



**Conceptions of Thinking
Legally:**

an interpretative approach

Robert Malcolm Herschell





Conceptions of Thinking Legally:

an interpretative approach



Robert Malcolm Herschell

A thesis
submitted in fulfilment of the requirements for the
Degree of Doctor of Philosophy
in the Faculty of Education, Health and Professional Studies

University of New England

by
Robert Malcolm Herschell
Cert.T.(KGTC), B.A.(UQ), M.Soc.Sc.(UQ), M.I.A.G.

May, 1997.



©

1997

No portion of this thesis, or its associated verbatim transcripts of conversation, may be reproduced, stored in a retrieval system, or transmitted in any form by any means electronic, mechanical, photocopying, recording, or any other - except for brief quotations in printed reviews, without the prior written permission of this thesis writer.

In the case of the transcripts, this also includes the receipt of approval from the interviewees involved in the research

ABSTRACT

Title: Conceptions of Thinking Legally: *an interpretative approach.*

The central question explored in this research study was *what are conceptions of thinking legally?* A review was undertaken of the predominant humanistic, rationalistic and dualistic approaches to educational research. These approaches have been criticised as being too limited in their epistemological and ontological presuppositions, assumptions and foundations. Their 'worldviews' which are based on cognitive dualisms, do not provide either comprehensive or sufficient frameworks for integrated perspectives. *Thinking legally* has been placed within a holistic context of 'knowledge as being' rather than the dualistic perspective of 'knowledge as cognition'.

The main focus of this study was to overcome the limitations of previous work that has been undertaken in this field of academic research. Rationalistic approaches to strategies such as *legal reasoning*, *legal problem-solving* and *legal thinking* were evaluated in terms of their dualistic and humanistic epistemologies and ontologies. Consequently, an alternate approach was elaborated.

The study focused on three questions which were:

- **The Contextualising Question:**
On the basis of your experience, what does 'right' and what does 'wrong' mean to you?
- **The Focusing Question:**
What types of experiences have you had with the law and legal issues, and how have these impacted on your life?
- **The Research Question:**
Based on your life experience, what does it mean to *think legally*?

An interpretative approach, phenomenography, was proposed as an alternative to the usual positivistic, rationalistic, reductionistic and deductive strategies. Phenomenography was used as an interpretative research strategy by the implementation of principles, procedures and concepts about intentional human experience. The extent to which the phenomenographic approach can be used to articulate a holistic, interpretative and inductive study of *thinking legally* was examined through an empirical study of 30 residents in south-east Queensland, Australia. These participants ranged included experienced legal, professional, political and governmental leaders; legal and law-related educators and law students; business and community leaders; and teachers, students and

parents. Interview/discussions were conducted to generate seven categories of description, interpretation and explanation of *thinking legally*.

Distinct conceptions of *thinking legally* have been identified. These were :

Conception A: *Thinking Legally as the rule of law;*

Conception B: *Thinking Legally as a representation of a personal worldview;*

Conception C: *Thinking Legally as a process of justifying personal behavioural space;*

Conception D: *Thinking Legally as a process of dealing with dualism;*

Conception E: *Thinking Legally as personal processing of contextual and situational data;*

Conception F: *Thinking Legally as providing pathways for decision-making;*

Conception G: *Thinking Legally as a pervasive and comprehensive construct.*

The outcomes of this study demonstrated that *thinking legally* was not predicated on mastery of a specified set of elements related to legal and law-related learning, as would have been expected under rationalistic paradigms. *Thinking legally* was perceived in this study as predicated on a broad definition of knowledge which includes: (i) *knowledge as content acquisition*, (ii) *knowledge as cognitive processes*, (iii) *knowledge as academic and practical skills*, (iv) *knowledge as professional abilities*, and (v) *knowledge as personal development*.

The outcomes of the study have major implications for those involved in the design, development, implementation and review of legal and law-related education programs. The epistemologies, ontologies and worldviews upon which current programs have been developed need to be reconceptualised. In addition, the elaboration of an interpretative approach to *thinking legally* has methodological implications for practice.

This study demonstrates how it is possible to investigate, in an inductive manner, the basic meanings of specific life experiences of a group of people in order to deepen understanding of the fundamental nature of human thinking, action and experience.

Acknowledgments

When one first entertains the thought of commencing a study of this kind, the journey begins with a sense of adventure, enthusiasm and high spirit. Encounters with significant people, readings and life experiences, develop a sense of reality that is, in most cases, overwhelming. Were it not for the inspiration, encouragement and support of significant individuals, this researcher would have abandoned the study in the pot-holes, dead-ends and detours of the Doctor of Philosophy journey.

Firstly, I express my deepest appreciation to my wife Desley, son Trent and daughter Kendre who have been so encouraging and supportive, especially during these last four years of part-time study and research. They have had to endure my dedication to this project, many times at the expense of more enjoyable and interesting family pursuits. I admire, love, and now give myself back to them.

The Council, Principal, Executive, staff and students of Christian Heritage College, Mansfield, Brisbane, Australia, have provided enormous support to me, both personally and professionally. I thank them for the many practical measures, such as providing study leave, to enable this task to be completed. Their encouragement and advice have been exemplary. I particularly appreciate the discussions and insights that College staff, especially Dr Jack Briggs and Denis O'Hara, have provided at critical points along the Ph.D. road.

My colleagues at both Queensland University of Technology and University of New England have also assisted in conferences, seminars, workshops and debates to provoke and stimulate both my thinking and my strategies in this research study. Dr John de Groot, my associate supervisor, and Dr John Lidstone both from QUT have been truly *critical friends*. I am particularly appreciative of the collegiality that Dr John Ferris has provided as we have walked the Ph.D. road together. John, it has not been a lonely path. Thanks for sharing your intellect, humour, and experience in such a supportive and enjoyable manner, especially over our 'long lunches'.

No study of this kind could have been completed without the guidance of my friend, coach and principal supervisor, Professor Rod Gerber. The 'set of qualitatively different ways' in which he provided personal and academic guidance, encouragement and critical debate 'is unlimited'. Rod, 'Every Ph.D. student needs a mentor like you!' Rod has passed on to others what has been developed in him. Sincere and hearty '*Thanks!*'

I dedicate this thesis to the thirty participants in the study as well as to the clients of the research: the Legal and Law-related lecturers, teachers and students, especially in Queensland and the other Australian States.

TABLE OF CONTENTS

Chapter 1 - The Research Setting	1
1.1 Introduction	2
1.2 Some traditions in legal thinking	5
1.3 A research need: the senior years of schooling (Years 11 and 12)	10
1.4 The Queensland experience in Legal and Law-related education: an overview	12
1.5 Expressed needs of teachers	14
1.6 The need for research and advice	18
1.7 What might be done?	18
1.8 The purpose of this study	19
1.9 Organisation of the study	20
Chapter 2 - Theoretical Orientations of the Study	21
2.1 Introduction	22
2.2 Contextual considerations	22
2.3 Some perspectives on learning	26
2.4 Sources of legal knowledge, skills, processes and concepts	31
2.5 Legal competence - more than just professional knowledge, decision-making and skills training	44
2.6 Legal practice training	53
2.7 Legal literacy in communities and societies	55
2.8 Towards a <i>legal knowledge</i> framework	57
2.9 Chapter conclusion	61
Chapter 3 - The Research Approach	62
3.1 Introduction	63
3.2 Nature of a qualitative study	65
3.3 Phenomenography: an overview	67
3.4 Some ontological issues	72
3.5 Some epistemological assumptions	75
3.6 Some methodological issues	79
3.7 Justification of the phenomenographic approach used in this study	82
3.8 The research questions and pilot study	83
3.8.1 The <i>contextualising</i> question	85
3.8.2 The <i>focusing</i> question	86
3.8.3 The <i>research</i> question	86
3.9 The research study procedures	87
3.9.1 Selection of participants	88

3.9.2	Format of the interview/discussions	90
3.9.3	Conduct of the interview/discussions	92
3.9.4	Form of the transcripts	95
3.9.5	Analysis of transcripts - an iterative analysis approach	96
3.9.5.1	The cognitive task	105
3.9.5.2	The meta-cognitive task	107
3.10	Establishing the outcome space	109
3.11	Chapter conclusion	112
Chapter 4 - Analysis of the Research Study Data		114
4.1	Introduction	115
4.2	Conception A: Thinking legally as <i>the rule of law</i>	116
4.2.1	Ethics, values and beliefs	116
4.2.2	Framework for 'right' and 'wrong'	118
4.2.3	Systemic framework and related actions	120
4.2.4	Specialist's roles and perspectives	123
4.2.5	Legal knowledge of 'right' and 'wrong'	124
4.2.6	Rules as the letter of the law	126
4.2.7	Legal principles	127
4.2.8	Legal procedures	129
4.2.9	Advocacy and the adversarial model	130
4.2.10	Objective, as compared with subjective, standards	131
4.2.11	Legal reasoning	133
4.2.12	Winning and losing	133
4.2.13	Conclusion	134
4.3	Conception B: Thinking legally as a representation of a <i>personal worldview</i>	137
4.3.1	Ethics, morals, values and faith	137
4.3.2	Knowledge base	143
4.3.3	Ways of thinking:	144
4.3.3.1	Philosophical thinking	144
4.3.3.2	Utilitarian thinking	145
4.3.3.3	Holistic thinking	145
4.3.3.4	Deductive thinking	146
4.3.3.5	Influential thinking	146
4.3.3.6	Dualistic thinking	147
4.3.3.7	Expert thinking	147
4.3.3.8	Hermeneutic thinking	147
4.3.4	Societal expectations	148
4.3.5	Societal benchmarks	149
4.3.6	The need for active citizenship	151
4.3.7	Personal benchmarks	152
4.3.8	Changes in personal action	154
4.3.9	Conclusion	155

4.4	Conception C: Thinking legally as a process of justifying <i>personal behavioural space</i>	156
4.4.1	Definitional clarity	156
4.4.2	Processing behavioural boundaries	161
4.4.3	Personal code of practice	166
4.4.4	Social code of practice	169
4.4.5	Consequences of negative actions	172
4.4.6	Unexpected outcomes	173
4.4.7	Discretion	174
4.4.8	Conclusion	175
4.5	Conception D: Thinking legally as a process of <i>dealing with dualism</i>	176
4.5.1	Criteria for defining ‘the line’	176
4.5.2	Idealism and pragmatism	180
4.5.3	The perceived power of influence	183
4.5.4	Differing values and social change	185
4.5.5	The need for a proactive education	186
4.5.6	Knowing and acting	188
4.5.7	Personal and professional	192
4.5.8	Contextual and decontextual factors	194
4.5.9	Rights and obligations	195
4.5.10	Individual and community	195
4.5.11	Fantasy and reality	196
4.5.12	The process of law	196
4.5.13	Conclusion	198
4.6	Conception E: Thinking legally as <i>personal processing of contextual and situational data</i>	199
4.6.1	Awareness of process	199
4.6.2	Getting the ‘big picture’	203
4.6.3	Making choices	204
4.6.4	A personal process	205
4.6.5	Logically sequenced processes	208
4.6.6	Education and training in procedural strategies	214
4.6.7	Development of personal and professional competence	217
4.6.8	Identifying process difficulties	221
4.6.9	Seeking professional advice	221
4.6.10	The role of advocacy	222
4.6.11	Conclusion	223
4.7	Conception F: Thinking legally as providing <i>pathways for decision-making</i>	225
4.7.1	Analysis of a problem’s context	225
4.7.2	Legislative entitlements	227

4.7.3	Procedural precedents	227
4.7.4	Analytical procedures	231
4.7.5	Identification of alternative strategies	233
4.7.6	Logical and procedural clarity	235
4.7.7	Negotiation and ownership of the problem-solving processes	239
4.7.8	Procedural consequences	240
4.7.9	Procedural closure	243
4.7.10	Conclusion	244
4.8	Conception G: Thinking legally as a <i>pervasive</i> <i>and comprehensive construct</i>	245
4.8.1	What social aspirations and goals?	245
4.8.2	The role of values, ethics, morals, beliefs	246
4.8.3	A pervading legal awareness	249
4.8.4	Community knowledge and skills	250
4.8.5	Logical and critical thinking	251
4.8.6	Personal and community involvement	252
4.8.7	Knowing, being and doing	253
4.8.8	Integration of all aspects of society: a conclusion	256
4.9	Chapter Conclusion	262
Chapter 5 - Outcomes, Implications and Recommendations		263
5.1	Introduction	264
5.2	Scope of the categories	265
5.3	Description of the outcome space	266
5.4	Structural relationships within each of the four clusters	268
5.4.1	The <i>foundational</i> conceptions	269
5.4.2	The <i>dualistic</i> conceptions	272
5.4.3	The <i>process</i> conceptions	275
5.4.4	The <i>integrative</i> conception	279
5.5	Structural relationships among the four clusters	280
5.6	Referential relationships within and among the clusters	282
5.7	A musical metaphor - <i>Jazz Combo</i>	284
5.8	Literature review and outcome space - a discussion	292
5.8.1	Participants' worldviews (personal knowledge and experience base) of thinking legally	294
5.8.2	Explicit relationships between each individual's worldview and the rule of law in their society	295
5.8.3	The dichotomous manner in which the research participants viewed their knowledge as <i>content</i> (know what) and knowledge as <i>process</i> (know how)	296

5.8.4	The seeming lack of adequate, yet agreed to, pathways of the processing of private and public problem-solving	297
5.8.5	The need for an holistic approach to problem-solving in society	298
5.8.6	The need for personal approaches to the solution of unique problems	299
5.8.7	The infusion and integration of thinking legally into almost every facet of individual and corporate/public life	299
5.8.8	The holistic, yet pervasive, nature of thinking legally of reach individual in a society	299
5.9	Implications of the study	300
5.9.1	For the research participants	300
5.9.2	For the educational enterprises at primary, secondary and tertiary levels	301
5.9.3	For teachers, tutors and lecturers involved in legal and law-related educational enterprises	302
5.9.4	For the body of academic knowledge that has been generated	302
5.9.5	For professional staff involved in legal enterprises	303
5.9.6	For governments promoting the education of their citizens	303
5.10	Proposals for further study	304
5.10.1	Investigation of contextual factors that might have influenced the study	304
5.10.2	Checking the authenticity of Conceptions A to G of this study	305
5.10.3	Review of the conceptual design of this study's outcome space	305
5.10.4	Critique of the relationships between (i) the legal and law-related literature, and (ii) the outcomes of this study	306
5.10.5	The identification of developmental stages through which each individual's thinking legally progresses from novice to expert	306
5.10.6	An investigation of the conceptual interrelationships among thinking legally, teaching legally and learning legally	307
5.10.7	The development of teaching and learning methodologies that are compatible and consistent with this study's outcomes and which promote students' abilities to think legally	307
5.10.8	Comparisons of intra-cultural and inter-cultural perspectives on, and practices for, thinking legally	308

5.10.9 Replications of this study in cross-cultural contexts	308
5.11 Conclusion	308
Bibliography	311
Appendix A - The pilot study research questions	336
Appendix B - Participants in the research project	341
Appendix C - Sample participant correspondence	344

List of Tables

Table 1.1	Queensland Year 11 and 12 Legal Studies Enrolment Statistics 1985-1995.	14
-----------	---	----

List of Figures

Figure 1.1	A Methodology for Teaching Legal Studies	17
Figure 2.1	Anderson's Continuum for Promoting Responsible Citizenship	38
Figure 2.2	Levels of Social-Cognitive Understanding	40
Figure 2.3	Stages of the Problem-Solving Process	42
Figure 2.4	A Master Skills List	49
Figure 2.5	A Legal 'Knowledge' Framework	59
Figure 3.1	Dahlgren and Fallsberg's (1991) - Steps in Phenomenographic analysis	97
Figure 3.2	Sandberg's (1994) Approach to Analysing Phenomenographic Data	98
Figure 3.3	An Iterative Approach to Phenomenographic Analysis	104
Figure 3.4	The Structural Relationships Amongst the Four Conceptions of Environmental Responsibility	110
Figure 3.5	Categories of Policing by Consent	111
Figure 4.2.1	Interviewee I ₁₆ 's View of the Process of <i>Thinking Legally</i>	136
Figure 4.3.1	Interviewee I ₈ 's View of the Process of <i>Thinking Legally</i>	140
Figure 4.4.1	Interviewee I ₂₂ 's Criteria for Deciding Acceptable Behaviour and Consequences	164
Figure 4.4.2	Interviewee I ₂₉ 's Views of Private and Professional Legal Thinking	165
Figure 4.4.3	Interviewee I ₂₁ 's Views on Private and Public 'Space'	168

Figure 4.4.4	Interviewee I15's Views of Law as Reflected and Shared Values	171
Figure 4.5.1	Interviewee I20's View of the Relationships among the Law and its Social, Practice and Academic Study	182
Figure 4.5.2	Interviewee I10's View of Engendering Social Justice	189
Figure 4.6.1	Interviewee I20's View of the Relationships among the Social Context of Law, its Practice and Academic Study	220
Figure 4.7.1	Interviewee I24's View of the Processes of <i>Thinking Legally</i>	230
Figure 4.7.2	Interviewee I25's View of Lawyers' Processes of <i>Thinking Legally</i>	232
Figure 4.7.3	Interviewee I26's View of Pathways for <i>Thinking Legally</i>	238
Figure 4.8.1	Interviewee I11's View of Factors Affecting the Development of One's Worldview and Personal Practices	248
Figure 4.8.2	Interviewee I6's View of the Nature of Thinking Legally	254
Figure 4.8.3	Interviewee I17's View of the Relationships amongst Constituent Factors of <i>Thinking Legally</i>	258
Figure 4.8.4	Interviewee I18's Personal Framework for <i>Thinking Legally</i>	260
Figure 5.1	The Outcome Space of Thinking Legally	267
Figure 5.2	A 'Jazz Combo' Musical Metaphor	286
Figure 5.3	Conceptions and the 'Jazz Combo' Metaphor	290
Figure 5.4	Conception G and the Musical Metaphor	291