

Imaginary Laws

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Maksymillian Del Mar, [Artefacts of Legal Inquiry: The Value of Imagination in Adjudication](#) (2020).

The subject of legal reasoning has stimulated an enormously wide variety of books and essays, articles and comments, offering the reader systematic exposition, technical illumination, practical guidance and critical commentary. The reader is clearly unsatisfied. The production of material continues without any sense that the latest contribution is about to close the debate and complete our understanding. Maks Del Mar's recent book is not likely to provide the last word on legal reasoning. It does provide a novel perspective on where the elusiveness of legal reasoning might lie. It seems that we cannot capture the subject because however learned we might become in the techniques of reasoning with the law that we have, there is always the problem that imaginary laws might be invoked to disturb the precedents and doctrines, the templates and patterns, into which we fit existing legal materials.

That is a gross oversimplification and mischaracterization of Del Mar's book, in at least three respects. First, for Del Mar, an imaginary realm of law does not exist outside of existing legal materials but rather legal materials possess an imaginative capacity. Secondly, legal reasoning does not get subverted by stretches of the imagination; instead, the imagination is a core faculty employed in legal reasoning. And thirdly, despite the limitation suggested by its subtitle, this is not simply a book about imagination, nor simply a book about legal reasoning.

To take the last point first, we can glean from the Introduction alone that this is a book which offers articulated views on the nature of theorizing: regarding "key theoretical questions" as the product of the biography and attitude of the theorist (Pp. 2, 13, 20-21, 23-25); and elevating the contingency of models over the necessity of concepts (P. 23). On the nature of language: seeing language as providing neither an obstacle nor a guide, but "a communicative and cognitive resource." (Pp. 5, 22-23.) On the nature of inquiry: seeking a richer notion beyond the dichotomy between discovery and justification. (Pp. 8-9.) These early signals are enough to reposition Del Mar's book away from any escape into the imaginary, as a serious exploration of the realities of law's social potential and of the practical and theoretical perspectives adopted towards that potential.

To return to the first two points, the book also does what it proclaims in its title. It offers a thorough investigation of the role of imagination in legal reasoning through the deployment of four "artefacts" that assist in the process of inquiry regarded as the heart of legal reasoning, or adjudication. The substantive investigation undertaken in the book is split into two parts. Part I provides theoretical treatments ("models") of inquiry, artefact and imagination, and then relates these ideas together by elucidating the author's idea of the dynamic and socially involved process of inquiry that informs legal reasoning. Part II illustrates this process with studies of four artefacts commonly found in legal reasoning: fictions, metaphors, figures (personifications), and scenarios (hypotheticals). A brief conclusion reflects on further directions the project might have taken but which are not followed in the book. The slightly apologetic tone of the conclusion seems out of place considering how much is packed into the book.

The book displays an extraordinary breadth of learning, fully living up to its interdisciplinary aspirations. But this is not just interdisciplinarity for its own sake. Del Mar works with an astoundingly rich array of intellectual resources to advance his own carefully thought-through positions. And he does work with them, not simply citing them as scholarly adornments. So, for example, he refers to Anthony Laden's social aspect of reasoning but extends it beyond Laden's own approach so as to press the "interactive level" of legal reasoning and provide a third way out of the deadlock between Stanley Fish and Ronald Dworkin. (Pp. 39-42.) At other times, he chooses a passage between opposing views in the literature so as to steer towards the destination he has in mind. So, moving closer to Peter Goodrich's

view of rhetoric, in opposition to Chaim Perelman's, Del Mar reaches an understanding of rhetoric capable of inverting the traditional respect for Plato's reason over the sophistry of Gorgias. (Pp. 85-88.)

When it comes to his pivotal chapter on Imagination, Del Mar masterfully draws the literature together in an apparently effortless but incisive way, stressing particular points and emphases (for example, justifying the inclusion of supposition, Pp. 154-57), so as to produce a resource that provoked by and responding to artefacts can "enable the activities of inquiry in adjudication." (P. 196.) The process of inquiry fed by the imagination is regarded by Del Mar as operating on an individual or social level (P. 202), but, in either case, the inquiry may become defective: if it is not open to imaginatively taking into account the perspective of another, if it fails to exhibit responsiveness to others, if it does not stress the importance of community, and if it does not embrace all members of a community in the invitation to imagine. (Pp. 216, 222, 226, 231.)

This represents Del Mar's vision. I shall say less here about the practice, as illustrated in the four case studies forming Part II. It should, however, be noted that each chapter devoted to fictions, metaphors, figures and scenarios provides a valuable study of its subject matter as well as a stimulating account of how that device is regarded by the author as enabling inquiry. It is the enablement of inquiry that is the unifying theme of this book. The theme holds together Del Mar's advertised undertaking of an investigation of the role of imagination in legal reasoning, but it also supports his understated but equally significant development of an aspirational theory of law – which places legal reasoning, adjudication, and the character of law itself, at the service of a wholly inclusive human society.

It is evident that such a society has not been produced by law, and this leaves Del Mar's project with something of a futuristic air to it. He repeatedly stresses the open-endedness of the exercise of imagination through the artefacts it employs, which in turn leaves inquiry ("never-ending and incomplete", P. 76) open to continue to deal with those interests and vulnerabilities in society as yet unreached by the law. It is telling that he couches law's normativity in terms of interests and vulnerabilities that need to be addressed in preference to rights that have been recognized. (Pp. 66-67, 72-73.) Does this, after all, mean that Del Mar's project has been primarily concerned with imaginary laws?

The answer to that question depends on how one regards the present (or past) state of law and envisages its potential state. As for relying on imagination to ensure that law's potential adequately addresses the interests and vulnerabilities of all its subjects, again, that is likely to depend upon the idealism or scepticism of the reader. Imagination is a faculty capable of sympathetically including the concerns of others, or forcefully suppressing them. Del Mar's book provokes us to reconsider how that faculty has been employed by the law. And how it might be.

Andrew Halpin, *Imaginary Laws*, JOTWELL (May 14, 2020) (reviewing Maksymillian Del Mar, **Artefacts of Legal Inquiry: The Value of Imagination in Adjudication**, (2020)), <https://juris.jotwell.com/imaginary-laws/>.