



UNIVERSITY OF LEEDS

This is a repository copy of *Camillia Kong, Mental Capacity in Relationship: Decision-Making, Dialogue, and Autonomy*.

White Rose Research Online URL for this paper:
<http://eprints.whiterose.ac.uk/137677/>

Version: Accepted Version

Article:

Clough, B orcid.org/0000-0001-7640-1378 (2019) Camillia Kong, Mental Capacity in Relationship: Decision-Making, Dialogue, and Autonomy. *Medical Law Review*, 27 (1). pp. 171-180. ISSN 0967-0742

<https://doi.org/10.1093/medlaw/fwy031>

© 2018, The Author(s). Published by Oxford University Press; All rights reserved. This is an author produced version of a paper published in *Medical Law Review*. Uploaded in accordance with the publisher's self-archiving policy.

Reuse

Items deposited in White Rose Research Online are protected by copyright, with all rights reserved unless indicated otherwise. They may be downloaded and/or printed for private study, or other acts as permitted by national copyright laws. The publisher or other rights holders may allow further reproduction and re-use of the full text version. This is indicated by the licence information on the White Rose Research Online record for the item.

Takedown

If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.



eprints@whiterose.ac.uk
<https://eprints.whiterose.ac.uk/>

Mental Capacity in Relationship: Decision-Making, Dialogue, and Autonomy, C. KONG,
Cambridge University Press, 2017, hardback, 272 pp., £69.99, ISBN 9781107164000

Beverley Clough, School of Law, University of Leeds, England, b.clough@leeds.ac.uk

Medico-legal debate around disability and mental capacity law is thriving. The UN Convention on the Rights of Persons with Disabilities 2006 (CRPD) has spawned lively discussion around the core underpinnings of our current legal framework, including where we draw the lines around legitimate decisions and decision-makers, what the role of the state should be in such decisions, and when others should intervene in decisions. Much of this has culminated in a critical reappraisal of autonomy and important interventions in long-standing debates about autonomy from a disability perspective. Where there appears to be less progress is in taking these abstract debates to the level of practice and law reform. This is where Camillia Kong seeks to step in and push these debates forward. *Mental Capacity in Relationship* is, in this sense, ambitious, timely and important. Kong melds an impressive range of theoretical, philosophical, doctrinal and socio-legal perspectives, in order to conclude as to how a more relational understanding of mental capacity could be operationalised in practice. It is a particularly rich body of research and argument, and so not all of the elements can be considered here in depth. This review will focus on discussion of the significance of disability, the framing of the CRPD, the theoretical underpinning of ethical obligations, and conclusions for next steps for the Mental Capacity Act 2005 (MCA).

In Chapter 1, 'Problems with Mental Capacity', Kong sets out the current critical terrain in this area and sets out the core tasks of the book; to argue for a relational concept of mental capacity and to clarify what this would mean in terms of obligations of others (capacity assessors and those in surrounding relations) to contribute to facilitating autonomy (p. 6). At the outset, the current problems are outlined through the use of practical scenarios which evidence the difficulties faced by those seeking to decipher the legitimacy of a decision based on the understanding of autonomy advanced in the MCA 2005. This, as Kong suggests, is based on an either-or concept of capacity, built on an idea of capacity as an internal 'thing' or ability. A further motivation for the monograph is said to be the 'othering' of those with impairments in society, as being seen as exceptions to general normative ideals which are often produced through rights, autonomy, and reasoning discourses. Instead, Kong seeks to 'push back against this side-lining move in rethinking the concept of mental capacity' and to shift the normative conditions to 'include individuals with impairments and their unique, embodied interactions with their environment' (p. 4). This is undoubtedly a pressing issue, given the challenges stemming from the CRPD and Article 12 in particular, which I will return to. However, it is important to reflect on the way that this problem is framed here and throughout the book. Whilst being more inclusive of those with impairments within philosophical debates is, of course, important, there are many who are going beyond this in the literature and advancing the need to rethink the foundations of the broader concepts of capacity and autonomy not just for disabled people, but for everybody.¹ It is not clear whether Kong ascribes to the idea that relationality is important just for those with particular impairments (that is, those falling within the boundaries of the MCA 2005), or whether we need to rethink the broader foundations of the legislative framework through the idea of relationality espoused here. There are some hints as to her stance, when Kong suggests that

¹ See, eg., L Davy, 'Philosophical Inclusive Design: Intellectual Disability and the Limits of Individual Autonomy in Moral and Political Theory' (2015) 30 *Hypatia* 132; B. Clough, *The Spaces of Mental Capacity Law* (Routledge), forthcoming.

the claims made in the monograph ‘could help the law develop towards a more relational interpretation of mental capacity so that medico-judicial assessors and judges can apply current legal concepts that will enable individuals with impairments to exercise their autonomy’ (p. 6). This suggests that this is just about shifting our ideas of autonomy in relation to those with impairments. Interestingly, however, in a footnote Kong reflects that ‘[i]t also could have a potentially broader scope, applying to relationships involving not only those with borderline capacity under the law but also victims of abuse who pass the legal threshold of mental capacity, in the context of promoting their potentialities and abilities in mundane day-to-day settings’ (n. 7 p. 6), but that this is beyond the scope of her book. This is disappointing as it could give the impression that those with cognitive impairments are still an ‘exception’ or ‘other’ who need to be theorised better, yet the norms against which they are measured or assessed should remain intact. But is it only those with impairments, and possibly also those in abusive relationships, whose decision-making abilities need to be promoted? Does this mean that everyone else either already ‘achieves’ particular abilities, or has these facilitated already (and if so, by whom, or what)? Whilst a seemingly minor point, a lack of precision on this broader aim haunted many of the subsequent arguments and, in turn, limited the strength and clarity of the conclusions.

Chapter 2 develops the discussion of relationality in order to argue that legal rights already structure relationships in particular ways.² Kong focuses here on the external challenge to mental capacity which inheres in the CRPD; in particular, Article 12 which she terms the ‘will and preferences paradigm’ (p. 19). She concludes in this chapter that this ‘will and preferences paradigm’ adheres to the public/private distinction and liberal individualism. According to Kong, the CRPD overlooks the ways laws and rights are designed to structure relationships and, as such, we should reject this liberal understanding in favour of a more relational approach to mental capacity. It is necessary to outline some of the background of Article 12 and the CRPD here, as the argument potentially becomes problematic in this understanding of the CRPD because of the lack of clarity about the precise target of criticism in the book, as noted above.

The CRPD is broadly seen as embodying a potentially revolutionary approach to disability rights, given the focus on the positive obligations of State Parties. Indeed, the Preamble and Articles of the Convention are infused with the language of the social model and capabilities approaches,³ echoing the need for equality and positive actions to achieve this change. The Preamble stresses the importance of recognising that disability results from the interaction between persons with impairments and attitudinal and environmental barriers to equality, the need to promote and protect human rights for people with disabilities, including those who require more intensive support. The ethos of the CRPD is very much about taking positive steps to enable rights to be protected,⁴ and the structuring of rights and obligations in various different spheres in order to enable the enjoyment of these rights.

Article 12 has received significant attention, particularly from those working in the fields of mental health and mental capacity law.⁵ It is concerned with the right to equal recognition

² ‘Mental capacity, legal capacity, and relational rights’.

³ C. O’Mahony, ‘Legal Capacity and Detention: Implications of the UN Disability Convention for the Inspection Standards of Human Rights Monitoring Bodies’ (2012) 16 *International Journal of Human Rights* 883; A. Samaha, ‘What good is the social model of disability?’ (2007) 74 *University of Chicago Law Review* 1251.

⁴ See UNCRPD Article 4, ‘General Obligations’.

⁵ See, eg., C. de Bailis and E. Flynn, ‘Recognising legal capacity: commentary and analysis of Article 12 CRPD’ (2017) 13 *International Journal of Law in Context* 6; T. Carney, ‘Supported Decision-Making for

before the law for persons with disabilities and is seen as one of the pivotal articles in the Convention.⁶ The UN Committee on the Rights of Persons with Disabilities published a General Comment on Article 12, in which they affirmed its importance for those with cognitive and psychosocial disabilities and the need for states to holistically examine all areas of the law with a view to ensuring that people have opportunities to express or develop their will and preferences, as well as having choice and control over their everyday lives.⁷ This is the ‘will and preferences paradigm’ to which Kong refers. The Committee are clear in the General Comment that ‘perceived or actual deficits in mental capacity (or decision-making skills) must not be used to as justification for denying legal capacity’,⁸ posing a central challenge to the MCA 2005. Instead, ‘State Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’.⁹ Article 12 goes on to impose obligations on State Parties to ‘provide access to persons with disabilities to the support they may require in exercising their legal capacity’.¹⁰ Essentially, much of Article 12 is about legal capacity and ensuring legal agency through legal capacity, and not denying this legal agency on the basis on disability or a perceived assessment of mental capacity.

The emphasis on support in Article 12(3) is important as this speaks to the substantive obligations on State Parties. It is not simply about formal equality. Kong recognises this in her outlining of Article 12 (pp. 22-23). The source of the ‘will and preferences paradigm’ is Article 12(4) which she presents as ‘the “exercise of legal capacity” must be ensured to “respect the rights, will and preferences of the person”’ (p. 24). This is then relied upon to suggest that the upshot of this is a ‘will and preferences paradigm’ built upon an understanding of Article 12 as presenting an individualistic view of liberty and the development of our will and preferences: ‘in short, the subjective preferences of the individual are prior to any other welfarist considerations or third-party obligations to intervene’ (p. 25). Yet, it is not clear that this reading and presentation of Article 12(4) is necessary or correct. Whilst this interpretation is favoured by Kong, and is further reflected in some of the more dominant discussions of Article 12,¹¹ this is not the only way to read what the Convention (and the General Comment on Article 12) is saying. In full, Article 12 states that:

States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and

People with Cognitive Impairments: An Australian Perspective?’ (2015) 4 *Laws* 37; J. Stavert, ‘The Exercise of Legal Capacity, Supported Decision-Making and Scotland’s Mental Health and Incapacity Legislation: Working with CRPD Challenges’ (2015) 4 *Laws* 296; P. Gooding, ‘Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law’ (2013) 20 *Psychiatry, Psychology and Law* 431.

⁶ L. Series, A. Arstein-Kerslake, E. Flynn, P. Gooding, ‘Mental Capacity Law Discussion Paper-The Mental Capacity Act 2005, the Adults with Incapacity (Scotland) Act 2000 and the Convention on the Rights of Persons with Disabilities: The Basics’ 39 *Essex Street Newsletter*, June 2014 <http://www.39essex.com/docs/newsletters/crpd_discussion_paper_series_et_al.pdf> accessed 3 Feb 2018.

⁷ ‘General Comment (Number 1) on Art 12: Equal Recognition Before the Law’ (April 2014) para 7, emphasis added <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>> accessed 7 Feb 2018.

⁸ *Ibid*, para 13.

⁹ Article 12 (2).

¹⁰ Article 12(3).

¹¹ W. Martin et al, *Three Jurisdictions Report: Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK*, (Essex Autonomy Project, 2016) <https://autonomy.essex.ac.uk/wp-content/uploads/2017/01/EAP-3J-Final-Report-2016.pdf> [last accessed 8th Feb 2018].

preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

There is here clear reference to safeguards and interventions, and when read in the light of the rest of Article 12 and the emphasis on support to exercise legal capacity, it is difficult to draw such an individualist conclusion. Moreover, Article 12 must be situated within the rest of the CRPD and the positive obligations contained in the other Articles which will (in theory if not in practice) impact upon agency and legal capacity through the dismantling of disabling social and political structures. It is not immediately obvious why the phrase 'will and preferences paradigm' is favoured by Kong over 'support paradigm', which is perhaps more reflective of Article 12. It is true that it is specifically termed this on one occasion in the General Comment in relation to being in contrast to the 'best interests paradigm';¹² however, the force of Article 12 as a whole (and the CRPD) is much more than 'will and preferences', with 'support' being the key driver.

Kong goes on to explain in detail why the 'will and preferences paradigm' reproduces the problematic public/private distinction of liberal theories, and this is a vital discussion for those seeking to think through approaches to rights in this context (p. 27). The discussion of the safeguarding interventions in abusive or coercive relationships brings a number of important issues to light; however, the framing of this in terms of Article 12 and 'will and preferences' was ultimately unconvincing. In many ways, the problematisation really shows that the salient problems are with the nexus between the MCA 2005 and adult safeguarding law and policy- problems which are exacerbated by the framing of people with cognitive impairments in law as 'other', and those who are merely making an unwise decision without impairment as capacitous and thereby autonomous. Yet, given the lack of clarity at the outset about the target of Kong's critique, and whether this relationality and social embeddedness is an issue for all or just those with cognitive impairments, the opportunity to engage with this point was lost in this discussion. Moreover, this issue becomes even more opaque when Kong moves on in this chapter to make a case for 'relational rights' (p. 38). She states that whilst the 'will and preferences paradigm' draws attention to problems with mental capacity, it is unsuccessful in arguing for 'the complete disposal of the concept' and, instead, we need an understanding of mental capacity which 'helps capture the relational dimensions that enable or disable an individual's decisional agency' (p. 38). Again, if this relationality is so key to agency then does this need to be built upon a concept of mental capacity? Is this not an issue for agency of all? One of the often overlooked and potentially most fruitful issues posed by Art 12 is the phrase 'on an equal basis with others'.¹³ There is the opportunity here for a complete reconfiguration of our understanding of equality and agency for everyone, based on a more relational conception of rights and the role of social structures.

Chapters 3 and 4 build upon the concept of relationality in the context of mental capacity further. Chapter 3 focuses in particular on autonomy and moving from a traditional liberal to a relational understanding of autonomy in order to promote decisional capacity.¹⁴ The discussion of a 'shared, more inclusive account of autonomy', in contrast to 'the predominant tendency in philosophy to use examples of individuals with impairments as "contrast" cases'

¹² General Comment (Number 1) n 9 above, para 21.

¹³ Article 12(2). This also runs through most of the Articles in the CRPD.

¹⁴ 'Relational autonomy and the promotion of decisional capacity'.

is built upon the concept of absorbed coping (p. 53). Absorbed coping is presented as reflecting our connections and interactions with our environment and ongoing participation within the world around us, and as an understanding which moves away from a more cognitively and conscious approach to reflection and intention (p. 75). The discussion and importance of absorbed coping is seen as a way to depart from rationalistic understandings of our agency, which inflect approaches to autonomy and capacity. Kong states that '[e]veryday coping itself forms the 'infrastructure' of our conceptual thinking; it has a fundamental, grounding quality which has characterised our lives from infancy to adulthood, whether one is impaired or not' (p. 79). This concept reflects many of the emerging debates in new materialist and feminist theory on our embeddedness within our environments, and the various forces (material, social, institutional, technological, cultural) with which we interact and which shape our experience.¹⁵ Many of these ideas are also being engaged with in critical disability studies, which seeks to challenge ideas of rationality and individualism.¹⁶ The recognition by Kong of absorbed coping as a quality for everyone, and not just those with impairments, had the potential to create a critical departure point for the mental capacity discussion in moving away from a rationalistic understanding of decision making; however, it was not taken up further. As stated above, the discussion and conclusions seem to support a mental capacity framework for those with cognitive impairments, albeit one which understands capacity more relationally. As Kong concludes in chapter 3, '[r]elational autonomy as a backdrop to capacity adjudication will bear on the model of rationality that is presupposed in the functional test of mental capacity' (p. 99).

Chapter 4 builds upon this in order to bring to light the 'social space of reasons' (p. 100), suggesting that as well as interpersonal relationships, broader reasoning about norms and rationality are similarly relational and context-dependent.¹⁷ The discussion in this chapter is illuminating and developed through a close and critical engagement with case law demonstrating this contingency in practice. Kong persuasively outlines how 'the rational norms implicit in the functional test, such as "understanding" or "use and weigh", hinge on the social context to determine which reasons are deemed valid and justifiable' (p. 120). Through analysis of case examples, a strong argument emerges about the values and norms which underpin capacity assessments and will shape the understanding of an individual's abilities, based on their given reasons, even in a framework which claims to be value-neutral and procedurally focused such as the MCA 2005. The discussion on page 132 is important and draws much needed attention to the often-overlooked value-laden nature of the capacity framework. To suggest that such capacity assessments could be otherwise is simply a legal fiction, and Kong persuasively argues for 'greater articulacy and critical transparency about these [normative] commitments and evaluative judgements amongst assessors' (p. 145). The remainder of the book seeks to reflect upon how such a relationally-situated framework of intervention in decision-making, on the basis of third-party assessment, could develop in practice.

¹⁵ J Conaghan, 'Feminism, Law and Materialism: Reclaiming the "Tainted Realm"' in M Davies and V Munro (eds), *Ashgate Research Companion on Feminist Legal Theory* (Ashgate 2013); D Coole and S Frost, *New Materialisms: Ontology, Agency and Politics* (Duke UP 2010); K Barad, *Meeting the Universe Halfway* (Duke UP 2007).

¹⁶ E Hall and R Wilton, 'Towards a Relational Geography of Disability' (2017) 41 *Progress in Human Geography* 727; K Ecclestone and D Goodley, 'Political and Educational Springboard or Straitjacket? Theorising Post/human Subjects in an Age of Vulnerability' (2016) 37 *Discourse: Studies in the Cultural Politics of Education* 175; F. Kumari Campbell, *Contours of Ableism* (Palgrave 2009).

¹⁷ 'Procedural reasoning and the social space of reasons in capacity assessments'.

Chapter 5 looks to theoretical approaches to source the ethical obligations for supporting and intervening in individual's lives.¹⁸ It is reiterated that the CRPD cannot be the source of this due to its apparent 'rejecting non-consensual interventions as inherently paternalistic, disrespectful of the autonomy of individuals with impairments' (p. 147). As highlighted above, this is not a necessary, or the only, interpretation of the CRPD and it would have been beneficial to consider competing interpretations. As a result of this, the opportunity to engage more critically with the idea of 'intervention' and how the CRPD can complicate this, or support different types of intervention, was missed.¹⁹ However, Kong goes on in this chapter to consider the persuasiveness of the social model of disability and care ethics as sources of ethical obligations to others, ultimately rejecting both in favour of what she terms a Kantian 'in spirit' justification for positive interpersonal duties. In terms of the social model of disability, it was surprising not to see this discussed earlier given the social model underpinnings of the CRPD. The social model is, however, presented as unable to ground interpersonal obligations to support individual autonomy (p. 151). Various reasons are given for this, including that it tends to oversimplify the relationship between disability and impairment, and Kong reasons that grounding obligations for support in the social model reproduces the 'negative liberty' or non-interference approach that she dismissed in chapter 2. In essence, the claim is that the focus on disabling structures and barriers results in overlooking the particular differences of people with impairments, and their lived experiences. This is a familiar debate to disability scholars and is still ongoing, yet strides have been made in avoiding this polarising of views and 'bringing the body back in'. Indeed, Kong engages with Carol Thomas' work to discuss the possibility of a more relational social model;²⁰ however, ultimately she argues that this still fails to disentangle itself from the problems with the social model as 'treating the individual with impairments differently ... could be perceived as mirroring an unequal power dynamic, which ultimately perpetuates prejudicial, disablist perspectives' (p. 154). It would have been beneficial to expand upon this discussion of the social model and developments more recently, as many commentators now take a more nuanced approach to these questions of disability, difference and discrimination.²¹ Engaging with these would have made the rejection of the social model (in a broad sense) more convincing.

The discussion and ultimately rejection of care ethics similarly took a narrow approach to the field, focusing primarily on Jonathan Herring's work given that he has applied care ethics to law in a sustained way.²² Whilst Herring is undoubtedly at the forefront of this legal field, the debates in care theory are much broader than are represented in this chapter. Moreover, Herring's conclusions on particular issues here are not universally supported in this literature. Much of the discussion is focused upon whether care ethics can support an intervention in an abusive relationship, with Kong suggesting that Herring's calls to override an individual's wishes in an abusive relationship fail to respect that individual's subjective claims (p. 157). However, care ethics as a field would not universally support this approach. More political care ethicists, such as Joan Tronto,²³ Selma Sevenhuijsen,²⁴ and Olena Hankivsky,²⁵ take a

¹⁸ 'Ethical duties of support and intervention'.

¹⁹ See, eg., B. Clough, 'New Legal Landscapes: (Re)Configuring the Boundaries of Mental Capacity Law' (2018) 26 *Medical Law Review* 246.

²⁰ C. Thomas, 'Rescuing a Social Relational Understanding of Disability', (2004) 6 *Scandinavian Journal of Disability Research* 22.

²¹ See 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 and Society* 863; F. Kumari Campbell, *Contours of Ableism* (Palgrave MacMillan, 2009).

²² J. Herring, *Caring and the Law* (Oxford, Hart, 2013).

²³ J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York, Routledge, 1993).

broader approach to care, focusing not just on the role of law and institutions at these ‘crisis points’ but at a broader, structural level. Moreover, there have been interesting conversations between care ethicists and disability theorists which converge around the productive potential for a theory of justice built upon the insights of both approaches.²⁶ As I have discussed elsewhere from a care perspective, a caring and attentive response in a situation might be not to ‘intervene’ at all.²⁷ The situation is not quite so linear as Kong presents here. Moreover, Kong was concerned that care ethics and the focus on dependency overlooks and invisibles relational inequalities, yet it is often these exploitative inequalities which care theorists are particularly concerned about; just because there is a relationship does not mean it must or even can be rendered a caring one. Engaging with some of this broader literature might have given a clearer reflection of the concerns of care ethicists and may have provided the ethical source that Kong felt missing, or, at the very least, provided a stronger basis for rejection.

Chapter 6 then returns to the idea of capacity assessment and introduces the concept of hermeneutic competence in order to shift attention away from the person whose capacity is being assessed, and to the competencies of those with who they interact.²⁸ This is an interesting and crucial manoeuvre and chimes with the work of others, such as Alex Ruck-Keene, who emphasise that ‘capacity is in the eye of the beholder’ to draw attention to the responsibilities placed upon such assessors.²⁹ The argument in this chapter focuses upon how such hermeneutic competence can be achieved, including through 1) phenomenological awareness, 2) dialogical understanding, and 3) self-nurturing recognitional mechanisms. Attention is given to the way in which the process of assessment can facilitate ‘narrative repair’ (pp. 222-223) through supporting those whose capacity is being assessed. There is depth in this chapter and this review cannot do justice to the detail of this; suffice it to say here that there is much to be gained from seeking ways to inculcate this level of reflection and awareness in those who are tasked with assessing people’s capacity. Yet, there is a lingering concern that such mechanisms may do little to redress the power imbalances which are built into the very structures of the legislation. Moreover, such an approach might simply reinforce the idea that individual professionals are the source of empowerment for people with cognitive impairments, without attending to the broader, multidirectional, and multiscale relations and norms which the legal framework creates.

In the final chapter, ‘Rethinking Capacity’ Kong draws together the strands of her argument to provide a summary of the key implications:

- That autonomy must incorporate phenomenological, relational dimensions (p. 225).
- The competence of those around individuals with impairments matters (p. 226).
- The content of self-constituting narratives matters (p. 227).
- The boundary between capacity and best interests is blurry and elastic (p. 228).

²⁴ S. Sevenhuijsen, *Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality, and Politics*, (Routledge, 1998).

²⁵ O. Hankivsky, *Social Policy and the Ethic of Care*, (Vancouver, UBC Press, 2004).

²⁶ B. Hughes et al, ‘Love’s Labours Lost? Feminism, the Disabled People’s Movement and an Ethic of Care’ (2005) 39 *Sociology* 259; N. Watson et al, ‘(Inter)Dependence, Needs and Care The Potential for Disability and Feminist Theorists to Develop an Emancipatory Model’ (2004) 38 *Sociology* 331.

²⁷ B. Clough, ‘Vulnerability and capacity to consent to sex – asking the right questions?’ (2015) 4 *Child and Family Law Quarterly* 371; Clough, n 19 above.

²⁸ ‘Hermeneutic competence and the dialogical conditions of capacity’.

²⁹ A Ruck Keene, ‘Is Mental Capacity in the Eye of the Beholder?’ (2017) 11 *Advances in Mental Health and Intellectual Disabilities* 30.

- Capacity as a socially situated, relational and dialogical concept transforms the role of the capacity assessor (p. 231).

These insights contain potentially transformative ideas for the ways in which the mental capacity legislation works in practice. However, a number of important questions remain from Kong's analysis. As noted at the outset, it is not clear whether these conclusions are only applicable to those with cognitive impairments. If this is what Kong sought to argue, then this needs to be stated and justified given that it goes against the grain of much critical work at present, including the important thread of 'on an equal basis with others' which runs through the CRPD. Moreover, the issue of whether and why Kong supports the idea of mental capacity as a 'thing' or as measurable is ambiguous. She quoted with approval the Committee's assertion in GC1 that '[m]ental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity',³⁰ yet some of the conclusions drawn seem to indicate that we can validly assess capacity - the key point being just to do so better and with a more reflexive standpoint being adapted by the assessor. Whether this assessment of capacity is then contemporaneous with a judgement that such an individual is autonomous (albeit relationally so) is also left open. If such an assessment becomes the basis for particular decisions, it is not apparent how this goes much beyond what we have now in the legislation. Again, it is fine to endorse this if this is what Kong seeks to do, but it is left unclear in the conclusions. A lingering question opened up by the discussion of empowerment, absorbed coping, relationality and hermeneutic competence, is whether the achievement of these is possible within the framework and broader structures of the MCA 2005, given that it is built upon a very particular structuring of relationships (not just relations between P and the capacity assessor, but also professional relations and medico-legal relations).

In summary, this is an ambitious and timely book which provides an important theoretical contribution to the ongoing debates on the MCA 2005 and the implications of the CRPD. It will appeal to lawyers, philosophers, ethicists and practitioners given its engagement and reflection on both theory and practice. As the conclusions drawn are in some ways tentative and open, rather than necessarily providing a solid agenda for change, this book serves to open up conversations and illuminate future research pathways.

³⁰ General Comment (Number 1), n 9 above, para 14.