BOOK REVIEW

B CLOUGH (ED) *THE SPACES OF MENTAL CAPACITY LAW: MOVING BEYOND BINARIES* (2022)

*Piers Gooding**

(Routledge 2023) 208 pages, ISBN: 9781032115771

1 Introduction

Beverley Clough's 2022 monograph, *The spaces of mental capacity law: Moving beyond binaries*,[1] critically examines legal frameworks that authorise a third-party individual or judicial body to act and make decisions on behalf of adults deemed to lack decision-making ability in certain areas. Legislative examples include the Mental Health Care Act 17 of 2002 in South Africa, or the Assisted Decision-Making (Capacity) Act, 2015 in Ireland. Mental capacity laws create rules and processes for restricting the legal capacity of people with intellectual, cognitive, and psychosocial disabilities, and enabling substituted decision-making. Decisions typically concern care about a person, whether by families seeking to attain decision-making authority, or by health and social services seeking to pursue an ostensibly protective intervention.

The spaces of mental capacity law takes the reader through debates in law, the humanities, and social sciences concerning mental capacity, asking what issues the law makes visible, and those it obscures. The book focuses on the often-hidden encounters of care experienced by people governed by mental capacity law. Care is conceptualised in the book as practice but also political theory, as Clough draws attention to the political, economic, and

* BA (Hons), PhD (Law). Associate Professor, La Trobe School of Law, La Trobe University, Melbourne, Australia. ORCID: 0000-0001-5743-5708 I would like to thank Dr Yvette Maker, Senior Lecturer in the Faculty of Law, College of Arts, Law and Education at The University of Tasmania, for her valuable feedback on an earlier draft of this review.

1 B Clough *The spaces of mental capacity law: Moving beyond binaries* (2022).

P Gooding 'Book review: B Clough *The spaces of mental capacity law: Moving beyond binaries* (2022)' (2024) 12 *African Disability Rights Yearbook* 232-241
https://doi.org/10.29053/adry.v12i1.5526

legal framework that makes space for care – or, as the case may be, *un*caring conditions. In so doing, she takes aim at the underlying norms and assumptions beneath the very idea of mental capacity.

The jurisdictional focus is England and Wales, concentrating on the Mental Capacity Act 2005 (MCA). Yet, doctrinal differences in capacity law – whether concerning 'guardianship' or 'conservatorship' or whatever the jurisdictional terminology used throughout the world – quickly give way to shared practical and conceptual issues. This is especially so in common law countries, given the MCA largely consolidates and codifies English common law responses to matters of capacity, impairment, and decision-making. These responses have not diverged significantly throughout the common law world, at least not yet. As Clough notes, the United Nations' Convention on the Rights of Persons with Disabilities (CRPD) has profoundly challenged the very idea of capacity law, sparking some noteworthy global experimentation and variation.[2]

Readers, therefore, could rightly acknowledge the MCA not just for exemplifying a new wave of mental capacity law, but also for sparking a proliferation of (largely British) scholarship on the topic.[3] The CRPD has expanded this critical scholarship, law reform, and activism internationally, sparking a proliferation of commentary on questions of capacity, personhood, disability, equality, and care.[4]

Clough, who is a Professor of Law at Manchester Metropolitan University, has contributed significantly to the field, having produced three co-edited collections, including a new collection with Laura Pritchard-Jones, titled *Mental capacity law, sexual relationships, and intimacy*.[5]

2 M Bach & N Espejo-Yaksic *Legal capacity, disability and human rights* (2023).

3 For example, P Bartlett 'At the interface between paradigms: English mental capacity law and the CRPD' (2020) 11 *Frontiers in Psychiatry* Article 570735; C Kong *Mental capacity in relationship: Decision-making, dialogue, and autonomy* (2018); L Series *Deprivation of liberty in the shadows of the institution* (2022).

4 For example, Bach & Espejo-Yaksic (n 2); D Bilchitz 'Dignity, fundamental rights and legal capacity: Moving beyond the paradigm set by the General Comment on article 12 of the Convention on the Rights of Persons with Disabilities' (2017) 32 *South African Journal on Human Rights* 410; W Holness 'Equal recognition and legal capacity for persons with disabilities: Incorporating the principle of proportionality' (2014) 30 *South African Journal of Human Rights* 313; W Holness & S Rule 'Legal capacity of parties with intellectual, psycho-social and communication disabilities in traditional courts in KwaZulu-Natal' (2018) 6 *African Disability Rights Yearbook* 27; J Duffy *Mental capacity, dignity and the power of international human rights* (2023); E Flynn and others *Global perspectives on legal capacity reform: Our voices, our stories* (2018); E Kamundia & I Grobellaar-du Plessis 'Supported decision-making and legal capacity in Kenya' in C Sunkel and others (eds) *Mental health, legal capacity, and human rights* (2021) 199; D Msipa 'A critical review of legal capacity reforms in the African region' in Bach & Espejo-Yaksic (n 2) 177; Y Maker *Care and support rights after neoliberalism: Balancing competing claims through policy and law* (2022); K Wilson *Mental health law: Abolish or reform?* (2021).

5 B Clough & L Pritchard-Jones (eds) *Mental capacity law, sexual relationships, and intimacy* (2024).

These works form part of her broader contribution to socio-legal scholarship concerned with disability, ageing, gender, and family.

In the early 2000s, MCA drafters sought to create a progressive and rights-focused law during a period of medical advances and an ageing population. The MCA was designed, at least partly, to 'empower' those for whom substituted decision-making was deemed necessary. But for Clough, the drafters' ambitions have fallen short because of deep conceptual problems, centring on its outmoded idea of the 'legal subject' – a 'legal subject built on Enlightenment ideals of autonomy and rationality'.[6] These unrealistic ideals, Clough contends, and the elevation of expert and judicial intervention to mediate the border of capacity/incapacity are 'dangerous and damaging [with] far-reaching repercussions across the legal landscape'.[7]

Instead, Clough makes the case for decentring the 'legal subject and their agency/choice', and refocusing on the 'recursive relationship between the legal subject and the material and discursive spaces' in which they are embedded.[8] She seeks to expose and agitate several key binaries that 'shape and form the logics' of mental capacity law, and broader legal frameworks,[9] namely: capacity/incapacity, autonomy/paternalism, empowerment/protection, carer/cared-for, disabled/non-disabled, and public/private. These binaries, Clough suggests, act as boundaries, falsely presented as 'natural, immovable and given'[10] in ways that cement the place of the state in mediating between them.

The book brings welcome theoretical attention to the often-overlooked matter of mental capacity in legal scholarship. As Clough points out, mental capacity law occupies a 'curious position' in law given it is typically presented as a peripheral or niche field.[11] When mental capacity law appears in legal education, for example (if it appears at all), it is typically presented as a minor sub-field of medical law or makes a brief appearance in the law of contracts. This is curious when you consider that countries like England and Wales have two million people thought to meet the definition of mental incapacity who receive some form of care, whether formally or informally from around six million people[12] – in what is a combined total of over ten per cent of the population.

6 Clough (n 1) 1.
7 Clough (n 1) 4.
8 Clough (n 1) 8.
9 Clough (n 1) 4.
10 Clough (n 1) 5.
11 Clough (n 1) 2.
12 Social Care Institute for Excellence (SCIE) 'Mental Capacity Act 2005 at a glance' (Last updated 2022) https://www.scie.org.uk/mca/introduction/mental-capacity-act-2005-at-a-glance/ (accessed 21 November 2024).

2 Chapter outline

There are seven chapters. **Chapter 1 and 2** set out key concepts. Clough draws from diverse theoretical traditions in cultural studies, geography and legal theory concerning 'spatial approaches' to law – drawing on authors such as David Delaney, Sarah Keenan, and Andreas Philippopoulos-Mihalopoulos –[13] which are brought into conversation with philosophies of vulnerability and relational autonomy, CRPD jurisprudence, with its profound challenge to theories of justice and the legal subject,[14] as well as ethics of care, critical disability studies, and feminist new materialist theory.

The latter theory of 'new materialism' features heavily, of which theoretical physicist Karen Barad is perhaps the most widely cited proponent.[15] New materialism emphasises the 'entanglements' of bodies, environments, and technologies. Applied to the disability context, this theory reframes disability not as an inherent lack or deficit, but as a predicament embedded in dense networks of material, social, and technological circumstances – or 'assemblages'. This may sound similar to the social model of disability, but Clough argues that new materialism addresses significant flaws in the social model by helping to examine diverse sources of agency at play in any given situation. Shifting the view of the capacity to act from an *individual* to a diverse *network* of people, things, and ideas which are in a constant state of interaction and co-constitution, helps Clough to then apply a spatial analysis to mental capacity law.

For readers unfamiliar with new materialism, the analytical concept of assemblages might feel conceptually chaotic. Which networks of people, things, and discourses are important? Who decides? Clough turns in Chapter 2 to disability studies, and more latterly, critical disability studies, to clarify the kind of variables she suggests are worth prioritising in any given assemblage. Clough cites a helpful passage from Michael Feely[16] to elaborate:

> [A]n assemblage account of why a particular service user, diagnosed as having cerebral palsy, cannot currently speak might consider:

13 D Delaney *The spatial, the legal and the pragmatics of world-making: Nomospheric investigations* (2010); S Keenan *Subversive property: Law and the production of spaces of belonging* (2015); A Philippopoulos-Mihalopoulos 'And for law: Why space cannot be understood without law' (2018) 17 *Law, Culture and the Humanities* 1.

14 E Flynn & A Arstein-Kerslake 'Legislating personhood: Realising the right to support in exercising legal capacity' (2014) 10 *International Journal of Law in Context* 81.

15 K Barad *Meeting the universe halfway: Quantum physics and the entanglement of matter and meaning* (2007).

16 M Feely 'Disability studies after the ontological turn: A return to the material world and material bodies without a return to essentialism' (2016) 31 *Disability & Society* 863.

- the biology of the particular body and its actual physical capacities (the things it can and cannot do in its current material context);
- existent communication technologies and current research into communication technologies;
- what funding is, or is not, available for this;
- how the relevant legislation and policies enable and constrain access to speech technologies; and
- how societal discourses construct speechless subjects and the provision of expensive technologies to them.

The assemblage analyst would seek to map how the complex interaction of all of these elements produces the problem of a body that cannot currently speak.

By applying these concepts to law, in what is a dense and challenging set of conceptual arguments, Clough suggests that 'spatialising the analysis' allows us to better recognise the conceptual, doctrinal, and material constraints of current law.

Clough joins critics of dominant accounts of the social model of disability, who argue that the model reinforces able-bodied norms and the classical liberal subject. Instead, she argues – per Barad's new materialism – that agency ought to no longer be tied solely to human subjects. From this view, the MCA's core focus on a person being able to 'understand, use, and weigh information'[17] fares poorly, exemplifying as it does the liberal legal subject in his splendid isolation.

Chapter 3 focuses on 'the processes through which the binary divide between capacity/incapacity is created and sustained', and its consequences.[18] The capacity/incapacity binary is presented as sort of an arch, organising binary for the MCA. Clough rejects calls by other figures in the British field for capacity assessment processes that are simply improved by integrating a more relational account of autonomy, or by acknowledging subjective elements to the capacity test.[19] Instead, she looks to 'disrupt the ideas of causality, temporality, responsibility, and agency that shape the mental capacity framework' and sees the assemblage, and the spatial and relational analysis as the means for such disruption.[20] Clough then applies these analyses to unpack key MCA cases. Article 12 of the CRPD is discussed briefly, but Clough raises concerns that some responses to the CPRD (typically more moderate interpretations) are merely overlaid onto existing binaries of mental capacity law, which leave deeper conceptual problems undisturbed.

17 *Mental Capacity Act 2005* (England and Wales) sec 3(1).
18 Clough (n 1) 52.
19 See for example Kong (n 3); A Ruck Keene 'Is mental capacity in the eye of the beholder?' (2017) 11 *Advances in Mental Health and Intellectual Disabilities* 30.
20 Clough (n 1) 60.

Chapter 4 turns to the binaries of carer and disabled person in mental capacity law and Clough suggests that the capacity/incapacity binary, which is presented as technical and apolitical, obscures the role and responsibilities of the state and institutions. She calls for a shift from focusing on the disabled/carer dyadic to instead envisioning 'landscapes of care'.[21] Care ethics scholarship and critics like Jenny Morris[22] have largely bridged care theory with disability scholarship, even as some conceptual and political tensions remain, which can see the political interests of carers and disabled people pitted against one another.[23]

Clough argues that a spatial and relational approach avoids reinforcing problematic binaries in a way that neither the MCA or CRPD seem able to do. Within the MCA, the test of 'best interests' focuses solely on the individual deemed to lack capacity, thus sidelining carers, while the CRPD characterises families in a separate and instrumental fashion in relation to the disabled person – though on this latter point, it was not clear why the CRPD provisions on disabled people as parents were left out (article 23(1)-(2)). By highlighting that disablement and carer status are context-dependent and influenced by factors such as changes over time and the people and resources to hand, Clough calls for a reframing of 'care as a practice involving a number of actors and institutional relations'.[24] This, she argues, can challenge the static views of care settings found in mental capacity law and adjacent policy, which applies different rules and regimes depending on the site in which care takes place. For example, different rules apply in an 'institution' versus a 'home', even as the distinction between the two is often far from clear.

Chapter 5 examines the role of the state, suggesting that mental capacity law veils the role of the state and other institutions when it frames issues through the binaries of autonomy/paternalism and empowerment/protection. Clough nods to theories of vulnerability, relational autonomy, and Amartya Sen's capabilities approach, which she acknowledges as important advances in more relational accounts of care, but they fall short for Clough due to their limited imagination for what is possible in law, as they too are bounded by the binaries noted above. Drawing on Margaret Davies' socio-legal work, Clough critiques the centrality of 'liberty as non-interference' in liberal legalism and stresses the 'state's ubiquitous presence' in everyone's life, a presence that is often made invisible, as the water in which fish swim.[25] But the state is never absent – it supports, intrudes, maintains, and generates conditions for people's lives. It is just that the state resources available to those who fit the mould of the ideal

21 Clough (n 1) 78.
22 J Morris 'Impairment and disability: Constructing an ethics of care that promotes human rights' (2001) 16 *Hypatia Special Issue: Feminism and Disability, Part 1* 1.
23 For example, Maker (n 4).
24 Clough (n 1) 95.
25 Clough (n 1) 29. M Davies *Law unlimited* (2017).

liberal legal subject are more often taken as a given, and falsely cast as natural within the zone of freedom to which he is afforded. But what of those who do not fit this ideal? Professional expertise and institutional resources are also obscured by a narrow either/or focus on autonomy or paternalism. The very processes of assessment, the operation of services, and the decisions as to what type of support can and cannot be provided, are then recast as neutral and unassailable – at least through the private law frame of mental capacity law which seems unable to marshal public resources as in public law.

Turning again to the CRPD, Clough discusses the right to independence and participation in community (article 19), suggesting it draws welcome attention to the role of the state in resourcing diverse ways to ensure people with disabilities can join and contribute to social life. Yet she warns, again, of a possible interpretation that is overly individualistic and built on the ideal of the autonomous liberal norm.

Chapter 6 critically examines liberty in the mental capacity framework, and reflects on the accounts of the state and legal subject they evoke. The chapter sets out the case for a move from the individualising concern with liberty to a focus on 'facilitating and enabling freedom *through* – by unbounding liberty and being attentive to the relational and spatial dynamics and what they allow or foreclose'.[26] Clough criticises both liberal and republican theories of liberty, for reinforcing individualistic framings that do not account for the relational nature of freedom. By recognising the entangled processes that shape experiences of freedom and constraint – and not a single source of domination or power imbalance – she calls for 'unbounding liberty'[27] in ways that move from a highly individualising account to one which considers those contextual power dynamics; and which does not denigrate dependency and instead acknowledges it as part of the assemblages in which all people live.

Chapter 7 focuses on the public/private divide and how it is deployed under the MCA, in Clough's reading, to entrench disempowerment and avoid scrutiny of broader disabling structures through society. She argues that the judiciary actively reproduces and reinforces the boundary between public and private, by assiduously avoiding a situation in which the court orders the deployment of resources or certain service configurations owed to the person. Instead, the MCA is designed to attend the private law matter of the 'best interests' of the person, maintaining jurisdictional boundaries in ways that, Clough suggests, obscures responsibility and constrains responses to the binaries noted earlier, particularly intervention or non-intervention. The outsized powers ascribed by courts to expert judgement by health and social care professionals function similarly. The

26 Clough (n 1) 160.
27 As above.

judiciary, from this view, ought not be seen as neutral observers, powerless to direct government resources, but as active participants in constructing and defining these dividing lines – and it is this role, Clough argues, that can and should be reconfigured around a richer account of the legal subject and the state.

The **Conclusion** contains an intriguing passage on the role of the CRPD in advancing the ideas in the book, which, for Clough, are dependent on the extent to which the CRPD 'can break out of a liberal legal mould'.[28] But Clough also stresses that the book is not about CRPD compliance, but rather aims to reveal the binaries on which mental capacity law seems to be built and constrained.

3 Commentary

Clough's writing is lively and enthusiastic – memorable was her rejection of a view of law 'as a static, authoritative, and positivist "thing", rather than the politically infused, shifting, and active beast that socio-legal scholars have long been illuminating'.[29] The writing-style reflects the deconstructive approach of the book itself; it pulls apart established binaries and persistently interrogates concepts rather than offering clear-cut definitions. Legal and social theorists are likely to be most at home with the long tracts of abstraction and forays into diverse theoretical traditions (particularly Chapters 1 and 2). This may not be a book for strict doctrinal researchers or black letter practitioners seeking guidance on the workings of mental capacity law.

The book is premised on an argument that the complexity of the concepts – primarily the instability of the idea of capacity itself, but also of disability, care, agency, and so on – are resistant to simplistic accounts, requiring complexity, abstraction, and intertextuality. Clough's resulting work is a rich tapestry of ideas, difficult to convey in a short review.

For readers in low and middle-income settings – acknowledging that I am not such a reader – the extent to which the book is relevant is perhaps the same extent to which any deep theoretical analysis of mental capacity law in the common law tradition is relevant. In most low- and middle-income countries, mental capacity law is not likely to touch on the lives of anywhere near the proportion of those in England and Wales, and other high-income countries. Yet, the basic theoretical suggestion that laws like the MCA narrowly constrain the focus in ways that obscure a multitude of other important factors that really *should* be considered, is likely to be of interest to anyone deeply interested in improving legal responses to care or

28 Clough (n 1) 191.
29 Clough (n 1) 6.

in building legal frameworks that are more responsive to particular social and economic contexts.

On the CRPD, and acknowledging that any book has a limited purview, some discussion lacked detail granted to the other theoretical fields. Passages on article 19, for example, would have been enriched by sources like the Committee on the Rights of Persons with Disabilities General Comment 5, or the rich scholarship and activist traditions of those engaged in drafting it.[30] These materials raise almost identical questions to those discussed in the book concerning the nature of 'community', the role the state, and the support/interference dichotomy. Such passages reflected a tendency, in my reading, to refer to quite specific interpretations of the CRPD without presenting their contested – and sometimes *highly* contested – status, and occasionally generalising very particular readings as dominant discourse.[31] That said, any CRPD proponents would do well to grapple with the broader critique of the humanist and liberal baggage they carry, and disability rights scholars sometimes – and perhaps often – overlook the kind or rich theoretical scholarship covered in this book.

Another thread I was left wanting to pull was the call in new materialism to flatten the agency between human and non-human entities. A focus on interwoven webs of agency requires diluting agency *away* from human actors, which seems at odds with the decades-long effort of disabled people and others precisely to *gain* recognition of their agency – and humanity more broadly – amid the hostile social context that Clough so vividly conveys. Whether this political aspiration is advanced by theoretical reconfigurations that draw agency *away* from humans writ large, surely remains an open question.[32] For her part, Clough seems to suggest that care ethics – as well as critical disability studies and perhaps certain accounts of the CRPD – can buttress new materialism to avoid such adverse consequences.

Regardless, this book is one of the most significant monographs to bridge the intellectual traditions of disability-related law with contemporary critical disability studies, care ethics, and political theory. Clough offers critique of mental capacity law in the true sense, not as mere rejection or criticism, but rather as an exercise in understanding what assumptions and preconditions underlie a problem. Her critique goes a step further and agitates many of those assumptions, offering a vital

30 For a survey, see Y Maker 'From care and welfare to independent living? Interpreting and assessing the human right to live independently and be included in the community' in S Robinson & KR Fisher (eds) *Research handbook on disability policy* (2023) 274; P Gooding 'The right to independent living and being included in the community: Lessons from the United Nations' (2018) 24 *International Journal of Mental Health and Capacity Law* 32.

31 Clough (n 1) 71-74, 128-132.

32 I am indebted to Prof Linda Steele for raising a query along these lines at a legal conference some years ago.

challenge for law reform, care practice and policy, activism, and scholarship ahead.