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# Reimagining the relationship between Legal Capability and the Capabilities Approach

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## **Abstract**

Within the literature on public legal education and legal capability, it is commonly stated that the concept of legal capability is closely related to the capabilities approach pioneered by economist and political philosopher Amartya Sen. This paper critically examines this assertion. Part I seeks to demonstrate that whilst they share some broad affinity, the relationship between legal capability and the capabilities approach is currently disparate in both conceptual and practical terms. In Part II, the paper goes on to consider what might happen if this relationship is reimagined and the two fields brought closer together. Aspects of this reimagining are then considered in turn. The paper concludes by summarising the potential advantages and disadvantages of this proposed reimagining, and by raising questions as to whether the implications of establishing a closer relationship between legal capability and the capabilities

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approach warrant further exploration, or whether it is preferable for the distance to be maintained.

## **Introduction**

Legal capability has been described variously as ‘the personal characteristics or competencies necessary for an individual to resolve legal problems effectively’;<sup>2</sup> ‘the ability of individuals to recognise and deal with law-related issues that they might face’<sup>3</sup> and ‘the abilities that a person needs to deal effectively with law-related issues.’<sup>4</sup> The latter description was provided by Jones in a 2010 publication for the Public Legal Education Network (Plenet); one of the first organisations to develop a conceptual framework for legal capability. This framework focused on knowledge, skills and attitudes, and provided a model for informing its work in public legal education (PLE) in the UK.<sup>5</sup> Since then, further frameworks and matrices of legal capability have been advanced in the UK and elsewhere. These vary in terms of content, but overall tend to adhere to the idea of knowledge, skills and attitudes as constitutive elements.<sup>6</sup>

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<sup>2</sup> C Coumarelos, D Macourt, J People, HM McDonald, Z Wei, I Iriana and S Ramsey, 2012, Legal Australia-Wide Survey: legal need in Australia, Law and Justice Foundation of New South Wales, Sydney, 29.

<sup>3</sup> S. Collard, C. Deeming, L. Wintersteiger, M. Jones, J. Seargeant, Public Legal Education Evaluation Framework, Public Legal Education Network, 2011, 3.

<sup>4</sup> Martin Jones, Legal Capability. London: Plenet, 2010, <http://lawforlife.org.uk/wp-content/uploads/2013/05/legal-capability-plenet-2009-147-1-147.pdf> p.1 (accessed 05.10.21) Plenet was established in 2007 with funding from the Ministry of Justice to take forward recommendations of a Public Legal Education and Support (PLEAS) Task Force.

<sup>5</sup> Community Legal Education Ontario (CLEO), Building an understanding of legal capability: An online scan of legal capability research, (CLEO, 2016)

<sup>6</sup> See for example, Collard et al. (n 3); L Mackie, Law for Life Legal Capability for Everyday Life Evaluation Report, (London: The Gilfillan Partnership, 2013); CLEO, *ibid*.

The capabilities approach (also commonly referred to as the *capability* approach) was pioneered by economist and political philosopher Amartya Sen, an Economics Nobel prize winner who has been described as ‘one of the key thinkers and commentators of the late twentieth and early twenty-first centuries.’<sup>7</sup> Sen’s ideas were presented initially in his 1979 Tanner Lectures, and developed in subsequent publications by Sen and by others, most notably Martha Nussbaum. As now developed, the approach has been described as ‘open-ended and underspecified’<sup>8</sup> in nature. Hence it is impossible to provide a precise definition, but a central feature of Sen’s capabilities approach is its concern to measure or evaluate human wellbeing according to the freedom or real opportunity each person has to live a life that she or he values, and has reason to value.<sup>9</sup> Because of this focus on individual freedoms, the capabilities approach necessarily represents a challenge to established ways of thinking about or evaluating human wellbeing where the traditional focus has been on purchasing power or the material standard of living.<sup>10</sup> It has been applied to varying degrees in a range of fields; notably it has contributed directly to the United Nations Human Development approach and the establishing of the Human Development Index ‘to emphasize that

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<sup>7</sup> M Walker and E Unterhalter, ‘The Capability Approach: Its Potential for Work in Education’ in M Walker and E (eds), *Amartya Sen’s Capability approach and Social Justice in Education* (Palgrave Macmillan, 2007), 1-18, at 1.

<sup>8</sup> I Robeyns, *Wellbeing, Freedom and Social Justice - The Capability approach Re-Examined* (Open Book Publishers, 2017) 24.

<sup>9</sup> S Alkire and S Deneulin, ‘The Human Development and Capability Approach’ in S Deneulin and L Shahani (eds), *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (Earthscan, 2009), 22-48, at 32.

<sup>10</sup> Walker and Unterhalter (n 7) 1

people and their capabilities should be the ultimate criteria for assessing the development of a country, not economic growth alone.’<sup>11</sup>

Within the literature on PLE and legal capability, it is commonly stated that the concept of legal capability is closely related to the capabilities approach. This paper critically examines the nature of this relationship. Part I seeks to demonstrate that whilst they share some broad affinity, the relationship between legal capability and the capabilities approach is currently disparate in both conceptual and practical terms. In Part II, the paper goes on to consider what might happen if this relationship is reimagined and the two fields brought closer together. Aspects of this reimagining are considered in turn under three headings: emphasising choice and opportunity, broadening perspective, and promoting participatory approaches. The paper concludes by summarising the potential advantages and disadvantages of this proposed reimagining, and by raising questions as to whether the implications of establishing a closer relationship between legal capability and the capabilities approach warrant further exploration, or whether it is preferable for the distance to be maintained.

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<sup>11</sup> UN Development Programme, Human Development Index, available at <http://hdr.undp.org/en/content/human-development-index-hdi> (accessed 05.10.21).

## Part I – the current nature of the relationship

In his 2010 publication for Plenet, Jones explicitly attributes the origins of legal capability to Sen's work.<sup>12</sup> Subsequently, in their 2011 evaluation framework for PLE, Collard et al. describe legal capability as 'drawing from wider capabilities theory'<sup>13</sup> and in their 2016 overview of legal capability research, CLEO describe the concept of legal capability as being 'rooted in the "capabilities" approach developed by economist Amartya Sen'.<sup>14</sup> More recently, writing in 2019, Pleasence and Balmer maintain legal capability 'can best be understood as an aspect of economist Amartya Sen's idea of capability as "the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles)."'<sup>15</sup> So from the perspective of legal capability, it is possible to state with some certainty that a relationship exists between legal capability and the capabilities approach. The focus of legal capability is on measuring/improving an individual's ability to deal with law-related problems; so contributing to his or her wider wellbeing.

The nature of this relationship from the perspective of the capabilities approach is more challenging to describe, but can be made more simple through analogy. If we imagine legal capability and the capabilities approach as two human families; we can say that most members of the legal capability family consider themselves to be related

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<sup>12</sup> Jones (n 4) 1, citing A Sen, *The Idea of Justice* (Allen Lane, 2009)

<sup>13</sup> Collard et al. (n 3) 3, citing A Sen, *The Idea of Justice* (Penguin, 2010)

<sup>14</sup> CLEO (n 5) 2, citing A Sen, *The Idea of Justice* (Harvard University Press, 2009)

<sup>15</sup> P Pleasence and N Balmer, 'Justice & the Capability to Function in Society' *Dædalus*, the Journal of the American Academy of Arts & Sciences, 140-149, at 141; citing A Sen, *Development as Freedom* (Oxford University Press, 1999), 75.

to the capabilities approach family; and that they share a common ancestor in Amartya Sen. However, as will be discussed further below, members of the (relatively small) legal capability family have not developed relationships with members of Sen's larger and ever-increasing extended family. Conversely, and perhaps more controversially, Sen's extended family members have never made contact with any of their legal capability relatives and – if asked – may question that any relationship exists between them.

The lack of relationship is evidenced by its absence in the capabilities approach literature. In her 2017 review and consolidation of the capabilities approach, Ingrid Robeyns provides an overview of the diverse range of fields in which the capabilities approach has been applied.<sup>16</sup> Whereas Robeyns recognises that the extent to which the approach has been applied and/or developed in different fields varies widely, she makes no reference to work on legal capability in this influential text. To cite a more specific example, apart from the author, the only participant presenting on the subject of legal capability at the Human Development and Capability Association Conference in 2019 argued:

'The current attempts at defining legal capabilities... have one major disadvantage. Even though they refer to the capability approach of Sen, none of them offers a strong theoretical reference to it... The idea of capabilities is taken

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<sup>16</sup> Robeyns (n 8) 9, 16-18.

as a starting point without paying much attention to further implications of this approach.<sup>17</sup>

The disparity is evidenced further by the different customs and terminology that the legal capability and capabilities approach families have adopted. Put simply – they do not speak the same language. For example, ‘functionings’ and ‘capabilities’ are key concepts within the capabilities approach and ‘the most important distinctive features of all capabilitarian theories.’<sup>18</sup> This distinctive language of functionings and capabilities, and the emphasis on agency and freedom to choose, is discernible in discrete elements of legal capability scholarship.<sup>19</sup> However, predominantly the terminology of legal capability relates to the three elements of knowledge, skills and attitudes identified by Jones in 2010; with knowledge and skills continuing to be presented as two underlying dimensions, and the third category of ‘attitudes’<sup>20</sup> being either retained or modified to refer to alternative terms such as ‘psychological readiness to act’<sup>21</sup> or ‘confidence’.<sup>22</sup> Pleasence et al. extended this underlying structure

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<sup>17</sup> Ann-Katrin Habbig, HDCA conference presentation, unpublished, September 2019. The HDCA was established in 2004 ‘to promote high quality research in the interconnected areas of human development and capability’ and its first President was Amartya Sen. See <https://hd-ca.org/about/hdca-history-and-mission> (accessed 05.10.21)

<sup>18</sup> Robeyns (n 8) 38.

<sup>19</sup> See for example, Pleasence and Balmer (n 15) 140-149 and P Pleasence, C Coumarelos, S Forell and H McDonald, *Reshaping Legal Assistance Services: Building on the Evidence Base* (Law and Justice Foundation of New South Wales, 2014) 130-137

<sup>20</sup> Pleasence et al. *ibid.* 122

<sup>21</sup> H.M. McDonald and J. People, ‘Legal capability and inaction for legal problems: knowledge, stress and cost’ *Updating Justice* No.41, June 2014, 2.

<sup>22</sup> Mackie (n 6) 28.

to include resources,<sup>23</sup> but other key capabilities approach terms, such as conversion factors (each person's ability to convert resources into functionings)<sup>24</sup> and structural constraints (factors *external* to each person, such as institutions, social norms and environmental factors)<sup>25</sup> do not feature in the literature.

### **Tracing the disparity in relationship**

The disparity in the relationship between legal capability and the capabilities approach can be attributed to the fact that the development of the concept of legal capability has been influenced by two major factors outside of the capabilities approach. To revert to the earlier analogy; the legal capability family considers itself related to Sen, but it has other significant relationships. It has strong connections with the access to justice agenda and associated legal needs-based research. In terms of its conceptual development, it also has a less obvious but important association with work in the field of financial capability.

Dealing first with financial capability. The significance of Jones' 2010 publication for Plenet and its influence on subsequent work has already been stated in this paper and we already know that Jones attributes the origins of legal capability to the capabilities approach; emphasising 'functional capabilities or 'substantive freedoms', looking at what human beings need to be able to do or be to effectively assert choices over their

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<sup>23</sup> Pleasence et al. (n 19) 126-7, drawing on R McLachlan, G Gilfillan and J Gordon, *Deep and Persistent Disadvantage in Australia* (Australian Government Productivity Commission, 2013).

<sup>24</sup> Robeyns (n 8) 45.

<sup>25</sup> Robeyns (n 8) 45-47 and 83.

own well-being'.<sup>26</sup> However, a notable feature of Jones' publication is its discussion of steps taken by the Financial Services Authority (FSA) to establish a model for financial capability. The result of the work undertaken by the FSA was 'a conceptual model based on Knowledge, Skills and Attitudes.'<sup>27</sup> Jones explains how this model informed foundational work by Plenet, based on the view that 'the capabilities approach of knowledge, skills and attitudes clearly has relevance in a civil law context.'<sup>28</sup> He reports that in 2008 and 2009, Plenet ran a number of exercises to explore what capabilities people need to be able to deal with law-related issues; 'What knowledge do they need? What skills do they require? What attitudes should they have?' Their conclusion was that 'the troika of knowledge, skills and attitudes *does work* [emphasis added] for legal issues and provides a useful conceptual framework to guide our PLE work.'<sup>29</sup>

It is argued that Jones' reference to 'the capabilities approach of knowledge, skills and attitudes' evidences a fundamental disparity in the relationship between legal capability and the capabilities approach. At a broad, aspirational level, a concern to measure and improve people's ability to deal effectively with law-related problems certainly aligns with Sen's focus on personal capabilities. But the more detailed and sustained focus on knowledge, skills and confidence comes from somewhere else; from financial capability and its own antecedents.<sup>30</sup> The disparity is demonstrated

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<sup>26</sup> Jones (n 4) 1.

<sup>27</sup> Jones (n 4) 2.

<sup>28</sup> Jones (n 4) 3.

<sup>29</sup> Jones (n 4) 4.

<sup>30</sup> Exploring the background of the FSA's work on financial capability is beyond the scope of this paper.

further in the work of Collard et al. Again at an aspirational level, Collard et al. refer to Sen and the role of PLE as enabling people to 'become more legally capable... to take more control of their lives and so improve them...to incorporate functional capabilities or 'substantive freedoms' that individuals need to assert effective choices over their own well-being.'<sup>31</sup> But when taking steps to conceptualise legal capability in more detail, the authors rely on four domains of financial capability modelled by the FSA in 2006.<sup>32</sup> Through engagement with PLE literature and with feedback from PLE experts, Collard et al. identify four analogous domains of legal capability; '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 situations; engaging and influencing.'<sup>33</sup> The value of this work is not disputed. However, it does demonstrate that developments in the concept of legal capability have been significantly influenced by analogous work in financial services and not just by a broad allegiance to Sen's capabilities approach.

The second key relationship for legal capability is its historical and ongoing connection with legal needs research and the global access to justice agenda. Coumarelos et al. explain that surveys of the general public to assess their legal needs date back to the 1930s. Initially these surveys focussed on a narrow interpretation of legal need; assessing how far people were able to access legal professionals and the

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<sup>31</sup> Collard et al. (n 3) 3.

<sup>32</sup> These are: managing money, planning ahead, choosing financial products and staying informed. See Collard et al. (n 3) 4.

<sup>33</sup> Collard et al. (n 3) 4.

justice system.<sup>34</sup> But they demonstrate that within some legal systems and systems of government, there has been a long-standing concern to explore the experiences of non-lawyers as they engage in the legal world. More specifically to the concept of legal capability, Marc Galanter argued as far back as the 1970s that ‘...lack of capability of parties poses the most fundamental barrier’ to their access to ‘legality’ and citing contemporary scholarship he proposes that as well as modifying systems and institutions, research should be conducted into how the ‘personal competence’ of parties might be enhanced.<sup>35</sup> He states: ‘We need research on party capability. Let’s begin from the question of personal competence. What makes parties competent and effective at securing remedies or participation or whatever? Does it depend on personal characteristics like poise, confidence, education, information, proclivity and ability to bargain?’<sup>36</sup> The narrow focus on formal legal proceedings (and so ‘parties’ for Galanter) was expanded in subsequent years, and legal needs surveys conducted by the American Bar Association in 1994, and in England and Wales by Hazel Genn in 1999 are described by Coumarelos et al. as ‘ground-breaking’ in their shifting away from narrow focus on formal justice, looking instead at a broader notion of ‘justiciable problems’ – a wide range of problems for which a legal remedy exists.<sup>37</sup> Since then,

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<sup>34</sup> Coumarelos et al. (n 2) 3. See for example Charles E Clark and Emma Corsvet (1938) *The Lawyer and the Public: An A.A.L.S. Survey*, 47 *YALE L.J.* 1272

<sup>35</sup> M Galanter, 'Delivering Legality: Some Proposals for the Direction of Research' (1976) 11 *Law and Society Review* 225, 242. Galanter cites J Carlin and J Howard *Legal Representation and Class Justice* (1965) 12 *University of California Los Angeles Law Review*, 381; Philippe Nonet, *Administrative Justice: Advocacy and Change in a Government Agency* (Russell Sage Foundation, 1969) and Douglas Rosenthal, *Lawyer and Client: Who's in Charge* (Russell Sage Foundation, 1974) in relation to the notion of ‘personal competence’.

<sup>36</sup> Galanter, *ibid.* 242.

<sup>37</sup> H Genn, *Paths to Justice: What People Do and Think about Going to Law* (Bloomsbury, 1999) 5.

multiple legal needs surveys have been conducted across different jurisdictions; providing vast amounts of valuable information on the nature of legal problems people encounter and how people's needs are met or not met when they encounter these problems.<sup>38</sup>

Concerns expressed by Coumarelos et al. that this research 'has often proceeded without explicit, detailed definitions of the concepts of legal need and access to justice'<sup>39</sup> have been addressed to some extent in a guide published by the Organisation for Economic Co-operation and Development (OECD).<sup>40</sup> Whilst recognising the term is contested, the OECD guide defines access to justice as

'broadly concerned with the ability of people to obtain just resolution of justiciable problems and enforce their rights, in compliance with human rights standards...if necessary, through impartial formal or informal institutions of justice and with appropriate legal support.'<sup>41</sup>

The guide goes on to explain that whilst it is an elusive concept, legal need is closely linked to (and a constitutive element of) access to justice. Broadly:

'legal need arises whenever a deficit of legal capability necessitates legal support to enable a justiciable issue to be appropriately dealt with. A legal need is unmet

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<sup>38</sup> Detailed information on the range and extent of these surveys is available in the OECD Guide authored by P Pleasence, P Chapman and N Balmer, *Legal Needs Surveys and Access to Justice*, (OECD/OSJI, 2019), 25-28

<sup>39</sup> Coumarelos et al. (n 2) 3.

<sup>40</sup> OECD Guide (n 38). This guide has directly informed the most recent legal needs survey in England and Wales: *Legal needs of Individuals in England and Wales Technical Report 2019/20* (YouGov, 2019).

<sup>41</sup> OECD Guide (n 38) 24.

if a justiciable issue is inappropriately dealt with as a consequence of effective legal support not having been available when necessary to make good a deficit of legal capability. If a legal need is unmet, there is no access to justice.<sup>42</sup>

The OECD guide notes there is no precise definition of legal capability, but identifies ‘much agreement among recent accounts of the concept.’<sup>43</sup> Citing some of the frameworks already referenced in this paper (e.g. Parle, Collard et al., Coumarelos et al.) the guide identifies as agreed constituents of legal capability: ‘the ability to recognise legal issues; awareness of law, services and processes; the ability to research law, services and processes; and the ability to deal with law related problems (involving, for example, confidence, communication skills and resilience).’<sup>44</sup> In keeping with the wider literature, brief reference is also made to the links between the concept of legal capability and ‘Sen’s (1980, 1999) capability approach to disadvantage.’<sup>45</sup>

## **Summary to Part I**

Whilst acknowledging it as a consistent feature in the legal capability literature, Part I of this paper has sought to contest the idea that legal capability has its origins in the capabilities approach and/or that it continues to be linked to the capabilities approach

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<sup>42</sup> OECD Guide (n 38) 24.

<sup>43</sup> OECD Guide (n 38) 86.

<sup>44</sup> OECD Guide (n 38) 86.

<sup>45</sup> OECD Guide (n 38) 41.

in any meaningful way. Rather, it is argued that as the legal capability and capabilities approach families have developed, the legal capability family has adopted Sen as a kind of 'honorary uncle' – someone originally unrelated to the family, but now embraced and respected by it. Sen's ideas may be said to have influenced the development of the concept of legal capability in very broad terms, but in terms of the detail, particularly in the development of legal capability frameworks, the influence of the capabilities approach as espoused by Sen and developed by others is much harder to discern (hence Habbig's criticism cited earlier).

But does this matter? From the perspective of legal capability scholars, it may be argued that there is no need for the capabilities approach to assert more than a broad influence over their work. The three categories of knowledge, skills and attitudes may not have descended directly from Sen, but they have provided an effective basis for further developing the concept of legal capability. Legal capability scholars may also point out that Sen has never formulated any specific list of capabilities, and so the broad but unspecified nature of his influence is entirely appropriate. Equally, from the perspective of the capabilities approach, it might be argued that there is no major problem. As already stated, the capabilities approach is described as 'open and underspecified' in nature, and it is 'generally conceived as a flexible and multi-purpose framework, rather than a precise theory.'<sup>46</sup> This creates potential for broad

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<sup>46</sup> Robeyns (n 8) 24.

influence, and the risk of inflation expressed by Robeyns (that any theory can claim to be a 'capability theory' because of an affinity with the broader approach)<sup>47</sup> can be dealt with simply by preserving the status quo; i.e. a lack of acknowledgment from capabilities scholars that the two families are related.

It is tempting to leave it at that. But because there is at least a potential benefit, the second part of this paper seeks to explore whether it *might* matter. And here the author's intention is to raise questions and promote discussion, rather than to provide definitive answers. What might be the implications of establishing a closer relationship between legal capability and the capabilities approach? Might they warrant further exploration? Or is it preferable for the two families to maintain a distant relationship? Drawing particularly on Robeyns' text, Part II of this paper sets out a tentative reimagining of the relationship between legal capability and the capabilities approach, focusing on three main areas; emphasising choice and opportunity; broadening perspectives and promoting participatory approaches.

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<sup>47</sup> It is partly to counter this risk that Robeyns sets out a very clear, modular interpretation of the capabilities approach in her 2017 text.

## Part II – Reimagining the relationship

### Emphasising Choice and Opportunity

As explained in Part I, ‘functionings’ and ‘capabilities’ are key concepts within the capabilities approach. Sen describes functionings as ‘the various things a person may value being or doing’<sup>48</sup> and capabilities are the freedoms or opportunities a person has to enjoy or exercise these functionings. Robeyns explains the distinction as follows:

‘...while travelling is a functioning, the real opportunity to travel is the corresponding capability. A person who does not travel may or may not be free and able to travel; the notion of capability seeks to capture precisely the fact of whether the person *could* travel *if* she wanted to. The distinction between functionings and capabilities is between the realized and the effectively possible, in other words, between achievements, on one hand, and freedoms or opportunities from which one can choose, on the other.’<sup>49</sup>

So when referring to someone’s ‘capability’ within the capabilities approach, this refers to a combination or set of functionings that a person is free to achieve, or *choose* to achieve. What is valued, is the real freedom for the person to choose to exercise them.

This is a subtle but important point when applied in the context of legal capability. Arguably, as currently presented, frameworks of legal capability and descriptions of

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<sup>48</sup> A Sen, *Development as Freedom* (Oxford University Press, 1999) 75.

<sup>49</sup> Robeyns (n 8) 39.

legal capability as ‘the personal characteristics or competencies necessary for an individual to resolve legal problems effectively;’<sup>50</sup> ‘the ability of individuals to recognise and deal with law-related issues that they might face’<sup>51</sup> and ‘the abilities that a person needs to deal effectively with law-related issues’<sup>52</sup> implicitly place value on specific abilities, rather than valuing a person’s freedom to choose whether or not to exercise them.

Related to this, a closer engagement with the capabilities approach reminds us that *persons* and the real opportunities each person has to live a life that she or he values are the central concern. As Robeyns summarises; ‘we should always be clear, when valuing something, whether we value it as an end in itself or as a means to a valuable end. For the capability approach...the ultimate ends are people’s valuable capabilities.’<sup>53</sup> So to articulate legal capability in capabilities terms, these are the ‘beings and doings’ that contribute to a person’s well-being when they encounter law-related problems. These should not be considered as any kind of benchmark qualification for all people to achieve.<sup>54</sup> Rather, they represent a sort of baseline of opportunity, or a means to the end of facilitating a person’s freedom to choose.

As stated earlier, Sen has never formulated any specific list of capabilities. However, Nussbaum has published a list of capabilities, referred to extensively in the wider

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<sup>50</sup> Coumarelos et al. (n 2) 29.

<sup>51</sup> Collard et al. (n 3) 3.

<sup>52</sup> Jones (n 4) 1.

<sup>53</sup> Robeyns (n 8) 47.

<sup>54</sup> See further Walker and Unterhalter (n 7) 1-18.

literature, which she argues are the capabilities 'that can be convincingly argued to be of central importance in any life.'<sup>55</sup> For the sake of space, a shortened, paraphrased version of the list is presented below:

- *Life*: being able to live a life of normal length, and a life worth living.
- *Bodily health*: being able to enjoy good health, and have adequate food and shelter.
- *Bodily integrity*: being free to move freely, and being free from assault and violence.
- *Senses, imagination and thought*: being able to imagine, think and reason.
- *Emotions*: being able to have attachments to people and things outside ourselves.
- *Practical reason*: being able to form a conception of the good and engage in critical reflection about the planning of one's life.
- *Affiliation*: being able to live with others and engage in social interaction; being able to be treated as a dignified being with equal worth to others.
- *Other species*: being able to live with concern for and in relation to animals, plants and nature.
- *Play*: being able to laugh, play and enjoy recreational activity.

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<sup>55</sup> M Nussbaum, *Women and Human Development* (Cambridge University Press, 2000) 74.

- *Control over one's environment*: being able to participate in political choices and being able to own property.<sup>56</sup>

Taking this list as a kind of template, what happens if we reimagine legal capability in similar terms? What can we agree on as being central capabilities, or what a person is actually able to do and to be when encountering a law-related problem?

So where to begin? The capabilities literature supports the drawing on existing expertise as an appropriate starting point.<sup>57</sup> A legal capability framework published in 2019 by Balmer et al. is arguably most appropriate.<sup>58</sup> As well as being the most recently published framework, it is also the most comprehensive; taking into account and further developing the frameworks and matrices published internationally since Jones' initial work in 2010.<sup>59</sup> The vertical elements reflect the familiar dimensions of knowledge, skills and attitudes, but are expanded to include resources/environment, as identified by Pleasence et al. in 2014.<sup>60</sup> The horizontal dimensions draw on Collard et al.'s 2011 framework, discussed above, but are amended to take into account aspects of the 2019 OECD guide. The result is the identification of the following four broadly defined stages of dealing with a legal problem:

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<sup>56</sup> The list can be read in full in Nussbaum, *ibid.* 78-80.

<sup>57</sup> See further I Robeyns (2003) *Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities*, *Feminist Economics*, 9:2-3, 61-92; M Biggeri and S Mehrotra, *Child Poverty as Capability Deprivation: How to Choose Domains of Child Well-being and Poverty*, in M Biggeri, J Ballet and F Comim (Eds.) *Children and the Capability Approach* (Palgrave Macmillan, 2011), 46-75

<sup>58</sup> The framework is published in Appendix A of N Balmer, P Pleasence, T Hagland and C McRae, (2019). *Law...What is it Good For? How People see the Law, Lawyers and Courts in Australia*. Melbourne: Victoria Law Foundation, at 60-61. Available at <https://victorialawfoundation.org.au/research/research-reports/law-what-is-it-good-for-how-people-see-the-law-lawyers-and-courts-in-australia/> (accessed 05.10.21)

<sup>59</sup> See for example, Collard et al. (n 3); Mackie (n 6); CLEO (n 5).

<sup>60</sup> Pleasence et al. (n 19)

- Recognition of Issues
- Information/assistance
- Resolution
- Wider influence/law reform

The table is then populated to produce multiple discrete dimensions; identifying specific knowledge, skills, attributes and resources relevant to each stage.

Notably, Nussbaum emphasises her list ‘represents years of cross-cultural discussion’<sup>61</sup> and is open to further amendment in the future. With this in mind, the list below should be considered merely a starting point for discussion, and certainly not an attempt to produce a definitive list. And as will be discussed further in the following section, some elements included in Balmer et al.’s list as dimensions of legal capability have been recategorised and removed altogether. With these caveats, some suggestions as to what is a legally capable person might actually be able to do and be are set out below:

- *Knowledge/Education*: be able to acquire knowledge about the nature and existence of law and rights (both general and specific to a situation).
- *Recognition*: be able to recognise the relevance of law to an issue or situation, and frame in legal terms.

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<sup>61</sup> Nussbaum (n 55) 76.

- *Research*: be able to find out more about the relevance of law to a situation; able to understand what information is required and locate it; able to assess reliability/credibility.
- *Assistance*: be able to seek and secure assistance from others.
- *Reasoning*: be able to think and imagine how law might apply to a situation and recognising the importance of the whole story.
- *Assessing*: be able to imagine and weigh up possible courses of action and possible outcomes; aware of own limitations and able to assess sources of help.
- *Planning*: be able to plan a course of action and anticipate potential barriers.
- *Fortitude*: be able to push for a desired outcome with firmness of purpose; legal confidence.
- *Influence/communication*: be able to engage and influence others.

This list represents a dramatic simplification of the Balmer et al.'s comprehensive framework and scholars working in the field of practical empirical measurement will justifiably call for the identification of more specific, discrete elements. Nevertheless, it is possible to argue that in this simplified form, the list represents a workable model for communicating the concept of legal capability to a wide variety of stakeholders; and particularly those people whose legal capability we are seeking to either measure or improve. As will be discussed further below, this increased accessibility is of importance if or when we seek to promote participatory approaches.

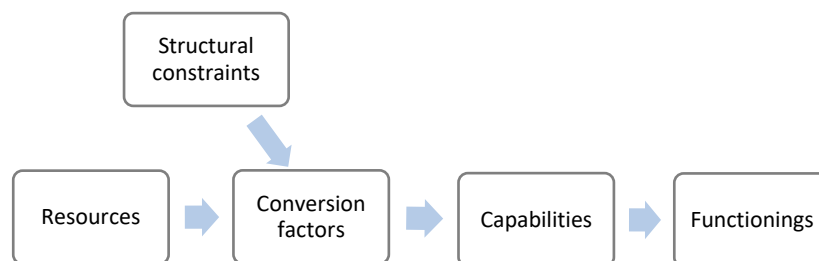
## **Broadening Perspective**

In this section it is proposed that a reimagining of the relationship between legal capability and the capabilities approach leads to a broadening of perspective and a separating out of factors. In particular, this shift in perspective causes factors currently included as elements or aspects of a person's legal capability to be reimagined as factors highly relevant to but separate from them. Again, this is a subtle but potentially important shift which may be best demonstrated by focusing on specific elements. Beginning with resources: as stated elsewhere in this paper, Pleasence et al. have added resources to the troika of knowledge, skills and attributes that inform frameworks of legal capability and in Balmer et al.'s comprehensive framework, these resources are stated to include time, money, social capital, availability of services and availability of processes. As aspects of legal capability, the extent to which these resources are available to a person in any given situation – together with a range of other factors included in the framework - will determine the extent to which a person is or is not able to deal with a law-related problem they encounter.

If we refer back to the origins of the capabilities approach, then we recall that Sen's ideas were presented in opposition to the traditional methods of evaluating human wellbeing by reference to purchasing power or the material standard of living. Hence Robeyns describes capabilities as 'real freedoms or real opportunities, which do not

refer to access to resources or opportunities for certain levels of satisfaction.’<sup>62</sup> At first sight, this may indicate that resources are not relevant to the capabilities approach. However, as Robeyns later makes clear, it is in the framing and conceptualising of capabilities that this separation from resources must take place. The importance of resources is recognised but they are situated ‘behind’ a person’s capability set; in recognition that a person’s capabilities are often determined by the resources available to them, combined with their ability to convert these resources into functionings (so-called conversion factors).<sup>63</sup> This is modelled below in Figure 1, in a much simplified version of Robeyns’ own visualisation of the core concepts of capability theories.<sup>64</sup>

Figure 1 Modelling core concepts



Modelled in this way, the significance of resources as determinative of capabilities is emphasised but separated from a person’s capabilities, or their ‘beings and doings’. Arguably, this shifts the responsibility for the provision of resources away from the individual, and emphasises the potential for a person’s opportunities to be realised

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<sup>62</sup> Robeyns (n 8) 39.

<sup>63</sup> Robeyns (n 8) 45 and 145-6.

<sup>64</sup> Robeyns (n 8) 83.

via third-party interventions at the resources stage. Related to this, resources are viewed very broadly under the capabilities approach and so the resources specified by Balmer et al. could be augmented to include, for example, provision of and/or access to public legal education.

The issue of accessibility is highlighted through the recognition that capabilities are not only often determined by the resources available to a person, but also by their ability to convert these resources into functionings; so-called conversion factors. This means different types of resources and support are required to enable diverse populations to reach similar thresholds of functioning. In the context of the capabilities approach, Robeyns provides the following examples:

- *Personal conversion factors*: internal to the person; such as metabolism, physical condition, sex, reading skills, intelligence.
- *Social conversion factors*: stemming from society, such as public policies, social norms, practices that unfairly discriminate, societal hierarchies, or power relations related to class, gender, race, or caste.
- *Environmental conversion factors*; emerging from the physical or built environment in which a person lives, such as geographical location, climate,

pollution, the built environment, means of transportation and communication.<sup>65</sup>

Whilst they are not described as ‘conversion factors’ many of these factors feature in analyses of legal needs surveys; which present evidence not only of the range and prevalence of law-related problems populations face, but also how particular problems are experienced by people or groups of people with different characteristics and from different environments. For example, from these we know that ‘disadvantaged people draw on fewer resources and are less able to avoid or mitigate problems.’<sup>66</sup> However, as with resources, many of these conversion factors feature *within* Balmer et al.’s comprehensive legal capability framework.

For example, literacy (in its various forms, including digital and information literacy) is identified as a dimension within the framework. And literacy is recognised in the capability approach literature as ‘a key determinant of wellbeing’ and ‘an important social entitlement.’<sup>67</sup> As Maddox identifies, in his writings Sen recognises ‘the *intrinsic* value of literacy’ at the same time as highlighting ‘its *instrumental* value in enhancing people’s wider agency, freedoms and capabilities’<sup>68</sup> and it is this instrumental value that Robeyns recognises in citing reading skills as a personal conversion factor. Applying this to the context of legal capability, it can be argued that literacy could be

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<sup>65</sup> Robeyns (n 8) 46.

<sup>66</sup> OECD Guide (n 38) 31-33.

<sup>67</sup> B Maddox, (2008) ‘What Good is Literacy? Insights and Implications of the Capabilities Approach’ *Journal of Human Development*, Vol. 9, No. 2, 185

<sup>68</sup> Maddox *ibid.* 189

viewed as a conversion factor, rather than as an aspect of legal capability.<sup>69</sup> This would then require legal services and processes to be designed in ways accessible to people with varying degrees of literacy, as seen in the emerging field of legal design;<sup>70</sup> so increasing the opportunities for people with limited literacy to convert these resources into functionings if they choose to do so.

More generally, as Robeyns states, an advantage of clarifying resources and conversion factors (and in the case of legal capability, separating these out from capabilities) is that this provides valuable information as to where interventions can be made or targeted, to increase or expand capabilities.<sup>71</sup> Adding a further and final dimension to this reimagining of the relationship between legal capability and the capabilities approach, the modelling of core concepts set out in Figure 1 requires us also to recognise that ‘the structural constraints that people face can have a great influence on their conversion factors, and hence on their capability sets’.<sup>72</sup> As stated earlier, much of this information is already known via the results of legal needs surveys, and their findings can and do prompt governments or organisations to adapt or implement policies and improve services.<sup>73</sup> This raises the question of whether this

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<sup>69</sup> Although the dichotomy between a conversion factor and a capability is emphasised here, it is important to note that because of the flexibility and open nature of the capabilities approach, it is possible for something to be categorised as *both* a personal conversion factor, as well as a very narrow and specific capability. Robeyns explains that ‘while reading skills can be modelled as a conversion factor (and for some contexts this is the most fruitful way), one can conceptualise the very same situation as ‘people being able to read’ and then it becomes a (very specific) capability.’ I. Robeyns, Correspondence with author, 6 May 2021.

<sup>70</sup> See further <https://www.legalgeek.co/learn/legal-design-wtf/> (accessed 05.10.21)

<sup>71</sup> Robeyns (n 8) 47.

<sup>72</sup> Robeyns (n 8) 65.

<sup>73</sup> OECD Guide (n 38) 11.

broadening of perspective, proposed here as one result of strengthening the relationship between legal capability and the capabilities approach, is worthwhile. And this paper does not claim to have the answer. But certainly there seems to be something more hopeful in taking personal factors such as literacy out of the realm of legal capability, where lack of literacy has an inevitable limiting effect, and seeing the legal capability of any person as capable of improvement via the provision of accessible resources and by the adaption of external constraints.

### **Promoting Participatory Approaches**

As Robeyns observes, a wide range of approaches have been adopted to selecting capabilities. Nussbaum's list of central capabilities can be considered to be at one end of the spectrum of possible approaches because it was determined at an entirely abstract level.<sup>74</sup> But for many other scholars in the field, participation is a central concern and the capabilities approach 'relies on the agency and involvement of people...to specify which capabilities to focus on.'<sup>75</sup> Indeed, Nussbaum's list has been criticised for its failure to do this.<sup>76</sup>

However, the capabilities approach literature also recognises that people's own views as to opportunities they value cannot be relied upon as the only evidence for

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<sup>74</sup> I Robeyns, 'The Capability approach in Practice' (2006) *The Journal of Political Philosophy*, 14, 3, 351–376, at 355

<sup>75</sup> Alkire and Deneulin (n 8) 43. For an in-depth consideration of this topic see DA Clark, M Biggeri and A Frediani (eds) *The Capability Approach, Empowerment and Participation : Concepts, Methods and Applications* (Palgrave, 2019).

<sup>76</sup> See further Walker and Unterhalter (n 7) 13.

formulating a list of capabilities. Indeed, within the capabilities approach, any theory which relies solely on people's subjective views of what contributes to their well-being is problematic. This is partly because it is recognised that all people's views are inevitably shaped by societal constructs and norms, so cannot be relied on strictly as their own views.<sup>77</sup> More particularly, it is due to concerns about adaptive preference. As Robeyns points out, a large body of literature exists in relation to adaptive preference, but within the context of the capabilities approach, the concern is that people whose freedoms and opportunities are limited can (and do) adapt to their circumstances over time, and so when asked to comment on their own well-being, their report 'is out of line with the objective situation.'<sup>78</sup> To put this another way, Walker and Unterhalter explain 'our choices are deeply shaped by the structure of opportunities available to us so that a disadvantaged group comes to accept its status within the hierarchy as correct even when it involves a denial of opportunities.'<sup>79</sup>

The resulting 'middle ground' is that so long as the method by which a list of capabilities has been generated can be explained and justified as appropriate; then once an explicit list is created – and the dimensions to be measured identified – then this should be openly discussed and defended, and adapted in light of new understandings.<sup>80</sup> Applying this to the context of legal capability, the process through which frameworks of legal capability have been developed was discussed in Part I of

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<sup>77</sup> Robeyns (n 8) 123.

<sup>78</sup> Robeyns (n 8) 137.

<sup>79</sup> Walker and Unterhalter (n 7) 6.

<sup>80</sup> See further I Robeyns, 'Sen's Capability approach and Gender Inequality: Selecting Relevant Capabilities' (2003) *Feminist Economics*, 9:2-3, 61-92

this paper. Whereas the potential limitations of exploring only knowledge, skills and attributes were highlighted as incongruous with the capabilities approach, the empirical approach adopted by Plenet in its 2008 and 2009 foundational work is noteworthy and in keeping with the capabilities approach insofar as it opens up the discussion as to what constitutes legal capability, and takes into account the views of non-experts in determining this.<sup>81</sup> Since then, legal capability frameworks appear to have been developed primarily by experts in the field. So whilst people's own views as to opportunities they value cannot be relied upon as the only evidence for formulating a list of capabilities, a closer engagement with the capabilities approach could prompt scholars in the field of legal capability to engage with the non-legal public as a means to testing out and potentially reviewing assumptions. As stated earlier, a reformulated, accessible list of attributes of legal capability lends itself to this participatory approach.

## **Conclusion**

In the summary to Part I of this paper, the following rhetorical questions were posed: What might be the implications of establishing a closer relationship between legal capability and the capabilities approach? Might they warrant further exploration? Or is it preferable for the two families to maintain a distant relationship? Taking the first question first, some of the possible implications have been considered in Part II, and

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<sup>81</sup> Jones (n 4) 4.

some possible advantages and disadvantages of these implications are considered below. This leaves the latter two questions, on which the paper concludes.

Taken together the most apparent advantages arising from a closer relationship between legal capability and the capabilities approach relate to the person or persons whose legal capability we are seeking to measure and/or improve. An unavoidable consequence of a closer engagement with the capabilities approach is a focus on the freedom or real opportunity each person has to live a life that she or he values, and has reason to value. This language of choice and opportunity features in Jones' 2010 publication for Plenet<sup>82</sup> but the implications of placing such value on opportunity and choice in the context of legal capability have never been fully worked through. Rather, value has been placed on those dimensions of legal capability seen as 'necessary for'<sup>83</sup> or needed by a person 'to deal effectively with law-related issues.'<sup>84</sup>

A reformulation of legal capability as 'beings and doings' results in a simplified, accessible list; which potentially provides a basis for meaningful participation. And this meaningful participation is suggested as necessary to informing and potentially revising expert opinion on what constitutes legal capability. Arguably, this elevates the position of the person whose legal capability we are seeking to measure and/or improve; either generally or in discrete contexts. More generally, it was argued in Part II that one consequence of taking a broader perspective and separating out resources

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<sup>82</sup> Jones (n 4) 1.

<sup>83</sup> Coumarelos et al. (n 2) 29.

<sup>84</sup> Jones (n 4) 1.

and conversion factors from capabilities, was to reimagine the idea that a person's characteristics (e.g. literacy) will inevitably influence their legal capability. In the proposed remodelled approach, the legal capability of a person with limited literacy can be improved by the provision of accessible resources.

The disadvantages relate firstly to those working in the field of practical empirical measurement of legal capability, for whom this suggested approach will be overly vague, idealistic and impractical. The second disadvantage relates to scholars working in the fields of PLE and legal capability more generally. This paper has relied heavily on Robeyns' 2017 text as providing a respected and convenient summary of the capabilities approach. This has been sufficient for and appropriate to its purpose. But a deeper exploration of the capabilities approach, and any further steps taken towards strengthening the relationship between the approach and legal capability, will require engagement with unfamiliar literature, spanning multiple disciplines.

And so this takes us to the final two questions: Might the implications of establishing a closer relationship between legal capability and the capabilities approach warrant further exploration? Or is it preferable for the distance between the two families to be maintained? Given the tentative tone of this paper, readers will not be surprised to find no definitive answers here. The potential for renewed emphases on choice and participation certainly seem attractive in principle and worthy of further attention; but the practical implications seem over-whelming. Perhaps it is possible for the capabilities approach to be allowed some greater influence on aspects of work and

research in the fields of PLE and legal capability in the future, but the extent of this influence will depend on the willingness of scholars and practitioners to accommodate this.

### **Author Postscript**

During the time when this paper was undergoing peer review, Ann-Katrin Habbig and Ingrid Robeyns sent me their draft paper entitled 'Legal Capabilities', which is currently under peer review. It is notable that writing independently from me, and from a different perspective, Habbig and Robeyns draw very similar conclusions to those presented in Part I of this paper. They then go on to offer their own proposals for a new underlying theory of legal capability. These proposals affirm some of my thinking set out in Part II – particularly with regard to broadening perspectives – but do so in a way that is further rooted in the capabilities approach; drawing especially on the work of Martha Nussbaum.

In light of the fact that there is a forthcoming publication on the subject of legal capability in the capabilities field, the practical implications of advancing discussions concerning the relationship between legal capability and the capabilities approach now seem less over-whelming. Habbig and Robeyns' expertise in the capabilities approach<sup>85</sup> is accompanied by a concern to engage with PLE scholarship. Returning

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<sup>85</sup> Robeyns is recognised as a leading scholar in the field. Robeyns' PhD was supervised by Amartya Sen, and she is supervising Ann-Katrin Habbig's PhD studies.

to the overall theme of this paper, this represents an opportunity for cultivating a new relationship between the two 'families'. This in turn creates potential for fruitful and open discourse, which I anticipate will be of interest and concern to this journal's readership.