

E Snyman-Van Deventer

Faculty of Law, University
of the Free State. ORCID:
[https://orcid.org/0000-
0002-9464-9892](https://orcid.org/0000-0002-9464-9892)

DOI: [https://dx.doi.
org/10.18820/24150517/
JJS44.i2.Chron2](https://dx.doi.org/10.18820/24150517/JJS44.i2.Chron2)

ISSN 0258-252X (Print)
ISSN 2415-0517 (Online)

*Journal for Juridical
Science*
2019:44(2):79-100

© Creative Commons
With Attribution (CC-BY)



CHRONICLE

Teaching South African (LLB) law students legal analysis to ensure critical thinking

1. Introduction

The art of thinking in a peculiarly legal way is a skill essential to successfully entering the discourse of law.¹

In the South African Council on Higher Education's (SACHE) *Report on the National Review of LLB Programmes 2018*, it is stated that

[t]here is a serious lacuna in the legal education system with regard to the inculcation in students of critical thinking skills. Almost half of the faculties/schools were found to pay insufficient attention to this important skill, and even among those that were giving this skill due attention, there was room for improvement. It is suggested that critical thinking skills, as described in the LLB Standard, are the most important of the skills listed in the Standard, as they encapsulate all the other skills.²

According to the SACHE, this graduate attribute is

[c]losely aligned to and as important as research and writing skills [and entails] the ability to engage critically with law produced by the legislature and the courts, and to be able to form a view on its efficacy, justice and wisdom, and to determine what alternatives might be available.³

Plana emphasises that

[t]he ability to critically analyse any situation, theoretical assumption or body of knowledge in order to produce an informed opinion, which is understood and recognised as a skill, is a

1 Venter 2006:626.

2 South African Council on Higher Education 2018:57.

3 South African Council on Higher Education 2018:35.

central responsibility for all university studies and especially those related to social sciences and therefore to law.⁴

James and Burton agree, stating that “[a]n ability to think critically is highly valued in legal education and in higher education generally.”⁵

The development of analytical and critical thinking skills thus needs to be an important part of any module within the LLB curriculum. The traditional view used to be that law schools (law faculties) teach law students to think like a lawyer⁶ and lawyers in practice teach law students to act like lawyers or how to be a lawyer. The current view is that law schools should teach both theory and skills. How to think like a lawyer and how to be a lawyer should thus both be taught at law schools. This underlines the fact that the lecturer in a specific discipline cannot teach everything (all theory) about that specific module or discipline, but must through lectures, learning material and assessment assist the student in ensuring a solid foundation to build on, that will also serve as a “GPS” (Global Positioning System) for the student both during his/her studies and beyond. In other words, the teaching of a module should equip a student with the ability to navigate or to be able to find his/her way in a specific field of law. The teaching of a module should guide a student like a GPS to be able to find the knowledge or answers the student is seeking. If a student must learn to think like a lawyer and do like a lawyer, there is also a need for that student to develop problem-solving skills.

In general, the work of a lawyer is to solve the problems of his/her clients. The lawyer must solve problems within the legal framework. In his/her teaching, the lecturer must, therefore, teach critical and analytical thinking and problem-solving skills. This includes a focus on advocacy skills, as well as writing, research and oral skills. Critical legal thinking, reasoning and analysis are essential for problem-solving. The LLB programme and curriculum must also contribute to the development of practice-ready graduates. The lecturer must also take into account the graduate attributes, as explained earlier. In other words, what must a student know; what must a student be able to do; what must a lawyer know, and what must a lawyer be able to do?

Apart from “practical skills” modules, traditional doctrinal or theory modules can play a crucial role in achieving the ideals of teaching effective lawyering skills in a holistic manner.⁷ How this may be achieved is one of the most important aspects to take into consideration in the general restructuring, re-curriculation and transformation of the South African LLB degree programme.⁸ If not, valuable opportunities to broaden and enhance the lawyering skills of law students are lost.⁹ Tracy observes that lecturers

4 Plana 2012:12.

5 James & Burton 2017:1.

6 For a discussion on “thinking like a lawyer”, see Natt Gantt 2007:413-418.

7 Snyman-Van Deventer 2015.

8 Snyman-Van Deventer 2015.

9 Snyman-Van Deventer 2015.

also fail to spend much actual class time on imparting especially analytical and critical legal thinking and writing skills.¹⁰

An essential component of the teaching of law is to ensure that students develop the ability to do research, analyse legal authority, and write or draft legal documents¹¹ with a logical structure of arguments.¹² Students must learn to solve problems, argue and communicate effectively. Students must be able to analyse legal texts and this will inevitably lead to logical thinking, structuring, organisation and, perhaps most importantly, solving legal problems.¹³ Rice states that “[l]ogical form plays an essential role in crafting and evaluating legal argument, and it finds its place at every level of the lawyering process”;¹⁴ students must learn the law and the legal-reasoning process.¹⁵ This is important, as the logical structure of a legal argument can raise it from legal analysis to legal persuasion.¹⁶ He emphasises that the logical structure of an argument is one of the most important details of persuasive advocacy.¹⁷

Various useful models¹⁸ have been developed from essentially the IRAC¹⁹ (Issue, Rule, Application, Conclusion) method to teach students legal reasoning and analytical skills. The UFS Faculty of Law²⁰ currently uses a model expounded by, among others, Maisels and Greenbaum,²¹ referred to as the FIRAC (Facts, Issue, Rule of law, Application and Conclusion) method of legal analysis. Whatever a model, framework or method of analysis is called, it is imperative that some method is used to lay the foundation for legal analysis. It is further important that *all* members of faculty are made aware of the fact that this method is taught to first-year students and that the method may be applied by students in all theory-based modules, in order to solve or analyse legal problems. Legal analysis and critical legal thinking are two sides of the same coin. Students need the skills of legal reasoning and critical analysis. When developing the ability to do basic legal analysis, irrespective of the method or model

10 Venter 2006:621.

11 Tracy 2006:298.

12 Rice 2015:551.

13 See Boyer (1985: 25) who is of the opinion that “[l]egal writing is the only course in which analysis is systematically taught; other courses hope that the student will learn analysis in the one-shot-only atmosphere of the examination room”.

14 Rice 2015:555.

15 Rice 2015:556.

16 Rice 2015:555.

17 Rice 2015:551.

18 In this note, the term “method” or “legal analysis method” will be used. Other terminology used to refer to these models/methods is, for example, “formula”; “formula for organising legal writing”; “paradigms”; “organisational paradigm”; “analytical schemes”; “organisational schemes”, and “legal analysis framework”.

19 Higdon 2013:98; Figley 2011:246; Flaherty 2001:73; Kerper 1998:359; Metzler 2003:501-503; Rappaport 2010:67; Miller & Charles 2010:193.

20 Also University of KwaZulu-Natal.

21 Maisels & Greenbaum 2001:95.

employed, students are taught not only to think about facts, but also to identify the issues, to apply law to the issues, and to reach a conclusion. In addition to this basic organisation of their thoughts, students should be able to add to their analysis comparisons, identification of advantages and disadvantages, strengths and weaknesses, and recognition of different views on the same matter.

These methods of legal analysis are also described as the “organization of legal analysis”.²² It is important that law students can organise the information that they need to convey either in writing or orally.²³ By using one of these methods of legal analysis, students learn how to structure their legal analysis.²⁴ A method of legal analysis gives students an organisational and analytical structure to do competent legal analysis. Students may use any of these methods of legal analysis and organisation to summarise, for example, case law, to solve problem-based questions and case studies, to answer examinations, to organise their legal writing and, of course, to develop the skill to analyse a given situation and the law pertaining to it.

The aim of this note is to focus on legal analysis as an important skill that law students must learn, in order to be effective lawyers who possess the ability to think critically. The note starts with a list of different methods of legal analysis to give a very broad overview of methods from which not only an individual lecturer, but also a law faculty as a whole, can choose when deciding on teaching legal analysis. The note also aims to examine the different elements of the methods of legal analysis and organisation that need to be taught to South African law students to ensure that they learn to conduct proper legal analysis. From the literature, it is clear that, in the United States of America, legal analysis is most often taught as part of legal writing, but it is also stated that it should form part of doctrinal subjects. This note proposes that this dual approach be followed in the South African LLB. As such, it is hoped that it will contribute to the discussions on the teaching of doctrinal modules in the South African LLB. As there is limited research in South Africa on teaching legal analysis, this note aims to provide a South African perspective based on the considerable body of research on this issue in the United States of America.

There are various definitions of “critical thinking”,²⁵ but in this note reliance is placed on the explanation provided by James and Burton,²⁶ who contextualise this concept for the purposes of legal education as

careful and thoughtful questioning of a legal statement, claim, argument, decision, position or action according to an explicit set of criteria or standards. It is a form of thinking about legal phenomena that is characterised by an unwillingness on the part of the law student to accept the object of critique at face value. Instead, the

22 Turner 2012:351.

23 Turner 2012:351.

24 Passalacqua 1997:207.

25 See James & Burton 2017:3 fn. 8 and 9. See also Kalinowski 2018:109-112.

26 James & Burton 2017:4.

student insists upon forming [his/her] own judgement and reaching [his/her] own conclusion through rigorous, open-minded and even-handed interpretation, analysis, and evaluation of the object of critique.²⁷

The authors proceed to provide the following comprehensive definition of critical thinking in the legal education setting:

Critical thinking is disciplined reasoning about a legal statement, claim, argument, decision, rule or action, beginning with an accurate and detailed interpretation, progressing through a perceptive and thorough analysis and an appropriate, rigorous and balanced evaluation, and concluding with an original, persuasive, and ingenious synthesis.²⁸

2. Legal analysis as a critical lawyering skill

According to Harner, it takes more than thinking like a lawyer to be a good practising lawyer. She also emphasises that analytical skills form a good foundation from which lawyers can serve their clients.²⁹ Spreng refers to the fundamental lawyering skills as comprising problem-solving, legal analysis and reasoning, legal research, factual investigation, and communication.³⁰ All these skills underline the necessity to be able to think critically and analytically. Venter is of the opinion that

[a]nalysis is a particular way of thinking about problems, drawing information from various sources, analogizing fact patterns, extrapolating rules, synthesizing and strategizing, and making predictions, no matter what the circumstances.³¹

She explains that students must be able to describe and apply the law, create persuasive arguments and, of course, use authority appropriately.³²

Wiseman³³ explains³⁴ that to think like a lawyer means to make distinctions that the vast majority of people will not make; to see ambiguity where others do not; to see both sides of an argument or situation, and to have the ability to be indifferent to which one of those sides is right.³⁵ According to Harner, key analytical skills refer to a particular set of abilities including the ability to identify issues and the applicable tools and possible barriers, while “embracing ambiguity, and thinking creatively to resolve issues”.³⁶

27 James & Burton 2017:4.

28 James & Burton 2017:9.

29 Harner 2011:103.

30 Spreng 2015:43.

31 Venter 2006:626.

32 Venter 2006:626.

33 Wiseman 2006:653-664.

34 Somewhat tongue-in-cheek!

35 Wiseman 2006:654; Gopen 2011:xvii-xxxv.

36 Harner 2011:102-103.

Kraft states that deductive reasoning is a crucial part of legal analysis.³⁷ She explains deductive reasoning as reasoning that moves from the general to the specific.³⁸ Swisher also refers to deductive reasoning, stating that “[i]n deductive legal reasoning, the conclusion must follow from the premises as a matter of logical necessity; if one accepts the premises, then one must also accept the conclusion, since it is logically compelling or *conclusive*”.³⁹

Nilson explains that asking questions is central to the development of critical thinking.⁴⁰ She proposes that lecturers should ask their students challenging, open-ended questions that demand real inquiry, analysis or assessment.

Without referring to one of the legal analysis methods or organisational structures, James and Burton summarise the need for and the process of critical thinking as follows:

Critical thinking is an important practical skill for solving legal problems, particularly once the law student moves beyond the simple formalism that [s/he is] taught in the early part of [his/her] legal studies. When presented with the details of a problem the student is able to interpret the information given; analyse it to identify any missing information, unspoken assumptions and implicit biases; evaluate its accuracy and reliability; and synthesise the results of [his/her] interpretation, analysis and evaluation to determine whether there is a need for more detail or information from another source, and to identify the most appropriate legal rules to be used to prepare the advice. After conducting the requisite legal research the student is able to apply [his/her] critical thinking skills to interpret the legal rules and doctrines that [s/he] locate[s]; analyse the information to determine its underlying structure; evaluate it for relevance and reliability; and synthesise the results in reaching an informed and persuasive conclusion about the legal problem and preparing appropriate advice for the client.⁴¹

3. Methods of legal analysis

Lecturers should be flexible in teaching legal analysis methods. Although it is important that especially first-year students are taught a specific method to make them understand the process and to give them guidelines in their writing and analysis, they should also be allowed and even encouraged to develop a method that suits them as well as the specific situation to be analysed. Kraft suggests that it will be helpful to expose students, even in their first year, to at least some of the other methods apart from the one they are taught.⁴² Students must understand that they do not need to

37 Kraft 2015:568.

38 Kraft 2015:568.

39 Swisher 1981:536.

40 Nilson 2016.

41 James & Burton 2017:2.

42 Kraft 2015:593.

follow a specific method rigidly, but that it is a basic guide to assist them to organise their argument, writing, and thoughts.⁴³ Spanbauer states that the methods of legal analysis are a deductive tool, which students must actively manipulate, in order to persuade the reader of their view or of a particular outcome.⁴⁴ According to Grant, “[t]he more that students can interact with and manipulate the materials and information, the more they can retain”.⁴⁵

Metzler views especially the IRAC method not only as an organisational structure, but also as a mental exercise that drives the student to a deeper understanding of the law.⁴⁶ Natt Gantt explains that “the IRAC framework and the search for coherence serve as good starting points for describing generally the cognitive thought processes lawyers customarily address in solving legal problems”.⁴⁷

However, critics⁴⁸ of these methods of analysis or organisation argue that they only teach students how to summarise cases and write examinations.⁴⁹ They do not teach students how to do analysis, but only provide them with an organisational method or formula to write the analysis.⁵⁰ Rappaport views the use of a specific method as limiting the pre-writing phase of thinking, free writing⁵¹ and discussion, and hindering the development of persuasive writing.⁵² Trevor explains that students often do not recognise that these methods leave room for flexibility, adaptation and a specialised approach. These methods are tools and not goals in themselves.⁵³ Venter also states that formulas or methods are helpful in assisting students to structure their writing and their analytical thought process, but these methods tend to become too formalistic and are too limited to contribute to the development of analytical skills.⁵⁴ These formulas also do not allow for creative thinking, but rather formalism.⁵⁵ The formulas should be a tool for writing the analysis and creativity should be part of the actual response or arguments.⁵⁶

The IRAC method is simple and convenient, but, according to Mendenhall, it lacks direction and possibly confines students to a rigid

43 Mendenhall 2008:23.

44 Spanbauer 1999:169.

45 Grant 2015:639.

46 Metzler 2003:501.

47 Natt Gantt 2007:443.

48 For detailed criticism of especially the IRAC method, see Emiri *et al* 2017:31-76; Graham 2015:681-715.

49 Kerper 1998:359.

50 Foehrkolb & DeSimone Jr 2014:172 fn. 9.

51 See Lee 2016:661-663.

52 Rappaport 2010:111-112. For a detailed critique of especially the IRAC method, see Cornwell 1997:1091-1135; Gopen 2011:xviii-xix, in particular; Rappaport 2008:267-302; Schee 1997:120-121.

53 Trevor 2015:232 fn. 66.

54 Venter 2006:624.

55 Venter 2006:624.

56 Venter 2006:624.

system. Mendenhall views IRAC as a basic guide, not a sovereign requirement.⁵⁷

Graham is especially critical of the IRAC method.⁵⁸ She states that IRAC is too simplistic and masks the complex and interrelated steps students must learn, in order to be able to analyse and write about a legal problem.⁵⁹ She identifies inherent inadequacies in all four components of the IRAC method.⁶⁰

There is not a single method that will be the right one to use in all circumstances⁶¹ and Gopen argues that “there is not and cannot be a single structure that is the right answer to the question how argumentative thought is best conveyed from the mind of a writer to the mind of a reader”.⁶² Students must be able to question, alter or reject the rigid method as need be.⁶³ Montiel explains that using a specific method is a cognitive skill, but determining when to modify it is a metacognitive skill that requires a more complex thought process.⁶⁴ The students must learn that a method can and must be varied to be appropriate to a particular issue or situation.⁶⁵

The methods of legal analysis provide a step-by-step framework to solve a legal problem.⁶⁶ The following methods can be used:⁶⁷

- BaRAC (Bold assertion, Rule, Application, Conclusion);⁶⁸
- CIRIP (Conclusion, Issue, Rule/principle, Interweaving, Policy);⁶⁹
- CLEO (Claim, Law, Evaluation, Outcome);⁷⁰
- CRAAP (Conclusion, Rule, Authority, Application, Policy);⁷¹

57 Mendenhall 2008:23.

58 Graham 2015:681-715.

59 Graham 2015:682.

60 Graham 2015:683-691.

61 See also Nilon 2017:195-220; Cotugno 2018:597-622. Nilon explains a holistic teaching method of teaching critical legal thinking, using various lecture and other methods to teach critical thinking skills.

62 Gopen 2011:xviii.

63 Todd 2006:938-939.

64 Montiel 2015:267.

65 Montiel 2015:267.

66 “Using IRAC to answer problem-solving questions”, <http://survivelaw.com/index.php/blogs/study/303-using-irac-to-answer-problem-solving-questions> (accessed on 13 August 2019).

67 Turner (2012:351-364) provides an overview of most of the methods and analyses for the application of these methods as illustrated by textbooks, and so on. She also gives a comprehensive bibliography on the methods of organisation or legal analysis, especially in fn. 2 on 351 and fn. 7 on 353. Pollman (2004:243, 257) suggests that there is confusion and no consistency pertaining to all these organisational terms.

68 Turner 2012:357.

69 Rice 2015:555.

70 Strong 2014:33.

71 Turner 2012:358.

- CRAAAP (Conclusion, Rule, Authority, Application, Alternative analysis, Policy);⁷²
- CRAC (Conclusion, Rule, Analysis, Conclusion);⁷³
- CRARC (Conclusion, Rule, Application, Rebuttal and refutation, Conclusion);⁷⁴
- CREAC (Context-Conclusion, Rule, Explanation of the law, Application of the law, Conclusion);⁷⁵
- CREXAC (Conclusion, Rule, Explanation of rule, Application of rule, Conclusion);⁷⁶
- CRuPAC (Context/Conclusion, Main rule, Proof of Rule, Application, Conclusion);⁷⁷
- FIRAC (Facts, Issue, Rule of law, Application, Conclusion);⁷⁸
- FORAC (Facts of precedent case, Rule, Application, Conclusion);⁷⁹
- HIRAC (Heading, Issue, Rule, Application, Conclusion);⁸⁰
- IGPAC (Issue, General rule, Precedent, Application of rule, Conclusion);⁸¹
- IRAC (Issue, Rule, Application, Conclusion);⁸²

72 Turner 2012:358.

73 Howell 2011-2012:64; Higdon 2013:98; Turner 2012:357; Pollman 2002:898 fn. 51; Spanbauer 1999:176 fn. 47.

74 Turner 2012:357.

75 Kraft 2015:567-597; Higdon 2013:98; Figley 2011:246; Rice 2015:555; Murphy 2015:179; James 2012:73; Nordquist 2016; Venter 2006:624.

76 Turner 2012:357; Rappaport 2008:270 fn. 11.

77 Higdon 2013:98; Figley 2011:246; Turner 2012:357; Rappaport 2008:270 fn. 11.

78 Maisels & Greenbaum 2001:95.

79 Pollman 2002:898 fn. 51.

80 James 2012:75.

81 Turner 2012:357.

82 Higdon 2013:98; Figley 2011:246; Flaherty 2001:73; Kerper 1998:359; Metzler 2003:501-503; Rappaport 2010:67; Wiseman 2006:660; Price 2007:996; Kraft 2015:567; Mendenhall 2008:23; Gopen 2011:xviii; Lake 2000:1023; Montana 2008:302; Feeley 2009:224; Pollman 2004:242 fn. 6; Pollman 2002:898 fn. 50; Spanbauer 1999:175 fn. 47; Miller & Charles 2010:192-220, especially 193; Rice 2015:555; Nordquist 2016; Venter 2006:624; Natt Gantt 2007:440; Graham 2015:681-715; Emiri *et al* 2017:31-76; "Using IRAC to answer problem solving questions", <http://survivelaw.com/index.php/blogs/study/303-using-irac-to-answer-problem-solving-questions> (accessed on 13 August 2019); "IRAC for law school essays and exams (with examples)", <http://youveenteredlawland.com/irac-for-law-school-essays-and-exams/> (accessed on 5 August 2019); "IRAC method", <https://libguides.usc.edu.au/c.php?g=508700&p=3478850> (accessed on 5 August 2019); "Using the I-R-A-C structure in writing exam answers", https://www.csun.edu/sites/default/files/IRAC/ANALYSIS_Suaders.pdf (accessed on 26 August 2019).

- IRAC with EIP (Issue, Rule, Application, Conclusion, Explanation, Illustration, Policy);⁸³
- IRAAC (Issue, Rule, Application, Alternative analysis, Conclusion);⁸⁴
- IRAACP (Issue, Rule, Application, Alternative analysis, Conclusion, Policy);⁸⁵
- IRAAPC (Issue, Rule, Authority, Application, Policy, Conclusion);⁸⁶
- IRAEC (Issue, Rule, Application, Explanation, Conclusion);⁸⁷
- IREAC (Issue, Rule, Explanation, Application, Conclusion);⁸⁸
- IREXAC (Issue, Rule, Explanation, Application, Conclusion);⁸⁹
- IRRAAC (Issue, Rule, Reasoning, Application, Alternative analysis, Conclusion);⁹⁰
- IRRAC (Issue, Rule, Reasoning, Application, Conclusion);⁹¹
- MIRAT (Material facts, Issues, Rules, Arguments, Tentative conclusion);⁹²
- RAFADC (Rule, Authority, Facts, Analogising and Distinguishing, Conclusion);⁹³
- RIRAC (Reference, Issue, Rule, Application, Conclusion);⁹⁴
- SOLVE (Statement of the problem, Observing, organising and redefining the problem, Learn by questioning all parts of the problem, Visualise possible solutions and selecting and redefining it, Employ the solution and monitor results);⁹⁵
- TRAAC (Thesis, Rule, Analysis, Application, Conclusion);⁹⁶
- TREAC (Thesis, Rule, Explanation, Application, Conclusion);⁹⁷
- TREAT (Thesis, Rule, Explanation, Application, Thesis);⁹⁸ and
- TRRAC (Thesis, Rule identify, Rule explain, Application, Conclusion).⁹⁹

83 Turner 2012:358.

84 Turner 2012:358.

85 Turner 2012:358.

86 Turner 2012:358.

87 Wojcik 2006:26; James 2012:76.

88 Murray 2011:217-237.

89 Turner 2012:358.

90 Turner 2012:358.

91 Turner 2012:358.

92 James 2012:76.

93 Turner 2012:358.

94 Emiri *et al* 2017:35.

95 Kerper 1998:367-370.

96 Flaherty 2001:69-78.

97 Turner 2012:358.

98 Figley 2011:246; Murray 2011:217-237.

99 Turner 2012:358.

In the following table, the methods are compared in respect of the reasoning pertaining to the conclusion. There are some methods where the student starts with the conclusion (second column) and then determines the rule, application and authority to support the conclusion. The reason for this is to ensure that the conclusion, as the central focus of the writing, is highlighted. The first column shows that, in most of the methods, the determination of the rule or principle applicable (and the corresponding authority) will lead to the conclusion.

Starts with thesis/issue/facts, and so on	Starts with conclusion
BaRAC	CIRIP
CLEO	CRAAP
FIRAC	CRAAAP
FORAC	CRAC
HIRAC	CRARC
IGPAC	CREAC
IRAC	CREXAC
IRAC with EIP	CRuPAC
IRAAC	
IRAACP	
IRAAPC	
IRAEC	
IREAC	
IREXAC	
IRRAAC	
IRAC	
MIRAT	
RAFADC	
RIRAC	
SOLVE	
TRAAC	
TREAC	
TREAT	
TRRAC	

4. A brief explanation of the elements or phases of a legal analysis and organisational method

The elements or phases of any particular legal analysis method are the building blocks of the student's arguments. These are most often REA (Rule, Explanation and Application). Montana explains that the legal reader expects to see the conclusion first, followed by the rule of law and an explanation thereof. Finally, an application of the rule of law to the question, issue or set of facts takes place.¹⁰⁰

Murphy points out that the advantage of IRAC is that the writer can start with the analysis before knowing what the conclusion is.¹⁰¹ IRAC is, therefore, especially useful when writing examinations.¹⁰² However, lawyers most often start with the conclusion and thus he prefers methods such as CREAC that start with the conclusion.¹⁰³

The elements or phases that most of the methods have in common, irrespective of the specific way in which they are used or organised, are the identification of the issues and the law applicable; the application thereof or the context and the explanation of the rule, and the conclusion. In the following discussion, these main elements are discussed as facts or issues; context-conclusion; rule; analysis or explanation of the law, and conclusion.

4.1 Facts/Issue

Issues and facts need to be identified. When using the IRAC method, the first step is to identify the relevant issue(s).¹⁰⁴ This step is especially useful when summarising case law. The facts – as in the FIRAC method – are most often not included in the methods used except pertaining to rule application where the facts are, for example, necessary to identify the applicable rule or to give context to the application of the law in specific circumstances. Thus, including the facts before the rule explanation and application is encouraged in especially fact-intensive situations and, in this regard, privacy and custody are often used as examples.¹⁰⁵ The decision to include specific facts is also a skill that law students should learn, and the ability to decide which facts to include and to exclude is an important lawyering skill. When students are using a specific method (as in our case FIRAC) to summarise cases or write examinations, they must learn to focus on facts relevant to the rule application. This may also include the procedural history of the case (for example, the case summarised involves an appeal from a lower court).

100 Montana 2008:302.

101 Murphy 2015:179.

102 Murphy 2015:179.

103 Murphy 2015:179.

104 Kerper 1998:365.

105 Kraft 2015:579-580.

The issue specifically refers to the question or the problem. In the summary of a case, the issue deals with the legal question that the court was required to answer. As such, in student writing, it should generally be formulated as a question.¹⁰⁶ It is important that the student is able to state the issue(s) in question clearly.¹⁰⁷ The student should also identify the area of law that may govern the specific problem or is relevant to the specific case.

4.2 Context-Conclusion

It is clear that all methods of legal analysis include the identification, explanation and application of the rule of law as the core of the analysis.¹⁰⁸ Higdon¹⁰⁹ explains that there is a movement to encourage legal writers to move from IRAC to CRAC, CREAC, or CRuPAC.¹¹⁰ This places the conclusion at the heart of the writing and ensures that the thesis of the writing is highlighted.¹¹¹ It will also help students develop the skill to start each paragraph with a thesis or topic sentence.¹¹² The thesis sentence identifies the law and is followed by, for example, case law that proves the statement.¹¹³ According to Flaherty, a thesis sentence or statement forces the student to focus his/her writing and to start with an answer to the question presented.¹¹⁴ The student must, therefore, think about the question before s/he starts to write.¹¹⁵ It also forces the student to prove the thesis statement through analysis and to take responsibility for the statement made.¹¹⁶ This is also a simple method to assess the overall organisation of the paper¹¹⁷ as well as its structure and argumentation.

4.3 Rule

The rule is the law applicable or the test that must be applied. The “black-letter law” must be applied to facts or the issues¹¹⁸ and should be stated

106 “Using IRAC to answer problem solving questions”, <http://survivelaw.com/index.php/blogs/study/303-using-irac-to-answer-problem-solving-questions> (accessed on 13 August 2019).

107 “Using the I-R-A-C structure in writing exam answers”, https://www.csun.edu/sites/default/files/IRAC/ANALYSIS_Suaders.pdf (accessed on 26 August 2019).

108 Kraft 2015:579.

109 Higdon 2013:98.

110 Higdon 2013:98.

111 Higdon 2013:98; Turner 2012:362; Ronay 2014:133.

112 Higdon 2013:98; Turner 2012:362.

113 Turner 2012:363.

114 Flaherty 2001:75.

115 Flaherty 2001:75.

116 Flaherty 2001:75.

117 Higdon 2013:98.

118 Succeed your finals with our essay tips: IRAC your way to an “A”. “Using IRAC to answer problem solving questions”, <http://survivelaw.com/index.php/blogs/study/303-using-irac-to-answer-problem-solving-questions> (accessed on 13 August 2019); “IRAC method”, <https://libguides.usc.edu.au/c.php?g=508700&p=3478850> (accessed on 5 August 2019); “Using the I-R-A-C

as a general rule and not a conclusion.¹¹⁹ Students must be able to do research on the legal principle identified and discuss it. Turner states that legal analysis on the principles of law is the core element of IRAC¹²⁰ (as well as other methods) and, therefore, the rule must be identified before any analysis or argument on the application of the rule to a set of facts can ensue.¹²¹ This is also true of all the other identified methods of legal analysis. There can be more than one applicable rule. Figley defines rule synthesis as “the process of integrating a rule or principle from several cases”.¹²² Rule synthesis is a skill used to formulate an effective argument, develop jurisprudence, and anticipate future problems.¹²³ As an analytical lawyering skill, students can learn this skill not only in a dedicated legal writing module, but also in doctrinal modules. Furthermore, students will find that rule synthesis finds application in all their modules as a useful skill in writing examinations.

According to Figley, a “structured legal argument needs a rule to apply to the facts of the situation”.¹²⁴ Analysing a legal issue starts with the identification of the relevant legal principle.¹²⁵ This means that the student must learn to identify “the authorities that have applied a body of law in actual situations, derive from those applications the key principles of interpretation, and state those principles as a rule”.¹²⁶ In a structured legal argument, the rule to be applied must meet three criteria, namely it should be simple and concise; it should be readily applied, specific and unambiguous, and it must be consistent with the (case) law, so that, if applied, it would accurately predict the outcome.¹²⁷

Price explains that, practically, students should be able to state their conclusion about the issue, state the applicable rule of law, explain the rule, apply the rule to the facts, and then restate their conclusion.¹²⁸ According to Kraft, in all methods of legal analysis, the rule is stated before it is applied to the facts.¹²⁹ She explains that rule explanation comes first before the rule application, because the rule explanation should provide the basis for the acceptance of the application to the facts.¹³⁰

structure in writing exam answers”, https://www.csun.edu/sites/default/files/IRAC/ANALYSIS_Suaders.pdf (accessed on 26 August 2019).

119 “Using the I-R-A-C structure in writing exam answers”, https://www.csun.edu/sites/default/files/IRAC/ANALYSIS_Suaders.pdf (accessed on 26 August 2019).

120 Turner 2012:356.

121 Enns & Smith 2015:129; Feeley 2009:225.

122 Figley 2011:245.

123 Figley 2011:245.

124 Figley 2011:246.

125 Turner 2012:356.

126 Figley 2011:246.

127 Figley 2011:247.

128 Price 2007:997.

129 Kraft 2015:569.

130 Kraft 2015:570.

4.4 Analysis or Explanation of the law

The analysis or explanation of the law is the most important part of legal analysis. It is the application of the rule to the fact and the question or problem. Students are required to focus on the relationship between law and facts.¹³¹ Through the analysis, the student must explain what the rule means, how it must be interpreted, and how it was applied in the past.¹³² The analysis or explanation of the rule is where the student expands on the rule by explaining how the rule has been applied and interpreted. This explanation could, for example, include case descriptions and a discussion of how the court applied the rule.¹³³ The student should be able to use the facts in order to explain how the rule leads to the conclusion.¹³⁴ Wojcik suggests that explaining the reason for a rule or the public policy behind the rule will usually support the argument.¹³⁵ A rule can also be explained by means of an example or by defining terminology.¹³⁶

The application consists of a discussion of the facts of the present case or question and how the relevant rule of law applies to it.¹³⁷ According to Ronay, the application of the law is the most important element of the legal analysis, because this is the persuasive part where the audience is asked to believe the writer.¹³⁸ Persuasive writing involves telling one side of the story and applying the law to it.¹³⁹ It is the application of the rule to the specific facts; this is where the argument is proved.¹⁴⁰ It can also include comparing and contrasting the particular case or issues with other cases.¹⁴¹

4.5 Conclusion

The conclusion is the answer to the question or problem. In especially summaries of cases or answers in examinations, it is necessary to give the final decision of the court or the final outcome of the case or problem. The student needs to give the solution to the problem or the conclusion or

131 Flaherty 2001:75; "Using the I-R-A-C structure in writing exam answers", https://www.csun.edu/sites/default/files/IRAC/ANALYSIS_Suaders.pdf (accessed on 26 August 2019).

132 Flaherty 2001:75.

133 Ronay 2014:133.

134 "Using the I-R-A-C structure in writing exam answers", https://www.csun.edu/sites/default/files/IRAC/ANALYSIS_Suaders.pdf (accessed on 26 August 2019).

135 Wojcik 2006:26.

136 Wojcik 2006:28.

137 Feeley 2009:225.

138 Ronay 2014:133.

139 Mendenhall 2008:24.

140 Ronay 2014:133.

141 Ronay 2014:133.

result reached,¹⁴² but should not rewrite the whole answer.¹⁴³ The student should choose the strongest argument and then formulate the answer.¹⁴⁴ The conclusion can also set out the courses of action available to a client and the probable success of each.¹⁴⁵

5. Conclusion

Law students need to develop the ability to summarise, argue, synthesise, criticise, organise, and evaluate. It is often said that law students must learn to think like lawyers and, therefore, the need to develop analytical and critical thinking skills is undeniably a core function of a law school. It is necessary to equip law students, especially in their first year, with a method to enable them to conduct legal analyses. Using one of these methods, as listed in this note, will contribute to the development of research skills, problem-solving skills and analytical and critical thinking skills. Students may use a specific method as taught by the specific lecturer to solve problems, and to argue and communicate effectively through structuring their arguments. It is, however, clear that there is not a single method that is suitable in all circumstances and students must be able to adapt the method they use to their own learning and writing style, the specific purpose and the particular issue or circumstances. The methods are just that, namely methods to do something and not goals in themselves. Students can use any of these methods to structure an argument in, for example, answering assessment questions, drafting documents, writing research reports, and summarising judgments. Whatever a method of analysis is called, it is imperative that *some* method be used to lay the foundation for legal analysis and critical thinking. It is further important that all members of South African law faculties are made aware of the fact that this method is taught to first-year students and that – in accordance with the dual approach followed in the United States of America – it may be applied by students in all theory-based subjects, in order to solve or analyse legal problems. If a student is able to identify the issues, to see both sides of the issue or argument and to apply the law (rules and principles) to the issue, s/he will be able to critically engage with the law and be able to evaluate the law (case law, legislation, and so on) in terms of its applicability, usefulness, success, but also its limits and constraints. Moreover, the ability to critically engage

142 “Using IRAC to answer problem solving questions”, <http://survivelaw.com/index.php/blogs/study/303-using-irac-to-answer-problem-solving-questions> (accessed on 13 August 2019); “Using the I-R-A-C structure in writing exam answers”, https://www.csun.edu/sites/default/files/IRAC/ANALYSIS_Suaders.pdf (accessed on 26 August 2019).

143 “IRAC for law school essays and exams (with examples)”, <http://youveenteredlawland.com/irac-for-law-school-essays-and-exams/> (accessed on 5 August 2019).

144 “IRAC method”, <https://libguides.usc.edu.au/c.php?g=508700&p=3478850> (accessed on 5 August 2019).

145 “Using IRAC to answer problem solving questions”, <http://survivelaw.com/index.php/blogs/study/303-using-irac-to-answer-problem-solving-questions> (accessed on 13 August 2019).

and evaluate the law will transcend module-specific constraints and will contribute to the student becoming a lifelong learner throughout his/her career, which is something that all law schools and faculties should strive for. A method of analysis or organisation will, like a GPS, serve the student as a guide in all legal writing, problem-solving, and legal analysis.

BIBLIOGRAPHY

ANON

[s.a.]. *Succeed your finals with our essay tips: IRAC your way to an "A". Using IRAC to answer problem solving questions.* <http://survivelaw.com/index.php/blogs/study/303-using-irac-to-answer-problem-solving-questions> (accessed on 13 August 2019).

ANON

[s.a.]. *IRAC for law school essays and exams (with examples).* <http://youveenteredlawland.com/irac-for-law-school-essays-and-exams/> (accessed on 5 August 2019).

ANON

[s.a.]. *Using the I-R-A-C structure in writing exam answers.* https://www.csun.edu/sites/default/files/IRAC/ANALYSIS_Suaderspdf (accessed on 26 August 2019).

BOYER A.

1985. Legal writing program reviewed: Merits, flaws, costs, and essentials. *Chicago-Kent Law Review* 62(1):23-54.

CORNWELL JR

1997. Legal writing as a kind of philosophy. *Mercer Law Review* 48(3):1091-1135.

COTUGNO M

2018. Using the case study method to improve Criminal Justice students' critical thinking skills. *Journal of Criminal Justice Education* 24(4):597-622. <https://doi.org/10.1080/10511253.2018.1426775>

EMIRI O, GIWA A & EHUSANI J

2017. Revisiting the traditional IRAC organisational structure for legal analysis: Towards a multidisciplinary approach. *Nigerian Law Journal* 20(1):31-76.

ENNS TL & SMITH M

2015. Take a (cognitive) load off: Creating space to allow first-year legal writing students to focus on analytical and writing processes. *Legal Writing Journal of the Legal Writing Institute* 20:109-140. <https://doi.org/10.2139/ssrn.2430741>

FEELEY BT

2009. Training field supervisors to be efficient and effective critics of student writing. *Clinical Law Review* 15(2):211-237.

FIGLEY P

2011. Teaching rule synthesis with real cases. *Journal of Legal Education* 61(2):245-263.

FLAHERTY M

2001. Paralegals and the community of legal discourse: Legal analysis and the TRAAC method. *Journal of Paralegal Education and Practice* 17:69-78.

FOEHRKOLB KV & DESIMONE JR MA

2014. Debunking the myths surrounding student scholarly writing. *Maryland Law Review* 74(1):169-198.

GOPEN GD

2011. IRAC, REA, where we are now, and where we should be going in the teaching of legal writing. *Legal Writing Journal of the Legal Writing Institute* 17:xvii-xxxv.

GRAHAM LP

2015. Why-Rac? Revisiting the traditional paradigm for writing about legal analysis. *University of Kansas Law Review* 63(3):681-715.

GRANT E

2015. The pink tower meets the ivory tower: Adapting Montessori teaching methods for Law School. *Arkansas Law Review* 68(3):603-667. <https://doi.org/10.2139/ssrn.2483130>

HARNER MM

2011. The value of "thinking like a lawyer". *Maryland Law Review* 70(2):101-130.

HIGDON MJ

2013. The legal reader; an exposé. *New Mexico Law Review* 43(1):77-126.

HOWELL L

2011-2012. Deconstructing CRAC: Teaching proposed findings of fact and conclusions of law in a legal writing program. *The Scribes Journal of Legal Writing* 14:53-92.

JAMES N

2012. Logical, critical and creative: Teaching 'thinking skills' to law students. *QUT Law & Justice* 12(1):66-88. <https://doi.org/10.5204/qutlr.v12i1.230>

JAMES N & BURTON K

2017. Measuring the critical thinking skills of law students using a whole-of-curriculum approach. *Legal Education Review* 27:1-20.

KALINOWSKI BA

2018. Logic *ab initio*: A functional approach to improve law students' critical thinking skills. *Legal Writing: The Journal of the Legal Writing Institute* 22:109-150.

KERPER J

1998. Creative problem solving vs. the case method: A marvelous adventure in which Winnie-the-Pooh meets Mrs. Palsgraf. *California Western Law Review* 34(2):351-374.

KRAFT DB

2015. CREAC in the real world. *Cleveland State Law Review* 63(3):567-597.

LAKE PF

2000. When fear knocks: The myths and realities of law school. *Stetson Law Review* 29(4):1015-1056.

LEE KJ

2016. Process over product: A pedagogical focus on email as a means of refining legal analysis. *Capital University Law Review* 44(3):656-670. <https://doi.org/10.2139/ssrn.2800135>

MAISELS P & GREENBAUM L

2001. *Introduction to law and legal skills*. Durban: LexisNexis Butterworths.

MENDENHALL A

2008. The importance of being earnest. A serious proposal to modify legal research and writing departments. *Student Lawyer* 5:20-24.

METZLER J

2003. The importance of IRAC and legal writing. *University of Detroit Mercy Law Review* 80(4):501-503.

MILLER NP & CHARLES BJ

2010. Meeting the Carnegie Report's challenges to make legal analysis explicit – Subsidiary skills to the IRAC framework. *Journal of Legal Education* 59(2):192-220.

MONTANA PG

2008. Better revision: Encouraging student writers to see through the eyes of the reader. *Legal Writing Journal of the Legal Writing Institute* 14:291-319.

MONTIEL J

2015. Empower the student, liberate the professor: Self-assessment by comparative analysis. *Southern Illinois University Law Journal* 39(2):249-274.

MURPHY JF

2015. Teaching remedial problem-solving skills to a Law School's underperforming students. *Nevada Law Journal* 16(1):173-198.

MURRAY MD

2011. Rule synthesis and explanatory synthesis: A Socratic dialogue between IREAC and TREAT. *Legal Communication and Rhetoric: JALWD* 8:217-237.

NATT GANTT II LO

2007. Deconstructing thinking like a lawyer: Analyzing the cognitive components of the analytical mind. *Campbell Law Review* 29(3):413-481.

NILON R

2017. A better way to fail: Teaching critical thinking to Chinese lawyers. *The Journal Jurisprudence* 33:195-220.

NILSON L

2016. *Teaching critical thinking: Some practical points*. http://email.magnapubs.com/teaching-critical-thinking-some-practical-points?ecid=ACsprvtAZvPbhIXSvmFb5Qk9hQgkbVJwcErTHdO-g-BHSLEFBEPH3CLUPIFc_HeKJQk4XW57WCco&utm_campaign=Faculty+Focus&utm_source=hs_email&utm_medium=email&utm_content=36254943&_hsenc=p2ANqtz-9R_iAyD79ce3tj_yEXJ7mLygktW6N_hf8SwfXGfNWvT0xFNn7xK_HEYWpDFybRVrdu34cwE2Zzc6MRxrhx4ZhaEQHH9Q&_hsmi=36254943 (accessed on 25 October 2016).

NORDQUIST R

2016. *IRAC (legal writing)*. <http://grammar.about.com/od/il/g/Irac.htm> (accessed on 25 October 2016).

PASSALACQUA A

1997. Using visual techniques to teach legal analysis and synthesis. *Legal Writing Journal of the Legal Writing Institute* 3:203-216.

PLANA RM

2012. Critical thinking inside law schools: An outline. *Onati Socio-legal Series* (online) 2(5):7-24. <http://ssrn.com/abstract=2115429>.

POLLMAN T

2002. Building a tower of Babel or building a discipline? Talking about legal writing. *Marquette Law Review* 85(4):887-928.

2004. IRLAFARC! Surveying the language of legal writing. *Maine Law Review* 56(2):239-298.

PRICE JE

2007. Imagining the law-trained reader: The Faculty description of the audience in legal writing textbook. *Widener Law Journal* 16:983-1002. <https://doi.org/10.2139/ssrn.929108>

RAPPAPORT B

2008. Tapping the human adaptive origins of storytelling by requiring legal writing students to read a novel in order to appreciate how character, setting, plot, theme, and tone (CSPTT) are as important as IRAC. *Thomas M Cooley Law Review* 25(2):267-302.

2010. Using the elements of rhythm, flow, and tone to create a more effective and persuasive acoustic experience in legal writing. *Legal Writing Journal of the Legal Writing Institute* 16:65-116.

RICE SM

2015. Leveraging logical form in legal argument: The inherent ambiguity in logical disjunction and its implication in legal argument. *Oklahoma City University Law Review* 40(3):551-596.

RONAY J

2014. A mother goose guide to legal writing. *University of La Verne Law Review* 36(1):119-144.

SCHEE A

1997. Logical reasoning "obviously". *Legal Writing Journal of the Legal Writing Institute* 3:105-126.

SNYMAN-VAN DEVENTER E

2015. Legal writing skills in the South African LLB (law degree): To integrate or not. Paper presented at the CLEA Conference, Glasgow, Scotland. South African Council on Higher Education (SACHE)

2018. *Report on the National Review of LLB Programmes. The state of the provision of the Bachelor of Laws (LLB) qualification in South Africa.* https://www.che.ac.za/sites/default/files/publications/CHE_LLB%20National%20Report_2018_DD_REV2-05.pdf (accessed on 28 October 2019).

SPANBAUER JM

1999. Teaching first-semester students that objective analysis persuades. *Legal Writing Journal of the Legal Writing Institute* 5:167-189.

SPRENG JE

2015. Spirals and schemas: How integrated courses in law schools create higher-order thinkers and problem solvers. *University of La Verne Law Review* 37(1):37-102.

STRONG SI

2014. How to write law essays and exams. 4th ed. Oxford: Oxford University Press. <https://doi.org/10.1093/he/9780199684557.001.0001>

SWISHER PN

1981. Teaching legal reasoning in Law School: The University of Richmond Experience. *Law Library Journal* 74(3):534-542.

TODD A

2006. Neither dead nor dangerous: Postmodernism and the teaching of legal writing. *Baylor Law Review* 58(3):893-947. <https://doi.org/10.2139/ssrn.895580>

TRACY JB

2006. I see and I remember: I do and understand – Teaching fundamental structure in legal writing through the use of samples. *Touro Law Review* 21(2):297-348.

TREVOR MB

2015. The care and feeding of the twenty-first century developing legal writer. *Legal Communications & Rhetoric: JALWD* 12:219-246.

TURNER T

2012. Finding consensus in legal writing discourse regarding organizational structure: A review and analysis of the use of IRAC and its progenies. *Legal Communication and Rhetoric: JALWD* 9:351-364.

VENTER CM

2006. Analyze this: Using taxonomies to “scaffold” students’ legal thinking and writing skills. *Mercer Law Review* 57(2):621-644.

WISEMAN P

2006. “When you come to a fork in the road, take it”, and other sage advice for first-time law school exam takers. *Georgia State University Law Review* 22(3):653-664.

WOJCIK ME

2006. Add an E to your IRAC. *Student Lawyer* 35(3):26-29.