Bruce Anderson
Saint Mary's University
Halifax, Nova Scotia
Canada

Method in Legal Theory

The differing and competing positions of legal scholars are recognized and classified as belonging to this or that legal theory: legal positivism, natural law, critical legal studies, post-modern, legal realism, and so on. However, the grounds and the extent of the differences among them have been largely ignored leaving legal theorists relatively undisturbed to develop their own perspectives with agreeable colleagues.

But recently legal theorists have become critical of others' work and even disillusioned with their own discipline. The current state of affairs is not pretty. For instance, Del Mar, Guidice, & Waluchow declare that "If there is a safe assessment of contemporary legal theory it is that several debates on the nature of law seem to have reached stalemate to a degree never seen before. Some even argue that the deadlocks are a permanent feature of legal theory."[1]

An echo can be heard in Sundram Soosay's words. "After fifty years of non-agreement and no way to settle the differences, and biting and convincing critiques perhaps it is time to move on from European legal science and legal theory dominated by Hart, Raz, Dworkin, Shauer, Wroblewski, and Alexy."[2]

Geoffrey Samuel captures the problem this way. "Does a modern doctrinal lawyer, epistemologically speaking actually know more about law as a discipline than say Ulpian, Bartolus, Domat or Savigny knew? In the natural sciences, Newton despite his enormous contribution to knowledge, would, if brought back to life today, not be able to recognize the models now employed by his successors. A Post-Glossator, in contract, would have few problems understanding a law lecture in a common law faculty and Domat would probably have little difficulty with French aggregation."[3]

Dan Priel takes stock. "In the last three decades or so there has been growing interest in questions of methodology in jurisprudence. It was perhaps growing awareness that substantive debates in this field seem to have ground to a halt, with disputants seemingly talking past each other, that may have prompted the thought that examining the different underlying, methodological assumptions of competing theorists would achieve better understanding of what is at stake in the substantive debates of jurisprudence.[4]

Recognizing the importance of methodological issues, Del Mar, Guidice, & Walujchow[5] and van Hoecke[6] collected and organized writings by legal theorists on method in legal theory. However, a confusing and disorienting portrait of method emerges. These collections reveal that, as it stands, there is no way to settle what are considered intractable differences, no method that can eliminate unnecessary questions, no basis for distinguishing among different methods, and no way for evaluating different methods. The discipline is full

---

[1] 'Introduction', ed M. Guidice, W. Waluchow, M. Del Mar, *The Methodology of Legal Theory*, Volume 1, Ashgate, London, 2011, xxi. Reprinted by Routledge in 2016.
[2] S. Soosay, *New Waves in Philosophy of Law*, Palgrave MacMilan, London, 2011.
[3] G. Samuel, 'What is Legal Epistemology,' in *The Method and Culture of Comparative Law*, ed M. Adams & D. Heirburt, Hart, Oxford, 2014, 207.
[4] D. Priel, 'Description and Evaluation in Jurisprudence,' 29 *Law and Philosophy*, 633-634.
[5] Ed. M. Guidice, W. Waluchow, M. Del Mar, *The Methodology of Legal Theory*, Ashgate, London, 2011.
[6] ed M. van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline*, Hart, Oxford, 2011.

of disputed questions all over the map, but there is no conviction that some method, some procedure, can be found to put an end to it all.

To state it simply, methodological problems are hindering meaningful reflection on law. It is also evident that the operations and procedures that comprise the methods of lawyers and legal theorists have not been subject to any sort of systematic examination and remain a matter of great obscurity.

The aim of my paper is to identify ways that might better equip legal theorists to handle methodological issues. I will begin with the question 'What is a method?' by drawing on the work of the philosopher Bernard Lonergan (1904-1984). I will discuss his definition: "a method is a normative pattern of recurrent and related operations yielding cumulative and progressive results."[7] Next I will pose the question 'What type of method do legal theorists need?' One, I will argue that it must be able to account for both the patterning of questions, insights, judgments, and decisions[8] of legal practioners and also those of legal theorists. Two, legal theorists must know the features and the strengths & limitations of specialized methods used in practical problem-solving,[9] science, and art in order to develop their own suitable method. Three, the method used by legal theorists must be able to intelligently organize the various specialized tasks performed by those who reflect on and care about law such as research, interpretation,[10] history, analyzing conflicts, imagining better ways to do things, making policies, planning how to implement policies, and executive reflection. In this fashion, my goal is to identify the elements of a method whereby legal theorists are able to eliminate unnecessary questions and handle disputes.

[7] B. Lonergan, *Method in Theology*, Darton, Longman & Todd, London, 1967, 1.

[8] Such operations and procedures are analyzed in B. Anderson, *Discovery in Legal Decision-Making*, Volume 24 Law & Philosophy Library, Kluwer, Dordrecht, 1996.

[9] For instance, B. Anderson and M. Shute, 'Is there a unity of practical reason that embraces law and morals?' in *Truth and Objectivity in Law and Morals*, Vol. 3, ed. A. Ferreira Leite de Paula, A. Santacoloma Santacoloma, Archiv fur Rechts und Sozialphilosophie-Beiheft, (Stuttgart: Franz Steiner Verlag, 21 pages, Final version sent to editors February 2018.

[10] For a discussion of methodological issues regarding interpretation see B. Anderson & M. Shute, 'Identifying "Purely" Interpretive Issues and Activities' (with M Shute), in *Modern Legal Interpretation: Legalism or Beyond*, ed. M Novak, Cambridge Scholars Press, Cambridge 1-15, proofed March 2018.