13. Legal capability and access to civil justice

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INTRODUCTION

When we enter the world, we enter a world that has become 'law-thick' (Hadfield 2010, p.133). Successive waves of 'juridification'[1] have seen law permeate almost all aspects of our lives. United Nations Sustainable Development Goal 16.3 asks governments to act to "ensure equal access to justice for all."[2] Yet, it is evident that equality of access to justice is a lofty goal, not least because some people face more, and struggle more to deal with, what Genn (1999, p.12) termed 'justiciable' problems.[3]

The many 'legal needs' surveys conducted over recent decades have demonstrated an "inequality of problem experience," with surveys repeatedly demonstrating "associations between disadvantage and justiciable problem experience" (Pleasence et al. 2019, p.31). This is compounded by an uneven distribution of 'legal capability' to address problems. How much we are aware of the law around us, how much we understand its content and the sources of legal help and processes available if needed, how confident we are in our ability to achieve appropriate resolutions to justiciable problems, and how well our awareness, knowledge and confidence translate – through our broader capability and circumstances – into effective behaviour all dictate how well we are able to utilise or defend our legal rights.

In this chapter we define legal capability, set out its many dimensions, provide an overview of levels and social patterns of some of the key dimensions, and explain why understanding and addressing legal capability is critical to effective access to justice policy and practice.

DEFINING LEGAL CAPABILITY

Galanter (1976, p.225) asserted that "lack of capability of parties poses the most fundamental barrier to access [to law]." He defined party capability as a combination of various personal capacities "which can be summed up in the term 'competence': ability to perceive grievance,

[1] Defined by Habermas (1987, p.357) as 'the tendency towards an increase in formal (or positive, written) law that can be observed in a modern society'.

[2] As detailed in Resolution 70/1 of the UN General Assembly, September 25, 2015. Ensuring equal access to justice can be defined as enabling people equally "to defend and enforce their rights and obtain just resolution of legal problems in compliance with human rights standards, if necessary through impartial formal or informal institutions of justice and with appropriate legal support" (UN Governance Statistics Praia City Group 2020, p.100).

[3] Genn (1999, p.12) defined a justiciable issue as "a matter experienced by a respondent which raised legal issues, whether or not it was recognised by the respondent as being 'legal' and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system."

information about availability of remedies, psychic readiness to utilise them, ability to manage claims competently, seek and utilise appropriate help, etc." (p. 231).

More recently, first in the context of community legal education (Parle 2009, Jones 2010, Collard et al. 2011) and, later, in the broader context of legal needs and access to justice (e.g. Pleasence et al. 2014), the array of knowledge, skills and attributes "required for an individual to have an effective opportunity to make a decision about whether and how to make use of the justice system" has come to be generally referred to as 'legal capability' (Pleasence et al. 2014, p.123–4).

The adoption of the term legal capability was accompanied by some efforts to conceptualise it as a component of Sen's (1999, p.75) broad notion of capability as "the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles)."[4] This broader notion of capability is at the core of Sen's influential 'capability approach' to human development. The capability approach significantly redirected the attention of development economics from solely measuring national income to emphasising policies that prioritise the well-being and empowerment of individuals, and reconceptualised the purpose of development as being "to enlarge people's choices in all fields – economic, political, cultural" (ul Haq 1995, p.xvii).

Within the capability approach, as elucidated by Nussbaum (2011, p.20), capabilities are not solely individual abilities but also encompass the freedoms and opportunities that arise from "a combination of personal abilities and the political, social, and economic environment." Thus, we can distinguish between 'internal capabilities' ("trained or developed traits and abilities" (p.21)),[5] "external opportunity" (p.61) and "combined capabilities" (p.21). The last of these is equivalent to Sen's 'substantive freedom'.

The distinction between internal capabilities and combined capabilities is particularly important in the policy context. It corresponds to two distinct, but overlapping, societal tasks: the first to produce internal capabilities, and the second to provide avenues "through which people actually have the opportunity to function in accordance with those capabilities" (Nussbaum 2011, p.21). In the access to justice policy context, Balmer et al. (2023, p.29) have noted that 'avenues of opportunity' are "represented most obviously by legal frameworks, institutions of justice and legal services," but also extend to "the more general favorability of the environment (which includes such things as IT and transport infrastructure, security and structural inequality)."[6]

The capability approach also requires differentiation between capabilities and functioning. Sen clarified the distinction in his 1985 Tanner Lectures (Sen 1987, p.36).

> A function is an achievement, whereas a capability is the ability to achieve. Functionings are, in a sense, more directly related to living conditions, since they *are* different aspects of living conditions.

[4] Indeed, we have sought to conceptualise the entire experience of justiciable issues in terms of capability (Pleasence and Balmer 2019).

[5] In turn, internal capabilities must be distinguished from 'innate equipment', also referred to as 'basic capabilities', which refers to the inherent potential individuals possess from birth (Nussbaum 2011, p.21).

[6] See, for example, the taxonomy of access to justice set out in the UN Handbook on Governance Statistics (UN Governance Statistics Praia City Group 2020).

> Capabilities, in contrast, are notions of freedom, in the positive sense: what real opportunities you have regarding the life you may lead.

Within the framework of the capability approach and the context of access to justice, Habbig and Robeyns (2022, p.10) have more broadly defined legal capability as "the genuine or real opportunities someone has to get access to justice." These opportunities, they went on, "include both the formal and the informal possibilities which can be employed to access a legal system or solve legal problems and that are embedded in a system guaranteeing fairness and rightness."

Figure 13.1 sets out an illustration of legal capability provided by Habbig and Robeyns, as modified by Balmer et al. (2024, p.23), to summarise the conceptual components of legal capability within the capability approach. Thus, in the broadest terms, as Balmer et al. (p. 24) went on, we can conceptualise legal capability as:

> the freedom and ability to navigate and utilise the legal frameworks which regulate social behaviour and to achieve fair resolution of justiciable issues.

Habbig and Robeyns (2022) highlighted the importance of considering all of the internal capabilities, external opportunity, and combined capabilities in access to justice policy and research. This is clearly so, though hugely challenging.

As Balmer et al. (2024, p.24) have observed, much recent deliberation on and investigation into legal capability has been linked to surveys, and surveys are limited as to which elements of capability they can explore effectively. As a result, their focus has been on "investigation of internal capabilities and the relationship between these and functionings." However, some survey-based studies have attempted to look beyond internal capabilities to some extent – in, for example, exploring geographical patterns of advice seeking (Patel et al. 2008) and the relationship between aspects of internal legal capability, legal service supply levels and demand for legal services (Pleasence et al. 2011). These studies reinforce a general impression of a wicked complexity in the interaction between different aspects of capability that matches the complexity of social policy's "wicked problems" (Churchman 1967, p.141).

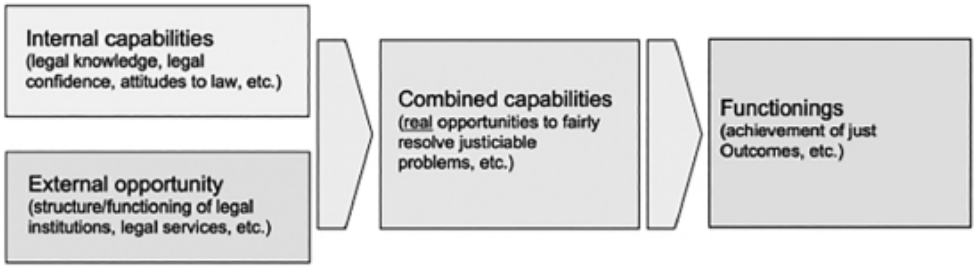

Figure 13.1 Legal capability within the capability approach

DIMENSIONS OF LEGAL CAPABILITY

There are many dimensions of legal capability, though only a proportion are particular to the legal domain. Most are generic.

Various competing and increasingly sophisticated frameworks of legal capability have been advanced to inform and guide research and to suggest interventions for access to justice policy and practice.

Galanter (1976, p.225) provided five examples of 'personal capacities' necessary for 'competence' to deal with justiciable problems. However, these were slow to be built upon. Although the 1980s and 1990s saw a 'substantial' emerging consensus around the elements of competent lawyering (Sherr et al. 1994), it was not until the early 21st century that concerted efforts were directed towards developing a more broadly applicable framework for understanding (the public's) legal capability.

In the context of a study investigating the need for public legal education for young people in England and Wales, "to gain an insight into the nature of their legal capability," Parle (2009, p.5) detailed six 'domains of legal capability': 'knowing rights and remedies', 'spotting a legal issue', 'knowing where to go for help', 'planning how to resolve the issue', 'communicating effectively' and 'managing emotions'. Building on this and drawing on an earlier financial capability framework conceived around domains of knowledge, skills and attitudes (Financial Services Authority and Basic Skills Agency 2004), Jones (2010) went on to detail 21 aspects of legal capability across four core domains. These were then modified to 22 aspects of legal capability across four functional domains: 'recognising and framing the legal dimensions of issues and situations', 'finding out more about the legal dimensions of issues and situations', 'dealing with law-related issues' and 'engaging and influencing' (Collard et al. 2011).[7] In listing 19 examples of aspects of legal capability, Pleasence et al. (2014) added to the underlying domains of knowledge, skills and attitudes by expanding the concept to personal attributes and resources. Community Legal Education Ontario (CLEO) (2016) subsequently detailed 44 aspects of legal capability in a legal capability matrix; its columns representing domains of 'knowledge needed', 'skills needed', 'personal characteristics and circumstances needed' and 'barriers', its rows representing various stages of the legal journey.[8] Most recently, Balmer and Pleasence (2019) refined this approach in setting out over 100 aspects of legal capability in a similarly conceived matrix. An abridged version of this matrix is set out in Table 13.1. The four columns represent domains of knowledge, skills, attributes and resources/environment while the rows represent the stages of issue recognition, information/assistance, resolution and (more broadly) wider influence/law reform. The horizontal dimensions draw particularly on Collard et al.'s functional approach and, as with CLEO's matrix, differentiate – in line with contemporary research methods in the field of legal needs (Pleasence et al. 2019) – stages of justiciable problem resolution. They thus also reflect abstract stages of disputing, such as those described in Felstiner et al.'s (1980–81) model of the emergence and transformation

[7] These domains were 'recognise and react', 'find information and help', 'manage and plan' and 'active citizenship'.

[8] These stages were split into six domains: (stage 1) 'figuring out that the problem is a legal one', 'getting information about the problem', (stage 2) 'getting help with the problem', 'figuring out the problem and identifying next steps', (stage 3) 'taking steps to deal with the problem' and 'taking formal steps in a legal process'.

of disputes as 'naming', 'blaming' and 'claiming'. The domain of issue recognition encompasses the stages at which situations are perceived as injurious (naming) and another party is blamed (blaming). The domains of information/assistance and resolution encompass the stage in which another party becomes the subject of accusations (claiming). In reality, passage through these stages is not always a simple linear one (e.g. Olesen and Hammersley 2023). But, it is vital that all components and stages of disputing behaviour (as well as of behaviour concerning non-contentious justiciable issues) are fully reflected in any comprehensive legal capability framework.

The matrix in Table 13.1 incorporates external opportunities (as defined above by Nussbaum) and makes explicit reference to, for example, the availability of services and processes. However, its focus remains on personal knowledge, skills and attributes – internal capabilities – which continue to be the main focus of related access to justice scholarship. Further insight into the broad range of external factors that influence people's ability to address justiciable issues is provided by the taxonomy of access to justice set out in the *Handbook of Governance Statistics* (UN Governance Statistics Praia City Group 2020).[9]

Levels of Legal Capability

In this section we provide an overview of empirical insights into the nature of, levels, and social patterning of four key broad dimensions of legal capability. Starting with an aspect of the 'naming' stage of Felstiner et al.'s (1981) model, which can be termed 'framing' (e.g. Merry 1990), we review the extent to which people see and apply the legal frameworks within which daily life unfolds. We then turn to the extent to which people understand the law, before moving on to people's attitudes towards law and, finally, their confidence to successfully navigate legal paths to problem resolution.

PUBLIC AWARENESS OF CIVIL LAW

There are many ways in which particular justiciable problems can be framed. In the context of mediation, Merry (1990, p.4), for example, identified distinct 'moral', 'legal' and 'therapeutic' discourses which each "point to" distinct solutions. Similarly, in the context of climate-induced population displacement, Arnall et al. (2019) discussed how 'legal', as opposed to, for example, 'security' or 'humanitarian' framing links to the use of different resolution processes. Thus, as Murayama (2010) found, whether people see problems as being 'related to law' links to subsequent use of lawyers. More extensive investigation by Pleasence and Balmer (2014, p.31), drawing on data from the English and Welsh *Civil and Social Justice Panel Survey* (CSJPS), found that "problem characterisation" is strongly associated with lawyer use. Issues characterised, or framed, as 'legal' were significantly more likely to see advice obtained from a lawyer, with statistical modelling indicating that legal characterisation was associated with significantly increased lawyer use (from 7% to 19%). However, the likelihood that advice

[9] Similar, though less extensive, conceptualisations of legal capability have also been offered by, for example, Coumarelos et al. (2012) and the Canadian National Action Committee on Access to Justice in Civil and Family Matters (2013).

Table 13.1 A legal capability taxonomy

Stage	Knowledge	Skills	Attributes	Resources/ Environment
Recognition of issues	• Core legal concepts and principles (e.g. types of law, key concepts, etc.) • Content of (substantive) law	• Recognise, for example, issues, culpability, relevance of law • Legal reasoning, analytical,	• Attitude to law, legal consciousness, open mindedness, intelligence, etc.	Time
Information/ assistance	• Capability limitations, such as concerning knowledge, skills and attributes • Sources of information, advice, representation, etc. For example, identity, location, cost, eligibility, etc., for legal assistance services, general advice services, issue specific services, etc.	• Recognise capability limitations, such as ignorance and lack of skill • Information literacy (generic and more specific). For example, recognise when/what information required, locate information sources, evaluate information, etc. • Digital literacy (technical, functional, social, etc.) • Communication (generic and more specific). For example, textual, verbal, non-verbal, comprehension, etc. • Inter-personal, such as rapport building and conflict management	• Self-awareness, self-esteem, emotional intelligence, empathy, open mindedness, readiness to act, patience, persistence, adaptability, etc. • Confidence in ability to acquire information, ask questions, use technology, etc. • Attitudes to law, legal services, technology, etc.	Time, money, social capital, availability of services, etc.

Stage	Knowledge	Skills	Attributes	Resources/ Environment
Resolution	• Process and resolution options. For example, forms of process, legal/extra-legal institutions, location, cost, eligibility, participants, functions of participants, etc. • Evidence. For example, forms, methods of obtaining, admissibility, etc. • Outcomes. For example, forms, means of enforcement, etc.	• Legal reasoning, analytical, information, literacy, digital literacy, communication (incl. with other parties, arbitrators, mediators, etc.), etc. • Organisation, such as record-keeping and time management • Planning, such as goal-setting and forecasting • Dispute resolution, such as negotiation and advocacy • Problem-solving, such as creative and lateral thinking • Decision-making, such as recognise options, recognise risks and evaluation	• Self-awareness, self-esteem, emotional intelligence, empathy, open mindedness, readiness to act, patience, persistence, adaptability, etc. • Confidence to change behaviour, negotiate, advocate, etc. Attitudes to process, accessibility, fairness, etc.	• Time, money, social capital, availability of services, availability of processes, etc.
Wider influence and law reform	• Nature of law, making / regulatory process. For example, judicial precedent, origins of legislation, legislative process, influences on legislative process, etc. • Institutions involved in law-making / regulatory process. For example, accessibility, internal process, etc. • Outcomes. For example, possibilities, impact, etc.	• Legal reasoning, information, literacy, digital literacy, communication, problem-solving, negotiation, advocacy, conflict resolution, evaluation, etc.	• Adaptability, assertiveness, empathy, fortitude, open mindedness, readiness to act, self-awareness, self-esteem, social awareness, etc • Confidence to enter public discourse, etc. • Attitudes to utility of process, etc.	• Time, money, social capital, availability of services, availability of processes, etc.

Source: Balmer and Pleasence 2019 (abridged).

from the (wider generic) 'advice sector' would be chosen as an appropriate response was the same irrespective of legal framing. The Victorian *Public Understanding of Law Survey* (PULS) also found legal framing to link to legal advice seeking behaviour among Australians. Problems framed as legal saw legal advice obtained on 35% of occasions, compared to 14% for other problems (Balmer et al. 2023, p.115).

Independent of justiciable problem experience, a number of studies have explored the extent to which people frame different types of problem as legal, along with the factors influencing this framing. Pleasence et al. (2011) found that some of 95 short descriptions of a diverse range of justiciable problems were much more likely to be described by survey respondents as legal than others.[10] Problems concerning personal injury and divorce were among those most often framed as legal, while problems concerning education were among those least often so framed (fewer than 30% of occasions). They also found that as the severity of problems increased, so too did the likelihood that obtaining legal advice would be selected as an appropriate response.[11] The 2019 Australian *Community Perceptions of Law Survey* (CPLS) yielded similar findings (Balmer and Pleasence 2019). On average, respondents perceived law as "relevant" or "very relevant" to 44 of 60 scenarios (and as "very relevant" to 23). Similar to England and Wales, law was most often seen as relevant to problems concerning personal injury and ancillary to relationship breakdown, but far less often seen as relevant to problems concerning education. Likewise, law was more often seen as relevant to more serious versions of problems, as was the importance of obtaining advice from a lawyer.[12]

Balmer and Pleasence (2019) also investigated the social patterning of legal framing. They found that women were more likely than men to see law as relevant to problems and, particularly, lawyers as important. This is particularly relevant in relation to issues where perceptions are gendered, such as in the case of intimate partner violence (e.g. Carlisle et al. 2022). They also found that those who lived in capital cities, along with those who reported a mental illness, were more likely to both see law as relevant and lawyers as important. Those with the most educational qualifications (compared to those with fewest) and those who spoke English at home (compared to those who spoke another language) were both more likely to see law as relevant to problems, but lawyers as less important.

The PULS incorporated a standardised Perceived Relevance of Law (PRL) scale, drawing on a subset of eight of the 60 justiciable problem descriptions used in the CPLS (Balmer et al. 2024).[13] Similar to the findings from the CPLS, the PULS indicated that those in major cities (particularly compared to those in regional and remote areas) and those with more qualifications were more likely than others to see law as relevant to the eight scenarios. Women and those who spoke English at home were also marginally more likely to do so. However, while those with a long-term illness or disability also did so slightly more often, those who reported severe mental distress did so less often.

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[10] Among options including 'moral', 'bad luck', 'private', and 'social'.

[11] The same was found by Pleasence and Balmer (2014).

[12] Although there was a strong positive correlation between perceptions of legal relevance and lawyer importance, there were some (typically less serious) problems for which perceptions of legal relevance were much more common than perceptions of lawyer importance and some (typically more serious) problems for which the opposite was the case.

[13] The scale development process is described in Pleasence and Balmer (2019), with further details of the particular scale set out in Balmer et al. (2022, 2023).

PUBLIC UNDERSTANDING OF CIVIL LAW

Even if people recognise there may be legal dimensions to problems, erroneous beliefs about the content of law can undermine the effectiveness of responses.

An increasing body of research into the public's understanding of the content of civil law suggests "a substantial knowledge deficit" (Pleasence et al. 2017, p.837).[14] The PULS found just 45% of 15 binary (yes/no) general legal knowledge questions were answered confidently and correctly, rising to just over 70% if tentative answers were included (and 77% if 'don't know' responses were then excluded) (Balmer et al. 2024).[15] This last percentage may seem impressive, but must be set against the 50% that could be expected by chance.

Mirroring earlier findings (e.g. Pleasence et al. 2017), the PULS also found marked differences in knowledge levels within and between areas of law. For example, the law concerning neighbours and rented housing was relatively well understood, while family and consumer law were relatively poorly understood.[16]

Beyond the content of the law, studies of litigants in person have also found that people have trouble "identifying facts relevant to [their] case," "understanding evidential requirements," and "understanding the nature of proceedings" (Williams 2011, p.5). There is also evidence of a sizeable knowledge deficit in relation to, particularly less common, sources of public legal assistance (Pleasence et al. 2015).[17]

Casebourne et al.'s (2006) study of employee awareness of employment rights in the United Kingdom found people to have less grasp of the intricacies of the law than broader legal principles. As with the PULS, it also pointed to the public's legal knowledge deficit being greater in relation to some areas of law than others. They showed that this is partly due to salience: individuals have little incentive to acquire knowledge that does not impact their lives. Thus, knowledge levels vary with people's circumstances. For example, individuals with dependent children were "understandably" found to be more likely than others to possess substantial knowledge about the parental right to request flexible working. More broadly, Pleasence et al (2017) found those in employment knew more than others about employment law generally. However, salience does not automatically translate to high knowledge levels, even among professionals. For example, studies have shown health and education professionals to have knowledge deficits in areas of law relevant to their practice (van Rooij 2021).

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[14] See, for example, Baker and Emery (1993), Balmer et al. (2023), Barlow et al. (2005), Darley et al. (1996), Denvir et al. (2013), Ellickson (1991), Kim (1999), Militello et al. (2009), Parle (2009), Panades et al. (2007), Pleasence and Balmer (2012), Pleasence et al. (2017), Sarat (1975), Saunders (1975), Tilse et al. (2019), Williams and Hall (1972), van Rooij (2021).

[15] Questions were all in the same format, with an example being "Is a rental provider allowed to enter a renter's home to carry out routine repairs without first telling the renter?"

[16] As Denvir et al. (2013) have discussed, general legal knowledge is not easy to measure through a short series of binary or multiple choice questions – though no ready alternative is available for incorporation into surveys. As indicated above, guesses will frequently yield 'correct' answers. However, these findings clearly indicate knowledge deficits and provide good insight into knowledge patterns.

[17] Also, while people generally report knowing something about lawyers and high-profile advice services such as, in the UK, Citizens Advice, they are often wrong in their assumptions about types of help and areas of law for which help is available (Pleasence et al. 2015).

There is evidence of there being less of a legal knowledge deficit among those with an interest in or, predictably, experience of the law. Baker and Emery (1993, p.445) found students about to commence a family law course had slightly better knowledge of divorce law than the public in general, with those who had finished the course having better knowledge still – although, "in absolute terms . . . even these students' perceptions were highly inaccurate."

In terms of demographics, age has been found to be associated with legal knowledge, with 'middle-aged' people associated with a higher knowledge level both generally and across different areas of law (Pleasence et al. 2017; Balmer et al. 2024). The PULS suggested some further (modest) demographic associations with general legal knowledge levels (Balmer et al. 2024). For example, women answered a slightly greater number of the 15 PULS knowledge questions correctly than men, despite Saunders (1981) having found men were more likely to think they know what the law is. PULS also pointed to higher general knowledge scores for those providing day-to-day care for elderly or disabled adults, those with a long-term illness or disability, those with English as a first language, and those living in outer regional and remote areas. However, in most instances, there appear to be differences in the demographic factors associated with knowledge levels between areas of law.

When it comes to the nature of erroneous knowledge, it seems that many errors are systematic in nature, not random. As Lewis et al (2009, p.107) observed, "people's perceptions of their rights and duties are learned in a social context." This means that legal reality and the public's perception of the content of law can both be coherent, while also being distinct. Pleasence and Balmer (2012, p.323) found a "symmetry of error in people's beliefs about [English and Welsh] marriage and cohabitation law, where beliefs about both cohabitation and marriage law err from their (often opposing) correct legal positions to rest more closely in line with social attitudes."

Incorrect perceptions of the content of law are resistant to change. Ellickson (1991) and Kim (1999) both drew on cognitive dissonance theory to explain why beliefs about laws concerning cattle trespass and employment persisted in the face of contradictory evidence. Kim (1999: 447–8) found that a fairness norm "overshadow[ed] the influence of most . . . experiential factors," while Ellickson (1991, p.89) memorably found that, even after repeated experiences of insurance companies and courts following different principles, the ranchers of Shasta County, California, held firm in the belief that, in the event of road collisions in 'open range,' "the motorist buys the cow." Pleasence and Balmer (2012) also drew on cognitive dissonance theory in explaining their findings, as well as optimism bias, but in a later study of public understanding of consumer law, Pleasence et al (2017) stressed the importance of norms and practice in establishing beliefs. In explaining their finding that survey respondents underperformed chance (i.e. performed less well than had they simply flicked a coin), they pointed to the strong influence of the practice norms of retailers, observing that "beliefs about consumer law, while strikingly wrong, are also strikingly in line with retail practice, where cancellations of orders for late (or even on-time) delivery are routinely accepted, refunds are consistently provided for 'mistake' purchases and defective products are ordinarily replaced with new ones" (p.855).

PUBLIC ATTITUDES TO CIVIL LAW

An 'attitude' is "an enduring pattern of evaluative responses towards a person, object, or issue" (Colman 2015, p.62). Attitudes are important in the context of legal capability, as "the common view" is that they bring about a "predisposition to behave in a particular way" (Coaley 2014, p.231). Beyond legal framing and knowledge of law, people's attitudes towards law, legal institutions, legal processes, and actors in the legal system will influence when and how people encounter legal issues and use law, legal services, and legal processes in their lives.

However, attitudes are complex and multidimensional. They are often described as being constituted of (or drawing from) affective, behavioural and cognitive (the 'ABC') components (or bases) (Rosenberg and Hovland 1960, Eagly and Chaiken 1993).[18] They can also be associated with multiple distinct aspects of objects (etc.), meaning "an overall attitude toward an object might be influenced by evaluations of many specific attributes of the object or emotions associated with the object" (Fabrigar et al. 2005, p.80). Furthermore, attitudes towards different objects (etc.) can inter-relate. For example, Wilson's (2012, p.52–3) review of evidence on public attitudes to the justice system found it to be "widely established that public trust in the justice system or its constituent parts is correlated to trust in other institutions," as well as "influenced by the particular history and culture of an individual society or geographical area (such as a country)."

The OECD (2022) has therefore stressed that simple measures of attitudes to law can mask a complex reality. For example, the 2021 OECD Trust Survey indicated that public trust in the judiciary and legal system "is generally high" across OECD countries, at 57% (p.36). However, results in Korea illustrated "the possible benefit of better clarifying these institutions: while Korea's result for trust in the judiciary and the legal system (grouping) is in the lower half of the OECD's cross-national results, Korea performs well in the more focused question on perceptions of the political independence of the judiciary" (p.33).

Wilson's (2012, p.7) review also identified "a range of types of attitude" relating to different types of evaluation, including trust, legitimacy, confidence, support, and satisfaction. In addition, it identified a range of justice dimensions to which attitudes can be directed, such as 'neutrality' (of process and decisions), 'treatment' (e.g. respect), 'having your say' (i.e. opportunities to state a case), and 'motive-based trust' (i.e. perceived motives of legal actors).[19] To these can then be added many "different dimensions of the justice system" (p.49), including areas of law, physical components, and actors. There are then also functional aspects of justice systems, such as market functioning, sustainable development, and socio-political stability (e.g. Desai et al. 2012, Zoellick 2008, Cunha et al. 2014).

Thus, there are countless potential dimensions of people's attitudes to civil law, from attitudes concerning its broad function and place in life (including in relation to competing normative orders[20]) to attitudes concerning very particular aspects of law, process, or practice.[21]

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[18] Referring to emotion/feeling, behavioural intent and belief/knowledge respectively.

[19] Associated with Tyler's influential theorising around procedural justice, legitimacy and compliance in the context of crime (e.g. Tyler 1990). Similar dimensions of justice quality are set out by Klaming and Giesen (2008) and Verdonschot et al. (2008).

[20] As Barendrecht (2011, p.281) has observed, "legal pluralism is common around the globe".

[21] In the context of public attitudes towards civil law, the task of investigation is complicated by people's common conception of "the criminal and civil justice systems [as] one and the same"

Pulling back to the broadest level, Ewick and Silbey's (1998, p.28) research into people's accounts of the place of law in US life suggested "three competing stories." In one, law is 'majestic'; distant from ordinary life, but "operating by known and fixed rules in carefully delimited spheres." In another, it is played as 'a game', comprising "a terrain for tactical encounters through which people marshal a variety of social resources to achieve strategic goals." In the last, it is "understood to be arbitrary and capricious;" a product of unequal power. These accounts were recently explored quantitatively through the PULS (Balmer et al. 2024). While a sizeable minority of respondents considered law to be distant to their life (37%), the vast majority saw it as being "good for resolving problems" (85%, including 77% of those who saw it as distant) – though often also as "a game you can play if you know the rules" (64%). A sizeable minority considered law to be "the last place I would turn to for help" (39%), though, demonstrating the intricacy of attitudes, this sometimes coincided with feelings of distance, often with the sense of law being a game, but also often with a belief that law has good problem solving utility – pointing to other obstacles to accessing law.

In recent years, standardised measures of attitudes to aspects of civil law, with good psychometric properties, have been developed to help explain law related behaviour. Four have been reported on: the (perceived) Inaccessibility of Justice (IOJ) scale, the Perceived Inequality of Justice (PIJ) scale, the Perceived Inaccessibility of Lawyers (PIL) scale and the Perceived Inaccessibility of Courts (PIC) scale (Pleasence and Balmer 2018, 2019).

In the case of the IOJ and PIJ scales, compared to those who hadn't experienced problems, scale scores were found to be significantly higher (equating to more negative attitudes towards accessibility/equality of justice) for English and Welsh survey respondents who had recently experienced justiciable problems and felt they had handled them poorly or obtained unfair outcomes. Moreover, compared to respondents who heard positive accounts, scores were higher for those who had heard negative accounts (from friends, family or colleagues) of lawyers, courts or tribunals. Compared to respondents who regarded them as unfair, PIJ scores were also higher among those who regarded recent court or tribunal processes they had experienced as fair. Findings for the PIL and PIC scales from Victorian survey respondents were similar (Balmer and Pleasence 2019). Negative experiences of lawyers or courts were associated with more negative attitudes, as was exposure to negative accounts (from friends, family or colleagues). This is not to say that experiences (or general attitudes – as the above OECD findings indicated) are generally negative. On the contrary, Victorian respondents were mostly satisfied with lawyers and mostly regarded proceedings as fair, although experience and attitudes can vary considerably between jurisdictions.[22] However, while it seems the public is generally satisfied with their experience of lawyers and generally has a high regard for the competence of lawyers, they are (as the nature of lawyer jokes suggest) frequently held in relatively low regard (e.g. Fiske and Dupree 2014).

The above findings based on standardised measures are in line with earlier findings from, for example, M/A/R/C research (1998) – that negative experience of courts was associated

(Green 2016, p.1263). This conflation is often compounded by insufficient subject specification. As Pleasence and Balmer (2018, p.257) noted, "even dedicated surveys of justice or court systems, such as the many national and state surveys conducted in the United States, have often made no distinction between civil and criminal justice, or only rarely explicitly specified a civil context."

[22] For example, the OECD (2022) found trust in the courts and legal system to extend to barely 20% of the Colombian population, in contrast to around 80% of the Danish population.

with similar or lowered perceptions of courts – and Currie (2009, p.100) – that Canadian survey respondents had "a greater tendency to feel that the law and the justice system are essentially unfair if they had experienced justiciable problems, if they had experienced unfavourable outcomes to those problems and if they have had difficulty obtaining satisfactory assistance."

Adding to this, Sandefur (2007) provided a powerful example of how attitudes tie to action. In her study of justiciable problem resolution behaviour among low- and moderate-income residents of a Midwestern American city, she found that repeated failure of attempts to resolve led to a sense of "frustrated resignation" that increased inaction in the face of problems, both individually and across the community.

LEGAL CONFIDENCE

Empirical studies of legal confidence grew out of interest in psychological aspects of justiciable problem resolution behaviour and recognition that confidence is an important driver of behaviour and outcomes across a range of domains.[23] Drawing on Bandura's (1997) concept of self-efficacy[24] and the broad concept of legal empowerment,[25] Gramatikov and Porter (2011, p.169) coined the term 'subjective legal empowerment' to refer to "the subjective self-belief that a person possesses . . . [in their] ability to mobilise the necessary resources, competencies, and energies to solve particular problems of a legal nature."

While recognising that measurement of subjective legal empowerment is "a challenging endeavour" (p.176), Gramatikov and Porter developed a series of simple questions to explore how it might vary across different areas of law.[26] These were included in the English and Welsh CSJPS,[27] which found subjective legal empowerment levels to be broadly similar across different areas of law, although lower in the case of business disputes, "with which a substantial proportion of the population will be unfamiliar" (Pleasence et al. 2015, p.121). The survey also found that, "as respondents' subjective legal empowerment scores increased, inaction significantly decreased" (Pleasence and Balmer 2014, p.32). This is perhaps not surprising. As Gramatikov and Porter (2011, p.172) observed, "power is the currency of disputes," with dispute resolution often occurring, as Galanter (1974) described, within a framework characterised by disparities in power.

Looking at influences on subjective legal empowerment scores, it was found that real-world experience of justiciable problems tended to be associated with lower scores, with each

[23] See, for example, Nelson and Furst (1972), Bandura (1977), Strecher et al. (1986), Grembowski et al. (1993), Dawes et al. (2000).

[24] Self-efficacy was defined by Bandura (1997: 3) as referring to "beliefs in one's capabilities to organise and execute the courses of action required to produce given attainments."

[25] The concept of legal empowerment emerged in the field of law and development (Golub and McQuay 2001) and now refers to the focus of developmental justice initiatives on "empowering individuals to realise their rights and voice their demands more actively" (Kolisetty 2014, p.9).

[26] The questions involved asking people to imagine problems of particular types and how likely they thought it was they would be able to reach solutions to them.

[27] The questions have been routinely incorporated into HiiL's *Justice Needs and Satisfaction Surveys*.

instance of justiciable problem experience compounding this effect. It seems "legal problems are more problematic than people imagine" (Pleasence et al. 2015, p.124). However, there was some hidden complexity in these findings. If respondents had done nothing to resolve problems, had been involved in disagreements in resolving problems, were not satisfied with outcomes or had little knowledge of their rights, scores were lower. But "if respondents had experienced problems about which they felt they knew their rights," then scores were higher (Pleasence et al. 2015, p.129). Controlling for other variables, there were also associations between demographics and scores. The oldest respondents had the lowest scores. However, while young respondents generally scored well, scores were substantially lower for young people not in education, employment, or training. Poor health was associated with slightly lower scores. Also, recent migrants to the UK scored lower, though the same was not true of those who spoke a language other than English at home.

To explore legal confidence further, Pleasence and Balmer (2019) undertook two methodological development surveys in England and Wales to develop a standardised General Legal Confidence (GLC) scale using modern psychometric methods. The scale utilised carefully specified questions linking to "an increasingly demanding legal scenario" (p.143).

As with subjective legal empowerment scores, experience of justiciable problems was found to be associated with GLC scores (Balmer and Pleasence 2018). People who felt they had dealt with problems well tended to score higher, while those who felt they had done poorly tended to score lower. Similarly, those who felt the outcomes of problems were fair tended to score higher, while those who felt they were unfair tended to score lower. Likewise, those who had previously used lawyers tended to score higher if they had been satisfied with the help received, but lower if dissatisfied. Beyond personal experience, accounts from others also influenced scores, although to a lesser extent. Higher scores were associated with positive reports of lawyers, courts, and tribunals from friends, relatives, or colleagues. Lower scores were associated with negative reports. In terms of demographics, women were generally found to have lower GLC scores than men, as were people who had nobody "to rely on when faced with problems" (Balmer and Pleasence 2018, p.1).

The GLC scale has been validated in Australia (Balmer and Pleasence 2019) and was included in the PULS. As in the UK, after controlling for other variables, the PULS found women to have lower scores than men. It also found the oldest respondents to be associated with lower scores (along with the youngest), along with those reporting higher levels of mental distress. Elsewhere, those on higher incomes tended to have lower scores. Indigenous people, those with daily caring responsibilities for adults, and those who did not speak English at home were all, in contrast, associated with higher scores.

THE BROADER RELEVANCE OF LEGAL CAPABILITY

To conclude, legal capability has long been recognised as essential to facilitating access to justice. Indeed, it is now largely conceived in terms of access to justice. A broad contemporary definition of legal capability, drawing on Sen's capability approach, is that it comprises the genuine opportunity to achieve just outcomes to issues involving legal rights or responsibilities – i.e. to achieve access to justice.

Legal capability is therefore constitutionally important. Particularly in an age of "legislative hyperactivity" (Bingham 2010, p.41), the possession of rights is, to paraphrase Garth

and Cappelletti (1978, p.185), meaningless without capability for their effective vindication. Moreover, the rule of law requires transparency, equality and fairness of the law, all of which relate to capability. For example, as Lord Diplock argued, "acceptance of the rule of law as a constitutional principle requires that a citizen, before committing [themself] to any course of action, should be able to know in advance what are the legal principles which flow from it."[28]

In underpinning access to justice, legal capability is also socially and economically important: "growing evidence sets forth effective access to justice as a compelling means of tackling inequality and as a contributor to individual and societal well-being" (OECD 2019, p.18).

However, our understanding of legal capability is far from complete, as is the application of this understanding within access to justice policy and practice. While the concept has matured, its complexity has exposed the many dimensions of legal capability about which we know little. Research, policy, and practice interest in legal capability is growing and, as would be expected given the links to the capability approach, is growing both in jurisdictions with established public legal assistance infrastructures and, more often under the banner of 'legal empowerment', in the development context (e.g. Commission on Legal Empowerment of the Poor 2008).

There have been welcome research initiatives, such as the incorporation of capability into legal needs surveys and access to justice assessments (Pleasence et al. 2019), the development of standardised measures of legal capability dimensions and some dedicated efforts (e.g. through the PULS) to explore the social patterning of particular legal capability dimensions, how they relate to each other and how they relate to experience of justiciable problems.

Both 'internal capabilities' and 'external opportunities' are equally important; the former in allowing individuals to navigate and make use of the law and legal environment, and the latter to provide 'avenues of opportunity' to achieve just outcomes to justiciable problems.

However, research efforts are constrained by the available research methods and policy is constrained by economic reality, meaning the appropriate balance between different capability dimensions and between internal capabilities and external opportunities becomes critical. Evidently, in policy terms, if avenues of opportunity such as legal aid are expanded, less reliance is placed on internal capabilities, and vice versa. As was recognised in the Public Bill Committee debates relating to the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, legal aid cuts in England and Wales placed far greater reliance on self-help (Pleasence et al. 2017).[29]

Finally, returning to Felstiner et al.'s (1980–81) model of the emergence and transformation of disputes, it is clear that naming, blaming, and claiming – along with associated 'stages', such as framing – all centre, in practical terms, on legal capability. Indeed, even before problems are experienced, legal capability informs the decisions from which justiciable problems arise. Understanding how people identify problems, frame them, choose to respond to them, and experience and engage in dispute resolution processes can therefore help improve not just the quality and reach of public legal assistance services and processes but also individual and social outcomes.

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[28] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 638D.

[29] See, further, House of Commons (2014).

Already our understanding of justiciable problem framing points to the value of a visible and general advice sector and paralegal outreach to support more traditional legal services. Our understanding of framing shows the potential for nudging people engaged in disputes towards particular forms of outcome. Our understanding of legal knowledge demonstrates the importance of salience and context to knowledge levels and public legal education initiatives. It also highlights the limitations of public legal education and the need to properly balance 'just in case' and 'just in time' interventions (e.g. Maule 2014). Our understanding of the impact of experience and third-party accounts of lawyers and courts on attitudes points to the importance of supporting client journeys effectively and promoting positive accounts of the justice system. As our understanding develops further, so will opportunities to improve access to justice.

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