

BOOK SYMPOSIUM

Legal Inquiry and Legal Arguments*

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Book Symposium: Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication*

Maks Del Mar's *Artefacts of Legal Inquiry*¹ arrived in my mailbox in the early days of the first COVID-19 lockdown in the UK, and it immediately became one of a small number of new books that kept me going academically during that extraordinary period. There are many reasons why I found intellectual solace in *Artefacts*, not least the systematic (but not dogmatic) way in which particular artefacts (fictions, metaphors, figures, and scenarios) are discussed and the illuminating general framework provided by the 'models' discussed in the book's Part I. I was particularly interested in the way *Artefacts* contributes to our understanding of the roles played by the decision-maker's subjectivity in legal decisions, an issue that has worried me over the past two decades. I share Del Mar's discomfort with the way subjectivity has been often handled in legal theory over the past century, and the perception that the time has come for legal theorists to move on from the comfortable, but in many ways misleading, picture built around the discovery/justification divide.

My intention here, however, is modest. Del Mar's conception of legal inquiry, in addition to offering a useful framework within which to understand the artefacts discussed in the book and, more generally, the pathways they provide to an important (and often unappreciated) set of reasons that bear on adjudication, can also shed new light on other aspects of judicial decision-making. In particular, courts' deployment of some argument-types can be best understood within the framework provided by Del Mar's legal inquiry. In turn, the deeper insight into these argumentative practices helps us better understand how legal arguments put forward in authoritatively decided cases relate to future cases, beyond the strict limits of a doctrine of binding precedent. In what follows I will try to motivate these claims, first, (Section 1) by unpacking the book's account of legal inquiry, second, (Section 2) by demonstrating that one common and important judicial argumentative practice (the judicial use of inferences to the best legal explanation) cannot be fully captured within the limits set out by a doctrine of binding precedent and, finally, (Section 3) by showing how a version of Del Mar's notion of legal inquiry can help us make sense of that particular argumentative practice.

* I would like to thank the participants of the workshop that gave rise to this special issue, in particular Maks Del Mar, for helpful comments.

1 Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (London: Hart, 2020).

1 The model of legal inquiry

Del Mar conceives legal inquiry as an explanatory framework for adjudication that is more capacious at capturing the rich and textured intellectual activity of adjudicators than the alternative frameworks often deployed by legal theorists. In particular, Del Mar worries about the alternative (and somehow ubiquitous) framework provided by the distinction between contexts of discovery and contexts of justification.² Legal inquiry is better at capturing, for instance, how the artefacts that are discussed in the book are used in adjudication to bring insight on ‘values, vulnerabilities, and interests’ that are relevant to legal decision-making.

Legal inquiry aims (at least partially) at achieving epistemic gains. In chapter 1,³ and throughout the book,⁴ these epistemic gains are often said to be insight into ‘values, vulnerabilities, and interests’. There are interesting and complex relations between these three categories, but what makes each of them relevant to adjudication is the fact that they are (or at least have the potential to be) reasons for action. There is much to be said about what kind of reasons for action such values, vulnerabilities, and interests might turn out to be (conclusive or *pro tanto*), about how strong the support they offer to the conclusion that a certain decision should be taken is, and about how they might relate to each other in concrete contexts of decision-making (do they concurrently support a course of action? Do they pull in opposite directions? Does one of them undercut the other?). In fact, Del Mar gives us a glimpse of how complex the relations between values, vulnerabilities and interests, *qua* reasons, can be when he discusses the three categories.⁵ It might even be that, when put under the microscope, a certain value, vulnerability or interest turns out to be only a *prima facie* reason.

Facts that the artefacts (within the framework of legal inquiry) are able to shed light onto are those that *objectively* count in favour or against a particular decision. From the perspective of the decision-maker, failure to perceive those facts *as reasons* and failure to assign them their due weight are mistakes (even if they might sometimes be excusable ones). In fact, they would constitute mistakes by the decision-maker even if the decision eventually produced ends up hitting the target. As Keats put it, the decision-maker would be doing the ‘right deed for the wrong reason’.

2 Del Mar, *Artefacts of Legal Inquiry*, 30-38. The distinction was introduced by RA Wasserstrom, *The judicial decision: toward a theory of legal justification* (Stanford: Stanford UP, 1961) and becomes part of what Atienza calls the ‘standard picture’ of legal argumentation, in Manuel Atienza, *Curso de argumentación jurídica* (Madrid: Trotta, 2013), 114-116. Some of my own worries are discussed in Claudio Michelon, ‘Legal Reasoning (Virtues)’, in *IVR Encyclopedia for the Philosophy of Law and Social Philosophy*, ed. Mortimer Sellers et al. (Dordrecht, Springer, forthcoming in 2023, available online at https://link.springer.com/referenceworkentry/10.1007/978-94-007-6730-0_728-1).

3 Del Mar, *Artefacts of Legal Inquiry*, 29-77.

4 Fictions, for instance, are said to enable ‘insight into values, vulnerabilities and interests’, (Del Mar, *Artefacts of Legal Inquiry*, 237) and so do metaphors (Del Mar, *Artefacts of Legal Inquiry*, 281), figures (Del Mar, *Artefacts of Legal Inquiry*, 339ff), and scenarios (Del Mar, *Artefacts of Legal Inquiry*, 391).

5 Del Mar, *Artefacts of Legal Inquiry*, 70-73.

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If this is correct, perhaps there is one aspect of the discovery/justification framework that needs to be preserved. It has been apparent for a number of years now that ‘discovery’ and ‘justification’ refers not to one, but to a number of distinctions, of different orders (there is a *conceptual* distinction, a distinction of decision-making *contexts*, a distinction between two *investigative procedures*, *inter alia*). To make matters more complicated still, other contrasts piggyback on different aspects of the discovery/justification distinction(s): a contrast between fact and value, another between investigative disciplines (science or philosophy), etc. In this complex ecosystem of partially overlapping distinctions there are some that not only remain relevant, but also seem to be presupposed by the conception of legal inquiry put forward by Del Mar (at least in my interpretation of it). In particular, the distinction between facts that *cause* a decision to be made and facts that are *reasons* why the decision is appropriate (or inappropriate).⁶ I believe this distinction is at the bottom of why Del Mar believes ‘normativity’ to be one of the four core features of legal inquiry. Thus, Del Mar’s prudence in not completely jettisoning the distinction is well-advised.⁷ Needless to say, his criticism of the shortcomings of the discovery/justification framework is not affected by a (putative) commitment to the facts-as-causes/facts-as-reasons distinction.

But how, according to Del Mar, can legal inquiry achieve its epistemic goals? As mentioned in the previous paragraph, there are four features of legal inquiry that, in different ways, help to identify the reasons bearing on particular cases that are put to the court. One of these features (legal inquiry’s ‘normativity’) has already been discussed in the previous paragraphs: it concerns legal inquiry’s goal of providing insight into certain types of putative reasons for action (those that concern values, vulnerabilities, and interests). But legal inquiry is also a *social* (i.e., interactive and collective), *diachronic*, and *experimental* activity. I cannot afford here to explain in detail each of those features. Instead, I would like to highlight some aspects of them that will help to explain why legal inquiry offers a way to better understand a court’s use of certain legal arguments, and in particular of inferences to the best legal explanation.

To conceive legal inquiry as a social activity is to see it as a collective enterprise or perhaps, more precisely, as several overlapping collective enterprises. In some legal inquiries, the ‘collective’ encompasses the actors that exchange communications within legal proceedings (the parties, their legal representation, judges, clerks, etc.). But this narrower conversation is itself embedded into a wider collective inquiry

6 Del Mar appears not to be convinced of the distinction between causes and reasons (for instance on page 36 of ALI), but often his misgivings are not so much about a distinction between two categories of facts (the ones that *cause* certain actions and the ones that *justify* certain actions), but instead between two ways of conceiving the phenomenology of decision-making. From a phenomenological point of view, certain facts feature as reasons that ‘push’ the agent in a particular direction, while other facts push the agent in a direction in a way that does not register with the agent as reasons. From a phenomenological point of view, Del Mar is right to suspect that the field of ways in which facts affect decision-making is not restricted to ‘as causes’ and ‘as reasons’.

7 E.g. in Del Mar, *Artefacts of Legal Inquiry*, 29.

which includes other, unknown addressees, including other courts.⁸ In this wider collective sense of inquiry, a court's argumentation might be seen less as an exercise of rational persuasion about what to do in the instant case,⁹ and more as 'invitations to think further together'.¹⁰

This helps us understand why legal inquiry exists within different timeframes. Adjudicators address the parties and their representatives within the timeframe of the legal process and, in doing so, they adopt linguistic and argumentative styles appropriate within those conversations. But adjudicators are also part of a wider conversation with past, contemporary, and future courts (and even, at times, foreign courts), with doctrinal scholars, and others. Attention to that wider conversation, carried out within longer timeframes helps us see why courts oftentimes display, in their reasoning, doubt, hesitation, and uncertainty.¹¹ In this longer conversation legal inquiry's experimental nature comes to the fore. The non-categorical language is precisely what to expect of those who are trying out solutions, making suggestions, seeking collaboration.

Legal inquiry's diachronicity is the reason why sometimes one finds in legal decisions (paradigmatically, but not exclusively, in *obiter dicta*) arguments and considerations that that, not being strictly necessary to justify the decision in the case at hand, sometimes signal to 'future courts that more work need to be done on the values, vulnerabilities, and interests at stake in this area of law'.¹² Within this timeframe, we can also make sense of court's preoccupation with the state in which their decisions leave the law that future courts will find.¹³

2 Inferences to the best legal explanation

From time to time, courts find support for a general claim about a principle of law on the existence of a set of authoritative legal decisions, each of which would be insufficient to support their claim.¹⁴ Thus, for instance, when Lord Goff argues that a defence based on the principle of 'change of position' should be available against certain claims in which a plaintiff tries to recover money from the defendant on the ground of an unjustified enrichment, he relies on the existence of two specific types of authoritative precedents: (a) those in which an agent can defeat an unjust enrichment-type claim on the ground that, before learning of the plaintiff's claim, the agent has paid the money over to his principal, on the faith of the payment and

8 Del Mar, *Artefacts of Legal Inquiry*, 43.

9 Del Mar, *Artefacts of Legal Inquiry*, 44.

10 Del Mar, *Artefacts of Legal Inquiry*, 44.

11 A point made by Del Mar, *Artefacts of Legal Inquiry*, 50.

12 Del Mar, *Artefacts of Legal Inquiry*, 55. This quote is extracted from a longer sentence that concerns what Del Mar calls 'scenarios'. I am not entirely clear whether the types of arguments and considerations that I will move on to analyse in section II below could be included in his conception of a 'scenario'. Be that as it may, the general point seems to extend to arguments presented as *obiter*.

13 John Gardner, *Torts and other wrongs* (Oxford: OUP, 2019), 315.

14 In what follows I will be focusing primarily on authoritative precedents, but I believe the same can be said, *mutatis mutandis*, about other authoritative legal sources such as legislation.

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(b) those in which money paid under forged bills has been held to be irrecoverable.¹⁵ Lord Goff ascertains that the principle that lies behind both groups of cases is the principle of ‘change of position’ and that principle, in turn, should be used to guide the court in deciding the case at hand, a case that does not itself fall within either category (a) or category (b).

There are many other examples of this type of argument being deployed by courts and, interestingly, they often share peculiar properties. I believe that Del Mar’s model of legal inquiry is more apt to shed light onto those features than other, more narrow, explanatory frameworks for adjudication. These arguments (i) display a distinctive linguistic style, (ii) often become germinal cases within a particular area of law, and, perhaps more importantly, (iii) are used by courts in a way that appears to be argumentatively unnecessary and, perhaps, supererogatory. I will come back to those features in Section 3. Before that, however, allow me to present what I believe to be the main features of this argument-type, which I refer to as ‘inference to the best legal explanation’ (hereinafter IBLE).¹⁶

IBLEs have properties that, taken together, make them a distinctive type of legal argument.¹⁷ First, the argument’s conclusion is a claim about there being a reason for the court to follow, in a particular case, a normative principle that is not itself part of ‘settled’ law.¹⁸ In this particular, it is similar to other types of legal argument such as legal analogies and arguments *a fortiori*. Second, the claim that there is a reason to act according to the principle is supported by the existence of authorities, each of which is not deemed to warrant that the principle is a part of settled law. Third, the relationship between the types of cases covered by settled law and the principle is such that the latter is put forward by the court as the best explanation for settled law to cover these cases. In other words, what explains the fact that these more particular cases are covered by settled law is the fact that they are vindicated by the principle. Notice that the *explanatory* relationship between unsettled principle and settled law is not a *causal* or *historical* relation but instead a *justificatory* relation. From that relationship it follows that courts have a good

15 *Lipkin Gorman (a firm) v. Karpnale ltd* [1991] 2 AC 548, at 578-579.

16 There are two types of argument which, in legal contexts, are referred to by phrase ‘inference to the best legal explanation’. On the one hand, it is used to refer arguments used in the assessment and/ or evaluation of judicial evidence (e.g., in David A. Schum, ‘Species of Abductive Reasoning in Fact Investigation in Law’, *Cardozo Law Review* 22 (2001): 1645 and in M.S. Pardo and R.J. Allen, ‘Juridical Proof and the Best Explanation’, *Law and Philosophy* 27 (2008): 223). On the other hand, it is used to refer to ‘legal abductions’ or inferences made in support of adopting a normative principle as grounds to decide a particular case (for instance by Amalia Amaya, *The Tapestry of Reason* (Oxford: Hart Publishing 2015), 503ff). In what follows only the second type of argument will concern me.

17 I developed this account of IBLEs at length elsewhere. See Claudio Michelon, ‘The Inference to the Best Legal Explanation’, *Oxford Journal of Legal Studies* 39 (2019): 878. My account is far from uncontroversial and, in fact, Luís Duarte d’Almeida objects to my analysis of the argument in his forthcoming paper Luís Duarte d’Almeida, ‘The Expiscation of Legal Principles’ (copy with the author).

18 By ‘settled law’ I am here simply referring to sets of cases over which the authority of precedent binds the court (not the more robust notion discussed by G. Alexander Nunn and Alan M. Trammell, ‘Settled Law’, *Virginia Law Review* 107 (2021): 57).

reason to adopt that principle. It has been remarked that, from those features, it follows that, whenever the conditions for a successful IBLE are present, the conditions for another legal argument will also be present, namely, legal analogies (I will come back to that later).

I cannot afford here to further develop the explanation of all the interesting features of IBLEs, but it is important to bear in mind that each of those features and, in fact, the very existence of this type of legal argument, is open to debate.¹⁹ I have so far relied on my own account of the argument and, moreover, I have been selective about which features to highlight here. I have focused here on features that appear to be peculiar against the background of narrower conceptions of adjudication. Let me further unpack the three aspects of IBLEs that were said above to resist satisfactory explanation within narrow conceptions of adjudication: their stylistic idiosyncrasies, their relative importance, and their redundancy.

Stylistic idiosyncrasies are found in many instances of court's deployment of IBLEs. In many such cases, courts are ambiguous about whether the argument (a) is simply unveiling an already existing (yet hitherto never articulated) legal principle, (b) is establishing that there is good reason to introduce such principle in English law, or else (c) is supporting the conclusion that there is good reason to follow that particular principle in the instant case, even it is not part of the law. About the principle of change of position, for instance, Lord Goff states that it '*is, or should be, recognised as a defence to claims in restitution*'.²⁰ In one of the foundational cases of the law of negligence, Lord Atkin writes that 'in English law there must be, *and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances*'.²¹ Sometimes this hesitation is expressed in the idea that there is an 'implicit' legal principle that lies beneath all apparently exceptional cases. Take Lord Denning's *obiter* in *Lloyds Bank v. Bundy*, where he states that '[t]here are cases in our books in which the courts will set aside a contract (...) when the parties have not met on equal terms (...). Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them'.²² In fact, the use of the phrases such as 'the time has come [to recognize the principle]' or 'the time [to recognize the principle] is long overdue' is remarkably common.²³ Another very common display of hesitation by courts employing IBLEs is the fact that they often see the role of future courts in 'refining' the principle they lay out as the ground for their decision in the instant case. In *Lipkin Gorman*, for instance, Lord Goff asserts that '[i]t is not however appropriate in the present case to attempt to identify all those actions in restitution to which change of position may be a defence'.²⁴

19 Duarte d'Almeida, 'The Expiscation of Legal Principles'.

20 *Lipkin Gorman (a firm) v. Karpnale ltd*, n. 1, 578 at [F], (italics added).

21 *Donoghue v. Stevenson* [1932] AC 562, 582 (italics added).

22 *Lloyds Bank v. Bundy* [1974] 3 A11 ER 757, 763.

23 *Lipkin Gorman (a firm) v. Karpnale ltd*, 580 at [B].

24 *Lipkin Gorman (a firm) v. Karpnale ltd*, 580, 586 at [D].

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It is interesting to notice that, in legal systems that contain a doctrine of precedent, many cases in which courts deploy IBLEs become foundational sources around which whole areas of law develop both judicially and doctrinally. To stick to the cases mentioned so far: *Donoghue* is one of the foundational cases of the law of negligence in both Scotland and England; *Lipkin Gorman* is a foundational case in the development of the law of restitution in England. Even Lord Denning's minority opinion in *Bundy* has been influential in the development of the English law of contracts.

Finally, I claimed above that a court's employment of an IBLE might be seen, from the perspective of a narrower conception of legal inquiry, as redundant. As I have tried to explain in previous work, in all cases in which an inference to the best legal explanation of the sort discussed here can be legitimately employed by courts, there will *necessarily* be another type of argument that would be available to the court to support the same judicial decision: a legal analogy.²⁵ Such legal analogies would not be *additional* arguments towards the same conclusion, but would cover the same normative space that is covered by the IBLE. In other words, what makes an IBLE convincing is exactly the same that makes the corresponding legal analogy (or analogies) convincing: a court has decided a case that in some respect is 'the same' as the case at hand. Furthermore, if that is the case, there would be reasons to prefer a legal analogy to an IBLE, at least according to a conception of legal analogies that I favour:²⁶ in this account, there would be no need to make explicit exactly what makes the two cases 'the same' for an analogical argument to run. But IBLE's can only run if what makes the cases 'the same' is made explicit: the principle that they are both instantiations of. Thus, analogies do the same that IBLEs do, but require much less. From the point of view of the decision of the case at hand it would be difficult to explain why courts should choose to deploy an IBLE when they have available a much simpler and equally effective legal analogy. Del Mar's legal inquiry can explain why. In fact, his conception of legal inquiry can explain all three features of cases in which IBLEs are employed. Or so I will try to show below.

3 Legal inquiry and inferences to the best legal explanation

Recall that Del Mar's inquiry is a more complex endeavour than simply finding the right argument to settle the particular case the court is charged with deciding. It is more complex in at least three different ways: (i) the people and institutions involved are partially different; (ii) the objectives of the inquiry are different and (iii) the timeframe within which it is carried out is different. These three dimensions of enhanced complexity allow us to see why courts employ the peculiar language they employ while employing IBLEs, why the cases are often seen as foundational, and why they are far from redundant.

25 Compare the discussion of consilience in Michelon, 'The Inference to the Best Legal Explanation', 895ff and the discussion of legal analogies in Luis Duarte d'Almeida and Claudio Michelon, 'The Structure of Arguments by Analogy in Law', *Argumentation* 31 (2017): 377.

26 Luis Duarte d'Almeida and Claudio Michelon, 'The Structure of Arguments by Analogy in Law'.

The hesitant and non-categorical language courts adopt in such cases is a function of the fact that, in those cases, courts have addressees other than the parties to the case at hand at the forefront of their minds (and their representatives, court clerks, etc). They are also addressing other courts. It is true that in any decision by any court taken within a system that contains the doctrine of precedent (and perhaps also in systems that do not) courts would be also addressing other courts. They would at last be aware of the fact that their decision might create a precedent (persuasive or binding) that might leave the law in a better or worse condition. But in employing an IBLE, a court is trying to establish a new starting point for legal development in a certain direction; it is putting forward an agenda for legal development along particular lines. Often the principles stated by courts as part of their IBLEs are stated in very general terms and the space left for collaboration is wide. The principle used does not constitute the *ratio decidendi* of the case and, therefore, the asymmetry between the precedent-setting decision and the precedent-bound decision is (further) diluted. IBLE's both settle the case *and* send a message in a bottle suggesting relatively open collaboration with other courts.

Within Del Mar's conception of legal inquiry one can see why IBLEs are not redundant. Even if it were true that the case could be decided in a more argumentatively 'economical' manner (say, by a legal analogy), there would still be an important reason for courts to use IBLEs. An IBLE is a communication directed to a wider gamut of participants engaged in a dialogue that includes other courts (including future, and perhaps even foreign, courts), doctrinal scholars, and legislators, *inter alia*. That social search for legal reasons for action, developing over longer stretches of time than the timeframe of a single lawsuit, is what IBLEs are a part of. But what would be the advantage of providing an argument such as the IBLE in order to support a decision according to a given principle? Would it not be better to simply put forward the principle as a normatively sound standard, thus starting the conversation anew, without bothering with claiming that there is an 'explanatory' or, more specifically, a 'justificatory' relation between the principle proposed and the string of more specific cases the principle is said to 'explain'? I believe not. To take the diachronicity of legal inquiry seriously is to understand that the explanatory principle in an IBLE works as a bridge between the authority of past decisions and the future cases that are not covered by the authority of these decisions but fall within the scope of the principle. Legal inquiry's diachronicity is not only future oriented, but also past-oriented. IBLEs stand on a relationship with both the past of the legal system and its future development.

We are now in a position to see why some of those cases had such profound impact in the development of whole areas of law. A successful IBLE puts forward a (tentative and provisional, but plausible) account of what the point of a finite set of legal authorities is, bringing together what was previously seen as exceptional under the same normative roof. In doing so, they often become the starting point of new areas of research. Lord Atkin's Neighbour Principle did so for the law of negligence; Lord Goff's Chance of Position Principle did so for the law of unjustified enrichment.

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We are also able to see how Del Mar's model of legal inquiry is better able to account for judicial use of IBLEs than the narrower view of adjudication that focuses exclusively on finding reasons to support the right decision in the instant case. The narrower view of adjudication sees the hesitant language of the decisions that deploys an IBLEs as odd and idiosyncratic; their foundational importance within legal development as merely coincidental; their deployment of IBLE's as unnecessary. Del Mar's legal inquiry helps us understand precisely why those arguments are important, why many decisions that rely on them become foundational, and why the style in which they are delivered is wholly fitting. It helps us see that there are more things in the heaven and earth of adjudication than are dreamt in the dominant legal philosophy of adjudication.