

Legal Consciousness and the MCA 2005 PowerPoint additional notes and references

Jay Kirkham, Keele University, 14th December 2022

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The LLM in Law and Society required a dissertation of up to 20,000 words. As my PhD is funded to research the understanding of certain aspects of the MCA 2005 with social care practitioners, I used this opportunity to review challenges faced by health and social care practitioners when assessing capacity. I researched legal consciousness as an aspect of legal theory that I had no knowledge of to learn about it and to see if this research methodology could help to inform or improve practitioners assessments using the MCA.

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I chose to undertake a literature review for two reasons. Primarily it was due to the timescale (June to August 2022) and my need for wider knowledge and learning. Finding participants and obtaining ethical approval takes time and is best suited to PhD research projects or part time post-graduate degrees where a dissertation can be conducted over a year. A literature review is an excellent way to learn. I carried out a narrative literature review with set search criteria and explanations around which literature I included and excluded, such as excluding literature focusing on a specialism, such as dementia, rather than general challenges, and literature that has been peer-reviewed and published within the last 5 years to reduce the numbers. This is a different approach to a systematic literature review which follows a strict methodological process and requires more than one person to examine all of the literature available within a wider search criteria (Clark, T., Foster, L, Sloan, L. and Bryman, A. (2021) *Bryman's Social Research Methods*, 6th ed. Oxford: Oxford University Press).

My literature review confirmed previous reviews which identified gaps in social care knowledge around MCA assessments in practice. No studies which had looked at MCA practice in social care using legal consciousness were identified within the search criteria of my literature review.

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My review highlighted difficulties around legal literacy, inconsistent application or understanding of the law and often a lack of confidence applying the law in MCA assessments. It suggested that supporting greater understanding of legal awareness could be valuable and this is something that legal consciousness considers. Links appeared between safeguarding and poor culture (LGA, 2020 see reference list at the conclusion of the slides). Legal consciousness widens the concept of law to include cultural and religious beliefs as a basis for legality. Therefore, practitioner awareness of their approach to laws could enhance or impact upon best practice around how law is applied in practice.

Legal Consciousness is extremely popular globally (especially in the USA, Russia and Holland) but rarely used in the UK. It may be more beneficial in large survey studies rather than smaller qualitative studies interviewing small numbers.

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How do certain Acts such as the MCA, 2005 or the Care Act 2014 make you feel. Reflecting about our own legal awareness and how it makes us feel and using it in supervision could be helpful to inform our practice – not just what we say but also what we then do.

The slides will outline the seminal research carried out by Ewick and Silbey and what they call legal consciousness, finally looking at what impacts practitioner assessments and how approaches to legality could potentially lead to cultural practice which can enhance or diminish good practice.

The activity is influenced by the work of Swiss Psychiatrist and Psychoanalyst, Carl Jung around self-awareness – see You Tube at https://www.youtube.com/watch?v=i0KzUS0b_uc for an outline of his thinking.

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Ewick and Silbey undertook a large scale project with detailed narrative interviews with 430 New Jersey participants in the USA, to understand people's routine experiences and perceptions of law. They were curious about the power of the law to discriminate and disadvantage people depending on their race and class, so purposively sampled residents to provide as much comparison as possible. The participants did not know that the study was about law, instead they were asked about family and community issues generally until aspects of law and legality were identified and discussed with participants to hear their stories in greater detail.

Many scholars have studied the law as a phenomenon and applied different philosophical approaches. For instance, a famous debate took place between HLA Hart (positivism) and Lon Fuller (natural law). In essence Hart argues that the law is limited to norms or laws recognised in a legal system. Fuller argues that law depends not just on the recognised laws within a system but includes other factors that are external to the system, such as morality. Ewick and Silbey argue that the law should be deconstructed and considered from less powerful perspectives, such as women, non-legal actors or more specifically considered the intersection of race and class.

Today this size of a study would be difficult to fund due to time and financial constraints.

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Legal Consciousness methodology is used worldwide to educate and inform either to improve knowledge or as a means for activism, resistance or awareness raising. For example, Nisbet & Morgan (2021) utilised LC to understand how community and residential care workers constructed legality in respect of their employment rights in the face of challenging working conditions in the USA. The study not only raised awareness of their rights and the availability of grievance procedures but highlighted aspects of the work that the participants most wanted to change and aspects they valued most, seeking to inform future research and policies within their community (Nisbet, E. and Morgan, J. (2021)

Constructing legality: theorizing work and the challenges for mobilization of home care workers', *International Journal of Care and Caring*, Vol. 5(1), pp. 45–63).

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Ewick and Silbey's post-modernist philosophy is influenced by the work of Michel Foucault and seeks to demonstrate how powerful institutions such as law, medicine or education can control and preserve the power for certain people, whilst discriminating and oppressing others. By decentering and deconstructing what law is and how it is understood and used by ordinary people in their everyday lives, Ewick and Silbey sought to widen our understanding of this power and its impact on people.

Legal Realists, such as Karl Llewellyn and Jerome Frank in the USA, argued that the law in action approach to understanding how law shapes our society is a more realist perspective than, say positivist thinking and the belief that the law is a phenomenon that should not be considered alongside other factors. They believed that Judges shaped the law by interpreting legislation and should adopt a more sociological law in society approach, being aware of social justice and the impact on others in every day life.

Legal Pluralism widens the concept of what is law and recognises state and non-state laws, including religious and cultural practice. This approach to legality is central to the work of Ewick and Silbey.

Legal Theory by Ian McLeod is a really useful book which summarises the development of legal philosophy (2012 – Basingstoke: Palgrave Macmillan).

See also Foucault, M. (1980) Two Lectures, reproduced in C. Gordon (ed), Michel Foucault: Power/Knowledge, London: Harvester Wheatsheaf, for his views on power.

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Legal Consciousness as a methodology was extremely successful and used in many studies about perceptions of the law in practice globally but less so in the UK. This led to researchers adopting different philosophies and methods to that of Ewick and Silbey. In 2005 Silbey published an article called After legal Consciousness in the Annual Review of Law and Social Science, Vol.1 pp 323-368, in which she suggested that legal consciousness had developed into something quite different to how they intended it to be. However, the literature from my review suggested that this kaleidoscope of approaches was positive and perhaps accounted for the success of their methodology (Halliday, 2019). It has been used for different styles of research projects using either quantitative, qualitative or mixed methods, such as surveys and interviews.

In England Cowan (2004) used this methodology to understand homelessness legislation by interviewing people seeking housing support (Legal Consciousness: Some Observations in Modern Law Review Vol.67(6) pp. 928-959). His study highlighted that most were 'before the law' (as Ewick and Silbey identified). This included a feeling that the law was authoritative and somehow fixed, and impervious to individual action. His findings explained why few appealed any decisions made.

Millie Simpson – Ewick and Silbey's case study to demonstrate how she took the punishment from the Court when her car was stolen and had an accident without her knowledge (Before) and yet took advantage of offering voluntary work at a local church as her punishment. As she already volunteered at the church (With). Eventually the family she cleaned for took the case back to Court and the conviction was withdrawn, demonstrating the power of the law and the importance of 'resources' - whether human resource such as cultural capital and people in this case, or financial resources.

Against the law approaches were identified in a study by Dennler (2018 - Re/Making Immigration Policy through Practice: How social workers influence what it means to be a refused asylum-seeker in Migration and Society: Advances in Research, Vol 1(1) pp 82-95). This study used Legal Consciousness to explore the gap between immigration law and social work practice in the UK. She found that despite the low threshold for Care Act 2014 assessments, practice was gatekeeping and limiting access to services to asylum seekers, particularly when applications had been refused. She identified Against the Law hostile practice, some of which she said was intrinsic to immigration law itself, but some through normalising the withholding of rights. Personally, I think the study more likely demonstrates a With the Law approach as social work resources are limited and I hope it is unlikely (although not impossible) that there was no intention to exclude by the Social Workers.

Ewick and Silbey claimed that Against the Law approaches were rarely a resistance to power or cynicism and were more likely to be used as small subterfuges or violations with a "*strong sense of justice and right*" (1998, p.49). This could easily occur when a practitioner is worried that capacity to make an unwise decision may lead the individual to suffer harm, a concern raised by the LGA review of SARs (2020).

The reason that LC methodology is limited in smaller scale studies is that the literature was not always clear about how the researchers had interpreted or evidenced which schemas applied, but moreover that Ewick and Silbey, and Cowan, identified that in fact most people did fall within the Before the Law schema. In certain circumstances individuals did overlap with the other schemas but unless very carefully analysed, it reduces the validity of the findings.

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After considering the literature in relation to challenges that practitioners faced there were no surprises and the same themes came up time and time again, particularly the effects of organisational constraints such as staff shortages and issues with legal literacy (start with Jeyes et al and Jenkins et al in the reference list for two strong studies).

The Local Government Association's Analysis of SAR's (2020) made recommendations in relation to legal literacy and culture as a recognised factor yet again. I was able to meet Margaret Flynn as part of Keele's Safeguarding Adult master's programme earlier this year and she stressed the importance of having a safe culture within organisations. Also that encouraging collaboration with others, transparency and the dangers of practising in isolation to avoid safeguarding risks. She particularly spoke about safeguarding reviews in which she would hear "this is how we do it here". This was a theme in Winterbourne View

but just as we hope that those days are in the past, BBC's Panorama filmed concerns raised in the Edenfield Centre near Manchester recently - <https://www.gmmh.nhs.uk/bbc-panorama-and-the-edenfield-centre/>

The literature suggested that for decision-makers to carry out MCA assessments confidently, rather than relying heavily upon and deferring to care home managers, doctors and psychiatrists, there needed to be collaboration between agencies where specific knowledge was needed but with accountability remaining with the decision-maker.

Legal literacy was inconsistent and at times non-compliant despite mandatory training and review. The literature suggested that combining human rights and mental capacity law training together could help and by encouraging the use of evidence-based checklists. Support for assessors confidence by way of supervision was also important and difficult to achieve during a staffing crisis.

See Manthorpe, J. and Samsi, K. (2016) Care homes and the Mental Capacity Act 2005: Changes in understanding and practice over time, *Dementia*, Vol. 15(4), pp. 858–871 and Samsi, K., Manthorpe, J., Nagendran, T. and Heath, H. (2012) Challenges and expectations of the Mental Capacity Act 2005: An interview-based study of community-based specialist nurses working in dementia care, *Journal of Clinical Nursing*, Vol. 21, pp. 11–12).

Confidence is not necessarily an indicator of good practice - Willner, P., Bridle, J., Price, V., Dymond, S. and Lewis, G. (2013) What do NHS staff learn from training on the Mental Capacity Act (2005)? *Legal and Criminological Psychology*, Vol. 18, pp. 83–101

Use of Case studies to improve learning and training and combining MCA and Human Rights training was beneficial - (Jenkins et al, reference list, Marshall, H. and Sprung, S. (2016) Community Nurse's Knowledge, Confidence and Experience of the Mental Capacity Act in Practice, *British Journal of Community Nursing*, Vol. 21, pp. 615–622 and Marshall, H. and Sprung, S. (2018) The Mental Capacity Act: 10 years on - the key learning areas for healthcare professionals. *Nursing: Research and Reviews (Auckland, N.Z.)*, Vol. 8, pp. 29–38

I was aware that my dissertation findings could not influence resource issues, however by focusing on micro level awareness it may support practitioners and managers to raise legal awareness with the potential to influence positive working cultures.

Young (2014) used legal consciousness in a study of illegal cockfighting in Hawaii but expanded the model to include what she called 'second-order legal consciousness'. She explained that cultures can be developed in which individuals or employees are influenced not just by their own experiences and beliefs about legality, but also by their understanding of the beliefs of others. She gives the example of a law professor legitimising the illegal downloading of media subject to copyright and how his actions shaped the views of students and colleagues. It is quite easy to see how managers and organisational processes can destruct or construct the interpretation of the law and to shape a culture of illegality, placing service users and staff at risk. (Young, K. (2014) Everyone knows the game: Legal consciousness in the Hawaiian cockfight, *Law & Society Review*, Vol. 48(3), pp. 499-530).

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In this case Miss B had a ruptured blood vessel in her neck which led to damage to her spinal cord. The dilemma faced by the court was the withdrawal of ventilation as this would lead to her death. Whilst a Pre MCA case it demonstrates the continuing complexity between carrying out the wishes of the person and respecting autonomy, particularly when the outcome would be death. The hospital was reluctant to follow Miss B's wishes without a Declaration from the Court of Protection for fear of **trespass** to the person. The Court held that if the person has capacity then they have the right to make the decision.

For a similar more recent case see Kings College NHS Trust v C & V (better known as the sparkle case) [2015] EWCOP 87. It was decided that as this mother was able to use and weight the information and had capacity, she was able to apply her own values and make what others considered an unwise decision to refuse treatment despite this leading to her death. Having been diagnosed with breast cancer she attempted suicide which was unsuccessful but left her needing renal dialysis. She refused the treatment despite the likelihood of its success.

Alex Ruck-Keene (KC Hon) et al (2019 see ref list) studied 40 cases in the Court of Protection and found that whilst on a learning curve still, the Court took capacity seriously. This study is part of the wider project Mental Health and Justice - <https://mhj.org.uk/>

See also the work by Owen, Kong and Coggon and their Project into values of Judges and Legal Practitioners and interdisciplinarity available at <https://www.icpr.org.uk/judging-values-and-participation-mental-capacity-law>

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Appreciating law and culture as legality through legal awareness may encourage practitioners to be reflexive about how we feel about our use and understanding of the law and reflect upon our application of and construction of legality. Seeking or facilitating regular supervision, training and collaborating with service users, families, carers, colleagues, and other professionals where necessary, enables practice that engages with the principles of the MCA and human rights, respecting the autonomy of people with cognitive impairments and their right to capacity set out at Article 12 of the CRPD – United Nations Convention on the Rights of Persons with Disabilities 2006.

Ewick and Silbey urge us to pay attention to legality as a whole, not just the contested parts of legality but the "unnoticed" parts and parts "seemingly open to negotiation" being aware of the power of laws and cultural legality in our everyday lives (Aidlinis, 2019 Defining the 'legal': two conceptions of legal consciousness and legal alienation in administrative justice research, The Journal of Social Welfare & Family Law, Vol.41(4) p. 496).

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Implications for Practice – legal awareness and its capacity to shape cultural legality supports best practice. Being reflexive and reflective when making decisions, completing checklists and engaging with supervision and collaboration with people with cognitive impairment, their families, carers and other staff and professionals. Thinking about Legal Awareness may just provide a space in which to consider how individual and organisational

practice supports the MCA to empower autonomy rather than focus on risk avoidance, particularly when practitioners and managers are under such organisational pressures to quantify and manage risk (Murrell and McCalla, 2016).

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I hope that this short presentation and notes are of some benefit. You are welcome to contact me with any questions or discussions after today by emailing me at j.kirkham3@keele.ac.uk