

**THE SPACES OF MENTAL CAPACITY LAW
MOVING BEYOND BINARIES, BY BEVERLEY CLOUGH (ROUTLEDGE,
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Dr Beverley Clough, Associate Professor in Law and Social Justice at the University of Leeds, has established herself in a relatively short space of time as one of those whose works go straight onto the reading list for students (in all senses) of matters capacity related. Her latest work, the fruits of a ISRF Early Career Fellowship, is "The Spaces of Mental Capacity Law: Moving Beyond Binaries," and should equally find its way onto the reading list. It is a stimulating, and very challenging, exploration of both the conceptual spaces and the contexts which mental capacity laws exist, focusing primarily upon England & Wales.

After two largely conceptual chapters, drawing out, in particular, a model with which to interrogate the space occupied by the Mental Capacity Act 2005, the central spine of the book is a dissection of five binaries that Clough identifies as pervading mental capacity laws in jurisdiction such as England & Wales: (1) capacity/incapacity; (2) care/disability; (3) state/individual; (4) freedom/deprivation of liberty; and (5) the distinction between public law and private law. In each of the chapters, Clough identifies ways in which the binary in question is perhaps not as fixed as is assumed, either by current law, or by those who apply it. She is particularly interested in, and critical of, the ways in those binaries are embedded in the broader logics of liberalism, and one of the signal services of the book is to bring those links into the light.

Refreshingly, at least to this reader, whilst Clough is clear that her goal is to open up new ways of thinking about mental capacity law, the book adopts a subtle and nuanced approach to some of the ways in which current legal frameworks relating to capacity have been challenged by those dissatisfied with the ways in which they serve (or do not serve) those with impairments of different kinds. She has, for instance, some acute, and interestingly sceptical observations about the debates relating to relational autonomy and vulnerability. She also asks some particularly pertinent questions about the potential for the UN Convention on the Rights of Persons with Disabilities to allow an escape from the binaries that she identifies, noting the extent to which (perhaps ironically) that the "residue of liberal legal ideals is present across the Articles of the Convention in terms of the language used and a focus on autonomy" (page 191).

I noted at the outset that the book is challenging, a word that I chose carefully for its multiple meanings. The more conceptual chapters, in particular, are definitely not an easy read, and those new to the field might find themselves at times having to wrap the wet towel around their heads whilst they trace the development of the

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arguments through. The wet towel would be well-used, though, because the chapters which follow amply bring the theoretical into close and detailed contact with 'real life.' As both an academic and a practitioner before the Court of Protection, I must also confess to giving the odd hollow laugh at the sustained analysis of judgments¹ which I am well aware reflect as much the vagaries and contingencies of fate than they do of the workings out of any very considered philosophy. That having been said, of course: (a) the judgments reflect the written record, and are therefore fair game for dissection; and (b) Clough's analysis of what is not said, or what is assumed, in those judgments is always stimulating.

The major reason for saying that I find the book challenging in what could be taken as a negative fashion is perhaps a little unfair, but it is only a function of it being so stimulating in what it covers. What the book left me wanting was a second volume in which Clough grapples with the ways in which the binaries that she so interestingly challenges play out in two key areas.

The first is where questions of disability are simply not in play (or not in play in the same way) in relation to capacity than in the ways she carefully analyses in chapter 3. For instance, what is a doctor to do in relation to a patient who is unable to consent to a life-saving procedure not because of any underlying cognitive challenges, but because they are unconscious having been brought in after a car-crash? It would certainly be possible to find other ways of directing and/or limiting the doctor's approach² but it does seem very difficult not to find a route which does not, at some level, engage questions of capacity.

The second is where there is no direct state involvement. Each of the binaries that she describes arises in situations where the state is in some way involved in the life of the individual(s) concerned, and Clough makes a powerful case for revisiting the very foundations of that involvement. It is, however, not so obvious that the state is intervening in a situation where someone seeks to enter into a contract, to make a gift, or to make arrangements to dispose of their property after death. All of those are situations where the capacity/incapacity binary arises (although largely unmediated by the Mental Capacity Act 2005³). I hope that Clough can be persuaded to offer some thoughts in her future work as to whether (and if so) how the binary needs to be revisited in such contexts. For my part, and accepting that I may be incapable of escaping the coils of liberal legal ideals, I might still require some persuasion that – for all its flaws – there is any other model that commands greater legitimacy for all the purposes for which it is which it is required than that of mental capacity.

I reiterate, though: that I make these observations is primarily a function of how stimulating the work itself is, and I recommend it highly to all those interested in

¹ Some of which relate to cases I have been in.

² There are some civil law jurisdictions, for instance, there is general health legislation providing for treatment to be provided in an emergency absent consent.

³ The test for capacity to contract, to make a gift, and to make a will are all governed by the common law, save that the Mental Capacity Act 2005 governs the situation if the Court of Protection is being asked to act on behalf of the person.

thinking more broadly about mental capacity law than is sometimes possible in the thickets of the MCA 2005 itself.