

# Bringing phenomenography & variation theory together

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# Phenomenography & variation theory

- Phenomenographic study – students ways of experiencing legal reasoning
- **Learning study** (Marton & Tsui 2004) – team of teachers design a lesson based on patterns of variation as revealed by the phenomenographic outcome space and teacher's own understandings of the phenomenon
- Intended object of learning – lesson plan
- Enacted object of learning – delivery of lesson
- Experienced object of learning – students' learning outcomes

# Methodology

## ***P'graphic study:***

### **Ways of experiencing legal reasoning**

- Interviews with 24 first year law students from ANU, UTS, QUT
- P'graphic data analysis – outcome space

## ***Learning study (variation theory):***

### **Design of intervention (class) – lesson plan**

### **Delivery of class**

- analysis of video of classes (4 classes 2@QUT, 2@UTS, 3 different teachers)

### **Short-answer response - students' learning outcomes**

- analysis of post-test “what is the purpose of legal reasoning?”

## DIMENSIONS OF VARIATIONS: WAYS OF THINKING ABOUT LEGAL REASONING

	1. A formulaic process for predicting a legal outcome	2. An interpretive process of arguing for an outcome that serves your client	3. A dynamic, responsive and innovative process for developing the law to reflect changing society – lead/support	4. Law as a tool for change. Recommendation to Parliament
<b>Nature of the rule / law in legal reasoning</b>	Rigid; completely clear (Accept the rule. Only the facts can be in dispute / argued)	Manipulable / Flexible Interpretable (Challenges the rule) Facts & rules can be argued	Changeable – Dissents, exceptions; [Change the rule]	
<b>Purpose of legal reasoning</b>	To correctly predict the outcome (Adjudicate)	To produce the best outcome for you client (Advocate)	To produce the best outcome for society [Change agent]	
<b>Role of HIRAC / ISAACS</b>	It is legal reasoning	It is a tool for aiding legal reasoning	It is implicit / evident in legal reasoning	
<b>Value of the logical and consistent nature of legal reasoning</b>	[Comfort with predictability of law] To be able to predict accurately	[Discomfort—will outcome be just; will I do the best/right thing] To treat people equitably	Greatest good for greatest number	[Comfort with unpredictability of law] Imperfect
<b>Purpose of reading the law (for students)</b>	To learn the rules (See example of LR)	To look for ambiguity and use it for your argument	To observe legal reasoning in action [?]	

# Extension of outcome space

Post-test – short answer question

- Category 2a – to make a reasoned argument (without the awareness that there may be alternative arguments)
- Category 2b – to present and consider alternative arguments

Delivery of class:

New category evident from enacted object:

Category 0 - Jumping to a conclusion (not using legal reasoning)

# Intended object of learning

Intended outcome to move students from Category 1 - *a formulaic process for predicting a legal outcome* to Category 2 - *an interpretive process of arguing for an outcome that serves your client*

Lesson plan - intended pattern of variation:

## **Scenario 1 – Fred driving at 60 kms in a 40 zone**

- Apply formula, no argument

## **Scenario 2 – Fred driving at 30 kms in a 60 zone**

- facts vary – apply formula, no argument

## **Scenario 3 – Fred alleged to be driving travelling at 45 kms in a 40 zone**

- facts vary
- facts in dispute – apply formula, awareness of alternative argument

## **Scenario 4 – Fred in passenger seat, accidentally causes car to move, travels at 50kms in a 40 zone**

- facts vary
- rule varies
- case law introduced – apply formula, create argument (interpretation of ‘driver’)


# Enacted object of learning

Class on legal reasoning

4 classes (2@QUT, 2@UTS), 3 teachers

## **Methodology**

- Watched videos & wrote basic transcript, making note of where the teacher seemed to depart from the plan and/or introduce different patterns of variation
- Collated notes into a summary table juxtaposing the 4 classes at each stage (where each new scenario was introduced)
- New table where each class was compared with the lesson plan at each stage of the lesson
- Notes on patterns of variation and where particular categories were being exemplified

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- Analysis included the activity the students were undertaking & which category this was targeting, and the statements the teacher made that exposed further variation, other categories (student experience via activity, vs student experience via listening)

***Variation theory analysis:***

- **Contrast** – discern differences between this and other phenomena
- **Generalisation** – experience varying instances of the same phenomenon
- **Separation** - separate features of the phenomenon are discerned (variant, invariant)
- **Fusion** – discern simultaneous variation of features in relation to one another



## QUT Monday

### Enacted pattern of variation

Intended pattern of variation	Enacted pattern of variation
<p>Scenario 1 – Fred driving at 60 kms in a 40 zone</p> <ul style="list-style-type: none"> <li>Apply formula, no argument</li> </ul> <p><i>Write up with fluid expression</i></p>	<p>Presentation of the different methods (formula) for legal reasoning (different acronyms/abbreviations are used eg IRAC, ISACS, SKARPI) – acronym varies, but they are all tools for legal reasoning</p> <p><b>Activity - apply formula – issue, rule, facts, conclusion (separation) (Cat 1)</b></p> <p>Statement - relationship between law and facts – correct application is discussion of law and facts together (fusion) (Cat 2a)</p> <p><b>Activity – write up in prose (contrast? – applying LR formula, and expressing it are different aspects)</b></p> <p>Statement – need fluid expression</p>
<p>Scenario 2 – Fred driving at 30kms in a 60 zone</p> <ul style="list-style-type: none"> <li>facts vary, rule invariant – apply formula, no argument</li> </ul> <p><i>Need a dispute for case to go to court</i></p>	<p><b>Activity - apply formula – issue, rule, facts, conclusion (separation) (Cat 1)</b></p> <p>Statement – a case only goes to court if there is an argument, a need for interpretation (Cat2b)</p>
<p>Scenario 3 – Fred driving travelling at 45 kms in a 40 zone</p> <ul style="list-style-type: none"> <li>facts vary, rule invariant</li> <li>facts in dispute – apply formula, awareness of alternative argument</li> </ul> <p><i>What will Fred argue? What will the Prosecutor argue?</i> <i>Does not create new rule of law</i></p>	<p><b>Activity - apply formula – issue, rule, facts, conclusion (separation) (Cat 1)</b></p> <p>Statement – creating an argument, awareness of 2 arguments – Fred’s and Prosecutor’s (fusion?)(Cat 2b)</p> <p>Statement – role of regulatory body (court) (Cat 2b?)</p> <p>Statement – applying established principle vs making precedent through argument (contrast, separation) (Cat 2b)</p>
<p>Scenario 4 – Fred in passenger seat, accidentally causes car to move, travels at 50kms in a 40 zone</p> <ul style="list-style-type: none"> <li>facts vary, rule varies (definition of driver)</li> <li>case law introduced – create argument (interpretation of ‘driver’)</li> </ul> <p><i>Don’t write using headings for exams. Rewrite in prose and keep expression fluid</i> <i>What are the 2 arguments?</i> <i>Is there such thing as a right or wrong answer?</i> <i>Is there such a thing as good/bad legal advice</i> <i>How comfortable are you with making a prediction?</i></p>	<p><b>Activity – apply formula – issue, rule, facts, conclusion (separation) (Cat 1)</b> <b>Activity – use case law to create an argument to determine whether Fred is the driver (Cat 2b)</b></p> <p>Statement –Right answer, better answer, <i>comfort</i> with making a prediction? (Cat 2b)</p> <p>Statement – difference in the type of legal reasoning and the different people who do it (Cat 2b)(separation - introduction of variation in actors and purpose)</p> <p>Statement – stretch, extend a principle (Cat 2b)</p> <p>Statement – <b>policy reasons for conclusion/outcome eg transfer of loss</b> (separation – introduction of acknowledgement of policy) (Cat 3?)</p>

# Cat 1: A formulaic process for predicting a legal outcome

- Legal reasoning involves a particular methodology, which incorporates many elements of the law, that allows a person to come to a conclusion on a legal issue (eg legislation, cases etc). The process involves the consideration of all appropriate issues in regards to the law, and the most appropriate determination of those issues using the law. (CM1)

# Cat 2a - To make a reasoned argument

- To be able to formulate an argument, apply relevant law and broad principles to arrive at the most probable conclusion or solution. To solve issues using the law and its application. To apply a methodical approach to solving issues using the law applying to the issues to come to a solution or conclusion. (CM3)

# Cat 2b - To present and consider alternative arguments

- The purpose of legal reasoning is to argue the facts of the case in different directions. There may be two or more similar cases with facts that have been decided and the issues / facts could be distinguished or have an analogy formed in relation to the outcome wanted. There may not be one particular right answer, however in terms of law exams etc it is essential that you apply / argue your view. Also things like 'coherency' and 'policy considerations' would be taken into account when deciding /commenting on an area of law. (CM5)

UTSB

Intended pattern of variation	Enacted pattern of variation
<p>Scenario 1 – Fred driving at 60 kms in a 40 zone</p> <ul style="list-style-type: none"> <li>Apply formula, no argument</li> </ul> <p><i>Write up with fluid expression</i></p>	<p>Simple vs complex legal reasoning (generalisation?) Intention of draftsperson / examiner</p> <p><b>Activity - apply formula – issue, rule, facts, conclusion (separation) (Cat 1)</b></p> <p>Red herrings from sts : licensed, driving safety sign, year offense took place, time of day, school zone, tree falling in a forest)</p>
<p>Scenario 2 – Fred driving at 30kms in a 60 zone</p> <ul style="list-style-type: none"> <li>facts vary, rule invariant – apply formula, no argument</li> </ul> <p><i>Need a dispute for case to go to court</i></p>	<p><b>Activity - apply formula – issue, rule, facts, conclusion (separation) (Cat 1)</b></p> <p>Statement – use checklist in textbook (Cat 1)</p>
<p>Scenario 3 – Fred driving travelling at 45 kms in a 40 zone</p> <ul style="list-style-type: none"> <li>facts vary, rule invariant</li> <li>facts in dispute – apply formula, awareness of alternative argument</li> </ul> <p><i>What will Fred argue? What will the Prosecutor argue?</i> <i>Does not create new rule of law</i></p>	<p><b>Activity - apply formula – issue, rule, facts, conclusion (separation) (Cat 1)</b></p> <p>Statement: IRAC is just a tool, can't use it for complex, sophisticated arguments (Cat2b) (generalisation?) Statement: style of writing /expressing, when practicing law need answer up front (Cat 2b)</p>
<p>Scenario 4 – Fred in passenger seat, accidentally causes car to move, travels at 50kms in a 40 zone</p> <ul style="list-style-type: none"> <li>facts vary, rule varies (definition of driver)</li> <li>case law introduced – create argument (interpretation of 'driver')</li> </ul> <p><i>Don't write using headings for exams. Rewrite in prose and keep expression fluid</i> <i>What are the 2 arguments?</i> <i>Is there such thing as a right or wrong answer?</i> <i>Is there such a thing as good/bad legal advice</i> <i>How comfortable are you with making a prediction?</i></p>	<p><b>Activity - apply formula – issue, rule, facts, conclusion (separation) (Cat 1)</b></p> <p>Statement: 2 bits of law – statute &amp; case law (fusion?) Statement: actor - examiner uses term 'allege' Statement: red herring – win case on technicality before it gets to court Statement: purpose of Act – Acts Interpretation Act Statement: actor – examiner – air your knowledge for the examiner Statement: actors –Fred, prosecution, judge (crusading) , 3 arguments (Cat 2b) Statement – following and distinguishing Statement: insurance case – damages (Cat 2b)</p>

# Cat 1: A formulaic process for predicting a legal outcome

- Legal reasoning is important in deconstructing legal problems. In identifying the legal issues / rules which arise in the course of problem solving legal reasoning provides a framework. This framework must be applied to the facts at hand sequentially and logically to reach a conclusion. (B4)

# Cat 2a - To make a reasoned argument

- To identify the material facts important in determining whether a piece of legislation has been followed or breached. It is a process of identifying and examining authoritative material so that it can be argued clearly and succinctly whether an offense or breach has occurred.  
(B20)

# Cat 2b - To present and consider alternative arguments

- To consider different perspectives, options and approaches towards issues of law. To take into account the best scenario that a client can achieve. To help use better understand the application of the law. (B18)
- The purpose of legal reasoning is to account for the process by which a legal practitioner must apply in order to find an answer to a legal problem. Legal reasoning identifies the sources that a practitioner utilises to determine the law. Finally that the answer is limitless, it all depends how the legal question is tackled. (B17)