual and collective rights with colossal comparative gains. Furthermore, vaulted by *The Great Alliance*, the critical ethos of the standard model of legal scholarship in liberal polities is meaningful to legal actors, structurally preservative, and evolutionarily productive.<sup>4</sup>

---

3. This Essay is not the occasion to discuss the themes of meaning, interpretation, and justification. Beyond Max Weber and Jürgen Habermas, see RAINER FORST, *NORMATIVITY AND POWER: ANALYZING SOCIAL ORDERS OF JUSTIFICATION* (Ciaran Cronin trans., Oxford Univ. Press 2017) (2015) and ANA PAULA DE BARCELLOS, *DIREITOS FUNDAMENTAIS E DIREITO À JUSTIFICATIVA: DEVIDO PROCEDIMENTO NA ELABORAÇÃO NORMATIVA* (2017).

4. The critical ethos is evolutionarily productive and structurally inert for the reasons I present in Paulo Barrozo, *Law in Time: Legal Theory and Legal History*, YALE J.L. & HUMAN. (forthcoming 2021) [hereinafter Barrozo, *Law in Time: Legal Theory & Legal History*]. I have elsewhere referred in these terms to the kind of healthy parochial dialogue carried out as the standard model of legal scholarship. Paulo Barrozo, *Institutional Conditions of Contemporary Legal Thought*, in *SEARCHING FOR CONTEMPORARY LEGAL THOUGHT* 114, 122 (Justin Desautels-Stein & Christopher Tomlins eds., 2017) [hereinafter Barrozo, *Institutional Conditions of Contemporary Legal Thought*] (“Every political organization should hope to educate a fraction of its members to engage in an aspirationally endless legal dialogue about the foundation and unfolding of the organization. I consider constitutional commentary in the United States to be a fine example of such dialogue, contributing to social cohesion and cultural reproduction over time. In my view, this dialogue should remain unburdened by expectations of higher knowledge, insight, and imagination. I argue only that such types of domesticated dialogue would benefit from enlarging their analytical and discursive capabilities. The best way to achieve that enlargement is to subject future participants of the dialogue to the study of the traditions of high legal thought from which the diluted ideas they will one day deploy originally come.”).

Whereas critique is the standard model of legal analysis under *The Great Alliance*, critical legal thought means something other than this standard model. It will not earn its title just by genealogizing law or by being contrarian, rebellious, performative, experimentalist, expert, policy-smart, decisionist, or “woke.”<sup>5</sup> Currently, critical legal thought relies excessively on the political identity of networks of scholars to set the boundaries between itself and other global critiques of law and legal thought found for example in the libertarian or the natural law traditions. This excessive reliance should instead be the first target of critical legal thought.

Critical legal thought faces higher and more demanding theoretical requirements than is generally recognized. Three such requirements set critical legal thought apart from and above not only the critical ethos characteristic of the standard model of legal analysis but also of more ambitious varieties of global critique of law.

First, in the rationalist tradition,<sup>6</sup> critical legal thought starts with a sustained examination of any reliance on intuition, experience, self-interest, convention (cognitive, semantic, practical, ethical, etc.), secularized dogma, and other mechanisms of self-convincement as a source for evaluation of the truth status of propositions, the soundness of conceptions of right or good, or the legitimacy of extant states of affairs. Critical legal thought

---

5. Michel Foucault offers that critique as an attitude of resistance to domination should take priority over the Kantian heritage of critique as epistemic liberation before liberation can be anything else. Or, as Marc Djaballah has put it: “Foucault himself urges that the most pressing task of being critical is to reverse this theoretical denial of the ontological motivations that condition it as a practice, and to interrogate knowledge in its relation to domination, abuses of power, and subjection to the politics of truth.” Marc Djaballah, *Foucault on Kant, Enlightenment, and Being Critical*, in *A COMPANION TO FOUCAULT* 264, 277 (Christopher Falzon, Timothy O’Leary & Jana Sawicki eds., 2013). The tradition of kinetic democracy urges (as Roberto Unger, Jeremy Waldron, and others do) that legal thought assist in the work of a citizenry embarked on democratic institutional experimentation as a source of legitimate resistance to the preservationist ethos of law. Both approaches (the Foucauldian and the experimentalist) insufficiently understand that critical legal thought requires the rigor of reason and its justificatory powers before performative resistance and experimentalist imagination can play their ancillary role. See ROBERTO UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); see also ALLAN C. HUTCHINSON, *THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED* (2009); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); HAUNKE BRUNKHORST, *DEMOKRATISCHER EXPERIMENTALISMUS: POLITIK IN DER KOMPLEXEN GESELLSCHAFT* (1998).

6. From Kant to Habermas.

starts there because only the rigor of reason is able sometimes to sufficiently counter distorting influences upon thinking.<sup>7</sup>

Controlling for rare insight, only the rigor of reason is sometimes able to reach farther than the standard legal critique or the opportunistic dives into the cracks that anyone can open in the structures, practices, and consciousness of the time or the mapping out of the contradictions of reflective equilibrium jurisprudence. All these types of critique are helpful, and it is a good thing that, as teachable skills, they have made their way into legal pedagogy and are now ubiquitous. Yet, critical legal thought means more than that.

Second, critical legal thought is, as suggested, structurally bent toward comprehensiveness and systematicity. It constantly plots the arc of the kind of theory that earlier subversive thinkers such as Thomas Aquinas, John Locke, Baruch Spinoza, Jeremy Bentham, or Karl Marx lifted against their received traditions of jurisprudence.

On this topic, we can classify legal thinking in an ideal-typical manner according to viewpoint and scope—*enclosed* or *enclosing*—and to timeframe—*synchronic* or *diachronic*. Whereas enclosed legal thinking remains bounded by the historical, doctrinal and policy viewpoints of actors *qua* actors of a legal order, enclosing legal thinking theorizes the nature and evolution of law, including the internal legal actors' enclosed thinking.<sup>8</sup> As an abstracting classification, this is not a typology of thinkers but of thinking. In any event, critical legal thought best earns its credentials when it succumbs to its structural tendency to operate at the comprehensive and systematic level of synchronic or diachronic enclosing legal thought.

To be sure, for some time now, enclosing legal thought has fallen out of fashion. I have elsewhere offered a critique of this popular resistance to grand theory.<sup>9</sup> However, if it is to earn its title, critical legal thought should resist this Faustian

---

7. Including the types of distortion theorized in the tradition of the Frankfurt School as social pathologies of reason.

8. I develop these categories in Barrozo, *Law in Time: Legal Theory & Legal History*, *supra* note 4. There I note to “[k]eep in mind that this typology is not one of types of legal mind, but rather one of types of explanations that legal minds produce. Aquinas, Bacon, Kant, Savigny, Hegel, Jhering and Holmes all authored doctrinal explanations in addition to other types of explanation they are best known for.” *Id.* at 394–95.

9. Barrozo, *Institutional Conditions of Contemporary Legal Thought*, *supra* note 4.

convention against grand theory. Only comprehensive and systematic legal thought has a chance at being critical in the sense I mean it, for there is no other way to know, first, where any fragmentary<sup>10</sup> critique fits in the larger structure of the nature and evolution of law and legal thought and, second, whether and how reason is structurally and evolutionarily effective in law.<sup>11</sup> Intellectual fashions come and go. Such fashions—as the convention supporting intellectual minimalism<sup>12</sup>—that demand a larger than usual intellectual sacrifice tend to go away sooner than others that do not. Critical legal thought is in the vanguard of abandoning this particular fashion of resistance to enclosing legal thought.

Third, critical legal thought of the order I mean is normative. It engages in constructive normativity, articulating the justification for holding freedom, flourishing, equality, solidarity or dignity, and respect supreme and for spelling out their myriad entailments, including their distributive entailments.<sup>13</sup> Political

---

10. “Yet the characteristic mark of the thinker’s activity is to determine for itself what it is to accomplish and serve, and this not in fragmentary fashion but totally.” MAX HORKHEIMER, *Traditional and Critical Theory*, in *CRITICAL THEORY: SELECTED ESSAYS* 188, 242–43 (Matthew J. O’Connell trans., Continuum Publ’g Co. 1982) (1968).

11. For an argument of how critical legal history fits in the evolution of law in complex societies, see Barrozo, *Law in Time: Legal Theory & Legal History*, *supra* note 4. An account of “historically effective reason” animates the tradition of critical theory that runs from Hegel and Horkheimer to Habermas and Honneth. An excellent summary of this critical project is found in AXEL HONNETH, *PATHOLOGIES OF REASON: ON THE LEGACY OF CRITICAL THEORY* (James Ingram trans., Columbia Univ. Press 2009) (2007).

12. Barrozo, *Institutional Conditions of Contemporary Legal Thought*, *supra* note 4, at 120 (“Minimalism is a multifold phenomenon. First and foremost, it has an intellectual aspect. In this first sense, minimalism is the view that the learning of—and what is to be learned in—law is reducible, first, to socialization into guild-member attitudes and jargon and, second, to learning rules, precedents, and technical notions, all mixed up with an often superficial form of cost-benefit analysis. It might be suggested that, psychologically, many would experience intellectual minimalism as reassuring: as offering an undemanding level of subject-matter mastery that allows those so trained to deploy lawyerly attitudes, language, and technique to arrive at smart answers to contained legal questions. However, intellectual minimalism is not the same as anti-intellectualism. The self-understanding of those who teach and study the law is that they are highly intellectually motivated and sharp. I agree. What distinguishes intellectual minimalism from anti-intellectualism is that the former views the world and the discourses that seek to make sense of and to engage with it as essentially simplifiable.”).

13. Writing on Foucault, Habermas, quoting Nancy Fraser, asks, “Why is struggle preferred to submission? Why ought domination to be resisted?” Jürgen Habermas, *Some Questions Concerning the Theory of Power: Foucault Again*, in *CRITIQUE AND POWER: RECASTING THE FOUCAULT/HABERMAS DEBATE* 79, 96

preferences based on sensibility, impulse, intuition, emotion, socio-psychological conditioning, and the attitudinal patterns and conventions they feed into are the targets, not the source, of critical legal thought.<sup>14</sup>

In relation to this third—normative—aspect of critical legal thought, an old lesson needs relearning. One of the prêt-à-porter modes of both standard critique and fragmented critical theory is *genealogy*, in the magnificent vein opened by Rousseau and Nietzsche and enlarged by Freud and Foucault.<sup>15</sup> The skills to conduct a genealogy are possessed *en masse* in the academy and beyond, and no human creation—none—deserves protection from it. However, genealogy has no explanatory or evaluative final word on existing legal orders or on any parts of them. Legal orders eventually stand or fall to critique for genealogy-independent reasons. Hegel thus recasts this old Kantian lesson, with an inverted signal:

[E]ven if the determinations of right are rightful and rational, it is one thing to demonstrate that this is so . . . and another to depict their historical emergence and the circumstances, eventualities, needs, and incidents which led to their introduction. This kind of demonstration and (pragmatic)

---

(Michael Kelly ed., 1994). The implications of his genealogy force Foucault to beg the question about the normative basis of social criticism. But as he begs the question, the modern humanistic normative paradigm makes a covert re-entry onto the stage: "if one tries to glean the standards implicitly appealed to in his indictments of disciplinary power, one encounters familiar determinations from the normativistic language games that he has explicitly rejected." *Id.* The tradition of the Frankfurt School offers that critique must be liberating by reason of its combining explanation of domination and the prescription of freedom. See HORKHEIMER, *supra* note 10. But the critical theory of the Frankfurt tradition trades—at a great loss—imagination for immanence. In doing so, it misapprehends the content of immanence, for what kind of thinking or praxis is not immanent?

14. Lest one wishes to count solely on fortune for having been socialized in the 2020s Boston as opposed to the 1930s Munich.

15. See JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE ORIGIN AND FOUNDATIONS OF INEQUALITY AMONG MEN (1755), *reprinted in* ROUSSEAU: THE DISCOURSES AND OTHER EARLY POLITICAL WRITINGS 113 (Victor Gourevitch ed., Cambridge Univ. Press 1997); JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE SCIENCES AND ARTS (1750), *reprinted in* ROUSSEAU: THE DISCOURSES AND OTHER EARLY POLITICAL WRITINGS 1 (Victor Gourevitch ed., Cambridge Univ. Press 1997); FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (1887), *reprinted in* BASIC WRITINGS OF NIETZSCHE 437 (Walter Kaufmann ed. & trans., Modern Library 2000); SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (James Strachey trans., W. W. Norton & Co. standard ed. 1989) (1930); MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 1995) (1975).

cognition in terms of proximate and remote historical causes is often called ‘explanation’, or even more commonly ‘comprehension’, in the belief . . . that this kind of historical demonstration is all—or rather, the one essential thing—that needs to be done in order to *comprehend* the law or a legal institution. . . . By disregarding the difference in question, it becomes possible to shift the point of view and to turn the request for a true justification into a justification by circumstances.<sup>16</sup>

Critical legal thought is thus rationalist, grand, and normative theorizing. There is no place outside one of these big things. There is only knowing or not knowing that you are inside one.

#### EQUALITY AND DISTRIBUTION

Critical jurisprudence aims reason at encumbrances to freedom. The specifically modern addition to this age-old effort that reaches back to Plato and Cicero is the understanding that the achievement of freedom has not one but two moments. First, there is the moment of emancipation, where the objective is to identify, explain, delegitimize, and remove obstacles to freedom. The second moment is by nature everlasting, for it seeks to identify, explain, and justify that which it takes to sustain freedom over time.

In this second moment, a principle of equality rises.<sup>17</sup> Of course, from the moment that freedom becomes a universal primary good alongside social order, the requirement of equality presents itself both as a measure of the equal distribution of freedom among all persons and as an evocation of the effects of that distribution on every other type of distribution. Kant’s concept of law demonstrates this: “Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.”<sup>18</sup> Sociologically and normatively, there is only freedom as

---

16. G. W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 29–30 (Allen W. Wood ed., H. B. Nisbet trans., Cambridge Univ. Press 2000) (1820).

17. I first developed some of the following ideas in Paulo Barrozo, *A Idéia de Igualdade e as Ações Afirmativas*, 63 *LUA NOVA* 103 (2004).

18. IMMANUEL KANT, *METAPHYSICAL FIRST PRINCIPLES OF THE DOCTRINE OF RIGHT*, reprinted in *METAPHYSICS OF MORALS* 27 (Mary J. Gregor trans., Cambridge Univ. Press 2017) (1797).



equal freedom for all; and equal freedom for all entails sufficient equalization of the social conditions for freedom.

Critical legal thought's commitment to freedom as a primary good thus presses it into analyses and evaluations of courses of action and states of affairs in terms of whether they encumber or emancipate, undermine or sustain freedom, chief among which is the materialization of the principle of equality. In this spirit, critical legal thought asks with respect to the victims of violation of the principle of equality: whether they are (I) individuals/groups on the basis of their condition as such, (II) individuals/groups on the basis of some special and transitory or permanent characteristic, or (III) individuals/groups on the basis of special and transitory or permanent circumstances. 'I' reflects a kind of inequality directed at or resulting from some characteristic linked to an individual's or group's claimed or attributed identity. 'II' reflects a kind of inequality that targets individuals or groups because of a characteristic that, while not necessarily defining their identity in a contextually relevant manner, possesses some form of social visibility that triggers the violation of equality. 'III,' in turn, refers to inequality associated with a set of circumstances involving individuals and groups and resulting from their position in relation to those circumstances, irrespective of their individual or group identity (I) or of their characteristics (II).

Next, critical legal thought asks with respect to the objects of violation of the principle of equality: whether they consist in (I) equality of *X*, (II) equality of opportunity to attain *X*, and (III) equality before *X*. In this analytical scheme, 'I' stands for unequal possession or ownership of a good, whatever the good is; 'II' describes an unequal relative chance that individuals or groups have of attaining ownership or possession of a desired good, where their unequal chance can be traced back to an inequality of opportunity to participate in the causality chain that brings, or may bring, possession or ownership of that good to its participants; and 'III' reflects a situation where individuals or groups receive an unequal share of privileges/entitlements to a public good, such as legislation, for instance.

With respect to the social pervasiveness of the violation of the principle of equality, critical legal thought asks whether it is (I) directed or (II) encompassing. What is important here is to define the equality violation according to its ultimate effect. Thus, in the case of 'I,' the violation's effect remains limited to

some of the individuals or identifiable subgroup, in a group or groups that share a given identity, characteristic, or circumstance, while in 'II' the violation's effects extend to all who share the same identity, characteristic, or circumstance.

Critical legal thought asks, with respect to the periodic adjustments required to remedy the violation of the principle of equality whether: (I) adjustments, or corrective actions, ought to be undertaken at the beginning of a given relationship or social process that has the tendency to undermine the principle of equality; (II) at certain moments during a relationship or social process; (III) at the end of a given relationship or social process; or (IV) various combinations of 'I,' 'II,' and 'III.' 'I' defines a situation where correction of inequalities can only be undertaken—which may prove to be a normative or practical limitation, or both—at the starting point of the relationship or social process that creates the equality violation. 'II' reflects corrective intervention during the relationship or social process, thereby rearranging the relative positions of individuals or groups before equality-undermining distributive results of the interaction may crystalize. In 'III,' at the tail end of the continuum, there can only be intervention—again for normative or practical reasons, or both—at the end of the interaction, and for the purpose of adjusting its distributive outcome according to some equality criterion. Finally, 'IV' represents corrective interventions possible at the start, along the way, and/or at the end of a social interaction or process that reveals the potential to create inequality.

With respect to the individuals or groups in whose favor corrective intervention to promote equality is undertaken, the question is whether the intervention is to be: (I) specific or (II) general. 'I,' in this case, refers to correction that is restricted in its effects to the parties in a specific relationship or social process. 'II,' in contrast, refers to corrective action whose distributive effects extend to all individuals or groups who share a relevant characteristic, identity, or circumstance with the parties directly or more visibly involved in the relation or social process that triggered the corrective action.

Further, critical legal thought seeks to understand whether the scope of corrective interventions, relative to any undermining of the principle of equality, ought to be (I) specific or (II) structural. The distinction here is between two types of intervention. The first type corrects unjustified inequalities through limited manipulation of its causes and conditions, but doing so

without generally blocking those from continuing to be the source of inequality in the future. The second type seeks to definitively reform structural aspects of the social relationships and processes causing inequality.

Critical legal thought's concerns with the two moments of freedom—that of emancipation and that of freedom stewardship over time—thus commits it also to equality. There are no free *citoyens* without *human beings*<sup>19</sup> equal in the required ways. Consequently, a commitment to equality commits critical legal theory to a comprehensive and systematic jurisprudence of distribution, to which I now turn.

#### FRAMEWORK FOR A JURISPRUDENCE OF DISTRIBUTION

*Distribution* is a capacious concept that encompasses a range of intrinsic and relative goods, harms, actors, types of agency, and effects. In all its aspects, distribution elicits evaluation and engages normative criteria. A *jurisprudence of distribution* as a component of critical legal thought must be a match to the conceptually capacious and robustly axiological nature of distribution.

In fairness, every generation has jurists interested in *distribution*.<sup>20</sup> However, only once in every few generations do jurists rediscover *en masse* the importance of distribution analysis. We are once again in the midst of such a rediscovery (e.g., many of those working in disabilities law, law and economics, critical

---

19. "Citoyens" and "species being" in Marx's early terminology. See KARL MARX, ON THE JEWISH QUESTION, reprinted in MARX: EARLY POLITICAL WRITINGS 28 (Joseph O'Malley ed., Cambridge Univ. Press 1994) (1844).

20. To remain within examples from the last 150 years: Oliver Wendell Holmes, Rudolf von Jhering, Miguel Reale, David Trubek, John Rawls, Duncan Kennedy, Ronald Dworkin, Roberto Mangabeira Unger, Martha Nussbaum, Richard Posner, Cheryl I. Harris, and William Forbath, to mention just a few. Looking further back in time, Duncan Kennedy correctly submits: "Marx and Ricardo invent distributional analysis. But they don't conceptualize it as distributional analysis of *legal regimes*. In fact, law figures in their work in a very mechanical, un-organic way, as a kind of inert background against which an economic conflict plays out." Duncan Kennedy, *Law Distributes I: Ricardo Marx CLS* (Feb., 2021) (unpublished manuscript) (on file with author). And Arnulf Becker on his part correctly states that "if one looks beyond the North, one sees the rise, during the 1960s and early 70s, and the fall, at the end of the 1970s, of Third World demands for a more egalitarian international order. Although Third World activism faded away, looking beyond the North reveals that their redistributive legal strategies have subsisted until today" Arnulf Becker Lorca, *Bargaining with Sovereignty, Fighting Global Inequality*. (Apr., 2021) (unpublished manuscript) (on file with author).

legal studies, law and political economy, critical race theory, environmental law, feminist legal theory, law and development, and socio-economic rights), with remarkable contributions already to show for it. However, compared to previous moments of ascent of distribution in legal thought, the current renaissance should have the greater ambition of bequeathing a general critical legal theory of distribution.

While there are traditions of legal thought that highlight distributive questions (as those just mentioned above), they have thus far left an undersized theoretical footprint. Additionally, those traditions all too often forced the normativity and the politics of distribution into an orbit around immediately monetizable aspects of distribution such as income and employment. Of course, economics is an important part of any *jurisprudence of distribution*, but it is not coextensive with it. Economics is not even be the most important part of it, as the *jurisprudence of distribution* has its full meaning only in the theoretical arc designed by freedom and curved by equality.

The creation of a general legal theory of distribution is daunting work. It must integrate into a general theory of distribution the analysis and evaluation of distributive patterns in a variety of contexts. From distribution in the modern state to transnational and international distribution, distributive impacts on discrete groups (disability, race, age, gender, geography, class, citizenship, and so on), areas of distributive intervention and mobilization, expert governance of means efficiency and outcomes efficacy of distribution, and the history of distributive schemes and ideas—where to begin?

One place to begin the work of a *jurisprudence of distribution* as part of grand critical legal thought is to identify the elements that any such theoretical efforts must integrate. The following list is significant in this pursuit.

#### ELEMENTS OF A JURISPRUDENCE OF DISTRIBUTION

- *Object*: Distribution patterns and distributive events are everywhere in nature and society. However, we care only about distribuends deemed to matter (e.g., respect, epistemic authority, punishment, risk, calories, disinformation, income, time, etc.). That presupposes a theory of inherent and instrumental significance that illuminates the features that render anything distributable an object

of distribution concern. Analysis of distribution is evaluative in this first, and unavoidable, mode.

- *Agent*: State, International Organizations, Private Agent. They are all involved in distribution, in myriad formations. Such formations need to be identified, described, explained, and evaluated.
- *Agency*: Creating, Sustaining, Resisting, etc. distribution schemes and patterns. The types of distribution agency also need to be distinguished, explained, and evaluated.
- *Action*: Direct (e.g., provision of basic income), Indirect (e.g., job creation incentive program) or Hybrid (e.g., combination of temporary income replacement with job retraining) are types of distributive action the understanding of which a legal theory of distribution must reveal with a view to generalization and systematization.
- *Effect*: Concentrative (e.g., taxation), Decentrative (e.g., mandatory employees' participation in profits) or Con/decentrative (e.g., tax incentives and power of control for donor-advised funds in Time 1 → free cancer treatment for children in Time 2) and vice versa. A jurisprudence of distribution must overcome the naïve "concentration = bad, deceneration = good" superficialities that plague analysis of distributive effects.
- *Long-Term Effects for Society*: Cohesion or Fragmentation, Mobility or Immobility, Stratification or Equalization, and the like. The ancients had already learned that in patterns of distribution hinge the cohesion or fragmentation of social orders. A jurisprudence of distribution would assist in the relearning of this lesson.
- *Long-Term Effects for Politics*: Legitimization or Delegitimization, Emancipation or Oppression, Destabilization or Stabilization, etc. The ancients knew this too,<sup>21</sup> and this is another lesson in need of relearning.

---

21. Think here of Solon's reforms in the 6th century BCE.

- *Time of Effect for Individuals and Groups*: Immediate (e.g., unemployment benefits) or Protracted (e.g., public education).
- *Frequency of Effect*: Onetime (e.g., disaster relief) or Recurrent (e.g., greenhouse gases exposure).
- *Extension of Effect*: Prompt (e.g., disaster relief converted into consumed calories) or Continued (e.g., disaster relief converted into small business creation), Intragenerationally or Transgenerationally, etc.
- *Impact*: Simple (e.g., episode of hunger placation or vote suppression) or Compound (e.g., lifespan increase or group disenfranchisement).
- *Epistemic Confidence*: Skeptical, Moderate, or Robust. A jurisprudence of distribution must confront the difficult questions about levels of cognitive confidence regarding the cognition of consequences of distributive interventions and of the causes of distributive outcomes.
- *Evaluation of Means*: Efficient or Inefficient, Inclusive or Exclusive, Disrespectful or Respectful, Stigmatizing or Lustrative, and so on.
- *Evaluation of Outcomes*: Just or Unjust, Efficacious or Inefficacious, Liberating or Oppressive, Right or Wrong, etc.
- *Timeframe of Evaluation*: Retrospective, Current, or Prospective.
- *Source of Personal Evaluation of Distributive Outcomes*: Impulse, Intuition, Emotion, Socio-psychological Conditioning, Adherence to a Theory of Justice, etc.
- *Justification of Evaluation of Distributive Outcomes*: Ratio-constructivism (e.g., theories of social justice, human endowments approaches, etc.) or Conventionalism (e.g., reliance on prior prevailing distributive preference among members of a group or an audience).

The wide-ranging nature of these elements of a jurisprudence of distribution points to a high level of social complexity. A critical jurisprudence of distribution is thus part of a general theory of the nature and evolution of the type of legal order that affords a high level of social complexity.

## CONCLUSION

High-complexity societies are so by virtue of demographic, economic, institutional, cultural, political, geopolitical, cognitive, technological, self-referential, and communicative aspects, each reaching both qualitative and quantitative thresholds. The moment at which these elements all reach their respective thresholds, their interrelationship activates the transformation in societal type from simple or complex to highly complex, with significant implications for social order.

Simple societies could achieve social stability through normative inertia.<sup>22</sup> In contrast, our high-complexity societies only achieve social stability as constant functional adaptation and axiological steering through constant small and sometimes large normative changes. *Distribution* is an aspect of each of these changes; an aspect the standard model of critical analysis only partially understands. Critical legal thought avoids the project of developing a general legal theory of distribution to accompany those changes and the social orders they produce at significant intellectual peril.

---

22. The literature on the normative lives of "primitive," "archaic," or "illiterate" societies is immense. A place to start would be HENRY SUMNER MAINE, *ANCIENT LAW* (1861), and its critical revisions.