In Search of Foundations

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REVIEW ARTICLE

In Search of Foundations: Ethics and Metaethics in Constitutional Adjudication

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Boško Tripković, **The Metaethics of Constitutional Adjudication**, Oxford: Oxford University Press, 2017, 272 pp, hb £60.00.

Courts, no doubt, can get moral answers wrong, but can they also get *morality itself* wrong? This is the ambitious question asked by Boško Tripković in *The Metaethics of Constitutional Adjudication* (MeCA, 8). This book aims to elucidate the use of ethical or moral arguments[1] in constitutional reasoning by searching for their metaethical foundations. The first part identifies and analyses three ethical reasoning ideal-types from a comparative constitutional perspective. These ideal-types are arguments from *constitutional identity* (Chapter 2), *common sentiment* (Chapter 3) and *universal reason* (Chapter 4). In constitutional adjudication, these types of ethical argument are often construed as self-standing methods of ethical argument, as this book demonstrates with reference to several jurisdictions including the United States, South Africa

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[1] In favouring the term 'ethical argument', the book follows P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford: OUP, 1982), but the terms 'ethics' and 'morality' are used interchangeably, as justified at MeCA, 5, fn 5. Any possible distinctions between the two are not relevant for our purposes.

and Israel. Tripković attempts to show how all three ideal-types lack a credible metaethical foundation.

In the second part, Tripković develops his own metaethical theory, drawing particularly from evolutionary ethics. This theory is based on the contingency of our ethical beliefs, and locates the metaethical foundation of value in the interaction between *confidence* in our firmly held beliefs and our critical *reflection* upon them (Chapter 5). The final chapter applies this metaethical theory to constitutional adjudication to show how confidence and reflection can serve as a basis of a theory of *constitutional ethics* (Chapter 6).

The book's approach is original and thought-provoking. Metaethics is likely to be unfamiliar ground for most lawyers, and may appear so abstract that its relevance for constitutional law practice is obscure. Tripković succeeds in demonstrating that metaethics *does* matter: different conceptions of what 'counts as' morality are likely to affect substantive outcomes in concrete cases. As I aim to show in this review, however, MeCA's categorisation of ethical argument at times seems crudely reductive, deploying an unrealistic benchmark of 'timeless and mind-independent moral facts'. MeCA's own metaethical theory is not entirely convincing, as it is so infused with normative reasoning that it fails to 'climb outside of morality'.[2]

In what follows, I first introduce the main aims of the book and situate its project in related literature. Then, to better grasp Tripković's metaethical arguments, I briefly discuss the relationship between the concepts of 'moral realism', 'mind-independency' and 'objectivity'. Thirdly, I critically review the three ideal-types of ethical argument discussed by Tripković. Lastly, I discuss the book's metaethical claims – questioning whether they are genuinely

[2] Cf R. Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 *Philosophy & Public Affairs* 87, 128 (remarking that 'we cannot climb outside of morality to judge it from some external Archimedean tribunal, any more than we can climb out of reason itself to test it from above').

metaethical – and how the central notions of confidence and reflection apply in the context of constitutional ethics.

METAETHICS AND LEGAL REASONING

This book's main contribution to the intersection between law and morality is its metaethical perspective. Tripković wants to assess ethical argument in constitutional reasoning in light of the question of what morality *itself* is. In doing so, the book deviates from most existing work on the relationship between law, constitutionalism and morality, which can be divided roughly into two approaches. One is the well-known debate in general jurisprudence on the question of the separability of law and morality,[3] which has developed into highly abstract discussions on whether criteria for legal validity include moral facts,[4] and whether the concept of law can be understood without moral appraisal.[5] Metaethics is largely absent from this current strand of legal-philosophical discussion.[6] A second approach located in constitutional theory is less preoccupied with abstract conceptual questions and instead focuses on moral features of

[3] Often taking as its starting point J. Austin, *The Province of Jurisprudence Determined* (Indianapolis, IN: Hackett, 1998 [1832]); and H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard LR 593.

[4] See S.J. Shapiro, 'The Hart/Dworkin Debate: A Short Guide for the Perplexed' in A. Ripstein (ed), *Ronald Dworkin* (Cambridge: CUP, 2012).

[5] B. Leiter, 'Beyond the Hart/Dworkin Debate: the Methodology Problem in Jurisprudence' in *Naturalizing Jurisprudence* (Oxford: OUP, 2007); J. Finnis, *Natural Law And Natural Rights*, 2nd edn (Oxford: OUP, 2011) ch 1.

[6] See however D. Plunkett, S.J. Shapiro and K. Toh (eds.), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford: OUP, 2019).

constitutional law and legal theory,[7] such as the virtues of constitutional pluralism.[8] This approach typically disregards both metaethics and general jurisprudence as its legal equivalent.

In contrast, MeCA purports to offer a foundational, rather than normative, analysis of ethical argument in constitutional reasoning. Abstract as this analysis necessarily is, it is clearly relevant for the practice and legitimacy of constitutional adjudication, as a simple example demonstrates. In *Pretty v United Kingdom*,[9] the European Court of Human Rights had to rule on the compatibility of section 2(1) of the Suicide Act 1961, criminalising assisted suicide, with Articles 2, 3 and 8 of the European Convention on Human Rights (ECHR). This assessment is premised on certain metaethical considerations as to what facts are relevant in moral reasoning. The ethical content of Ms Pretty's human rights might be sought, for example, in the ECHR's constitutional identity, i.e. its scheme of moral principle. When constitutional identity is silent or question-begging, one might instead locate the ethical content of human rights in common moral sentiment. Lastly, one might argue that the ethical content of Ms Pretty's rights is to be found beyond the specific ECHR context, with the benefit of greater detachment from culturally contingent value-choices, by examining assisted suicide regulation in a variety of foreign jurisdictions. The appropriate choice depends on one's conception of morality itself, i.e. *what facts* – if any – *determine moral content*. MeCA sets out to scrutinise whether any ideal-type of ethical argument is grounded in a sufficiently robust theory of metaethics.

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[7] Recently eg J. Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge: CUP, 2016); D. Grimm, *Constitutionalism: Past, Present, and Future* (Oxford: OUP, 2016); A. Sajó and R. Uitz, *The Constitution of Freedom* (Oxford: OUP, 2017); P. Eleftheriadis, 'In Defence of Constitutional Law' (2018) 81 MLR 154.

[8] N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317; M. Kumm, 'The Moral Point of Constitutional Pluralism' in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford: OUP, 2012).

[9] *Pretty v United Kingdom* (2002) 35 EHRR 1.

Philosophical debates on metaethics have grown exponentially in recent decades, producing a semantic minefield. We can distinguish cognitivist from non-cognitivist,[10] naturalist from non-naturalist theories of morality;[11] and partly within those categories among others between moral realism,[12] emotivism[13] and error theory.[14] MeCA does not focus on traditional theories of metaethics as such. Rather, in Chapters 2–4 Tripković considers how three distinctive types of ethical argument – constitutional identity, common sentiment and universal reason – succeed in reflecting *objective*, *timeless* and *mind-independent* moral truths. Having argued that all three types of ethical argument lack credible metaethical foundations, Chapter 5 purports to set out a metaethical theory based on the premise that morality is probably mind-dependent and contingent. Structurally, it might have made more sense to have addressed the metaethical debate first, so that the three ethical argument-types could be assessed against a more nuanced benchmark. In fact, the critique developed in Chapters 2 to 4 is largely based on elements drawn from Tripković's own theory, in particular his anti-realist metaethics and the notion of reflection, which are introduced in detail only in Chapter 5. Before addressing this thesis directly, a short detour into the concepts of 'realism', 'mind-(in)dependency' and 'objectivity' will facilitate richer understanding of MeCA's main claims.

MIND-INDEPENDENCY AND OBJECTIVITY IN ETHICS

[10] Cognitivist theories of morality hold that moral claims are propositions capable of being true or false (ie that they are 'truth-apt'), while non-cognitivist theories deny this.

[11] Naturalist theories state that moral claims are reducible to facts about the natural world. Non-naturalists deny this connection, claiming that moral facts are autonomous from facts about the natural world.

[12] Moral realism holds that at least some moral claims are actually true: eg G.E. Moore, *Principia Ethica* (Cambridge: CUP, 1903).

[13] Emotivism states that moral claims reflect emotional attitudes that are not truth-apt: eg J. Ayer, *Language, Truth and Logic* (London: Gollancz, 1936).

[14] Error theory states that moral claims are simply based on a mistake because morality does not really exist: eg J.L. Mackie, *Ethics: Inventing Right and Wrong* (London: Penguin, 1977).

MeCA's metaethical benchmark is the concept of 'mind-independency': the idea that moral judgments 'could be true irrespective of our contingent attitudes' (144). It is not entirely clear, however, what it means for a moral judgment to be 'true' irrespective of our 'contingent attitudes'. Does it imply, for example, that the fact that almost all people today consider slavery immoral is irrelevant to slavery being immoral? By extension, does it entail that slavery was *always* immoral, a judgement as valid as the laws of physics, no matter how widespread the belief that it was a natural phenomenon in earlier times? Rather than delving deeper into these philosophical complexities, MeCA conflates the concepts of 'objective truth', '(moral) realism' and 'mind-independency'.

Most people equate 'objectivity' with *metaphysical* objectivity. For some statement to be metaphysically objective, its correctness must depend on the existence of an object in the world which has properties corresponding to the statement.[15] Objectivity thus entails that the correctness of the statement is not determined by 'what seems correct' as a matter of subjective assessment.[16] Appearances may be deceptive, and even a consensus among minds might be mistaken. Yet, contrary to MeCA's suggestion, the connection between objectivity and mind-independency is not obvious. Countless objects which we consider to exist objectively are socially constructed, and thus mind-dependent at least to some degree; think of 'fashion', 'nation-states' or 'inflation'.

Coleman and Leiter propose a helpful distinction between strong, modest and minimal objectivity. This distinction elucidates the different ways in which we speak about objectivity, and has particular relevance for MeCA's thesis. *Strong objectivity* divorces objective reality

[15] A. Marmor, 'Three Concepts of Objectivity' in *Positive Law and Objective Values* (Oxford: OUP, 2001) 116–119.

[16] See J.L. Coleman and B. Leiter, 'Determinacy, Objectivity, and Authority' in A. Marmor (ed), *Law and Interpretation* (Oxford: OUP, 1995) 252–256.

from human thought.[17] It is closely related to mind-independency and metaphysical realism, positing an objective reality independently of human thought and perceptions.[18] At the other end of the scale, *minimal objectivity* locates objectivity in conventional, community standards of correctness (ie, it is not dependent on any *individual's* mind).[19] Borrowing Coleman and Leiter's example, fashion is objective in this minimal sense. Something is 'fashionable' only by virtue of the objective fact that the majority of persons (perhaps following some recognised authority) in a community recognises it as fashionable, and not just because I say so.[20] Lastly, *modest objectivity* is indexed to epistemically ideal conditions.[21] Colours, for example, are modestly objective because what is objectively blue corresponds to what humans perceive as blue in epistemically ideal conditions: observations should be made in white light, the subject should have unimpaired vision, etc.[22] Neither minimal nor modest objectivity presupposes metaphysical realism or mind-independency in a strong sense.

As applied to moral facts, strong objectivity would entail that moral facts exist independently of what humans think about what morality is or requires. Minimal and modest objectivity about morality only require, respectively, that there should be conventional agreement within a community about the content of morality, or that morality be determined by moral reasoning in epistemically ideal conditions. Beliefs in the contingency of morality and value pluralism among communities (for example) are fully consistent with a metaethically sophisticated understanding of moral objectivity.[23]

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[17] ibid, 252.

[18] Marmor, n 15 above, 116, referring to M. Dummett, *The Interpretation of Frege's Philosophy* (London: Duckworth, 1981) 434. However, not all moral realists are committed to mind-independence of moral facts, eg D Copp, *Morality, Normativity, and Society* (Oxford: OUP, 1995).

[19] Coleman and Leiter, n 16 above, 253.

[20] ibid.

[21] *ibid*, 263–264.

[22] ibid, 266.

[23] For a masterful exposition, see I. Berlin, *The Crooked Timber of Humanity* (London: Pimlico, 2003).

Tripković's conflation of mind-independency, realism and objectivity at times leads him to misconstrue the metaethical foundations of ethical arguments.[24] By consistently focusing on 'mind-independency' as the only benchmark, MeCA also overlooks contemporary metatethical debates. Although questions about the degree of objectivity of ethical arguments barely surface in MeCA's analysis, the character of objectivity is an important (implicit) factor in the persuasiveness of judicial reasoning, as reflected in Tripković's three ideal-types.

THREE TYPES OF ETHICAL ARGUMENT

Constitutional identity

Constitutional identity might be the most commonly employed variant of ethical reasoning by courts. MeCA distinguishes between 'particular constitutional identity' – the specific identity which underlies the constitutional fabric of a particular community – and 'general constitutional identity', which refers to a particular set of values or principles with wider application (50–56). Examples of particular constitutional identity include the right to bear arms under the US constitution,[25] or the principle of *laïcité* in France.[26] These principles are inherent to their respective communities' constitutional identities, but do not necessarily have universal aspirations. In contrast, 'general constitutional identity' refers to concepts endorsed sufficiently broadly to be essential to any liberal constitution, for instance the rule of law, democracy and

[24] For example, Tripković mistakenly attributes to Dworkin a 'robust version of moral realism: a belief that there are mind-independent, universal and timeless moral answers' (7, fn 7). Dworkin rather ridiculed such moral realism, sarcastically referring to 'moral particles' or 'morons', while he certainly believed in moral objectivity: eg Dworkin, n 2 above, 104–105, 128.

[25] Second Amendment to the US Constitution (1791).

[26] Constitution of the French Republic (1958), Art. 1.

human rights protection (54).[27] Tripković concludes that particular and general constitutional identity alike fail to serve as self-standing foundations for ethical reasoning, basically for two reasons. First, both are typically too indeterminate to produce concrete ethical answers to concrete questions. Secondly, it is unclear what generates their asserted normative force.

Regarding particular constitutional identity, the problem of indeterminacy reveals itself in the distinction between constitutional identity and common sentiment. As Tripković shows, courts often juxtapose the former with the latter to prevent constitutional identity from collapsing into the common sentiment of the day (50–52). To use a different example, the fact that in 2008, 51% of US citizens favoured stricter gun control,[28] did not (morally or legally) prevent the US Supreme Court from striking down Washington DC's ban on handguns and the requirement that rifles and shotguns be kept 'unloaded and disassembled or bound by a trigger lock'.[29] Particular constitutional identity is often substantively indeterminate and its implications for individual cases are debateable (50–53, 57). More fundamentally, constitutional identity as such does not explain *why* we should favour constitutional identity over common emotional sentiment in abstract terms:

> [I]t is then neither clear what generates the normativity of the descriptive social and psychological facts that constitute particular constitutional identity, nor why we should give priority to evaluative attitudes attached to constitutional identity as opposed to current moral sentiments (14).

Appeals to constitutional identity indeed resist contigent community moral sentiment. Deference to constitutional identity boils down to deference to past generations, expressed in

[27] See also Weinrib, n 6.

[28] https://news.gallup.com/poll/1645/guns.aspx.

[29] *District of Columbia v Heller*, 554 US 570 (2008).

written constitutions or jurisprudence (or both).[30] Thus, the normative premise of constitutional identity as an ethical argument is that the collective wisdom of previous generations merits the moral authority to determine current legal controversies.

This premise may well be wrong.[31] For example, the US constitution has been (and to some extent, continues to be) 'a covenant with death, and an agreement with hell', according to Jack Balkin.[32] Previous generations have been convinced of the moral authority of the US constitution to allow for segregated schools,[33] the prohibition of abortion[34] and discriminatory sodomy laws.[35] While the problem of constitutional evil is perhaps not as pressing in all jurisdictions as it is in the US, similar ethical conundrums are ubiquitous. In the UK, for instance, the ethical credentials of the common law constitution are questionable insofar as it prioritises property and contractual rights over race and gender equality.[36] Locating the ethical content of rights in constitutional identity rather than moral sentiment, then, has tangible implications for the content of common law rights. As for EU constitutionalism, recent scholarship has questioned whether the EU's constitutional identity lives up to its foundational

[30] Parallels may be drawn with debates on the normative force of 'originalist' constitutional interpretation: see A. Marmor, 'Meaning and Belief in Constitutional Interpretation' (2013) 82 Fordham LR 577; L.B. Solum, 'Originalism, Hermeneutics, and the Fixation Thesis' in BG Slocum (ed), *The Nature of Legal Interpretation* (Chicago, IL: U Chi Press, 2017).

[31] See also J. Waldron, 'Particular Values and Critical Morality' (1989) 77 California LR 561.

[32] J.M. Balkin, 'Agreements with Hell and Other Objects of Our Faith' (1997) 65 Fordham LR 1703.

[33] R. Kluger, *Simple Justice: the History of* Brown v Board of Education *and Black America's Struggle for Equality* (New York, NY: Knopf, 1976).

[34] L.J. Reagan, *When Abortion Was a Crime Women, Medicine, and Law in the United States, 1867–1973* (Oakland, CA: UC Press, 1998).

[35] W.N. Eskridge Jr, *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge, MA: HUP, 1999). See eg *Bowers v Hardwick*, 478 US 186 (1986), overturned by *Lawrence v Texas*, 539 US 558 (2003).

[36] C. Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (Oxford: OUP, 2016). Cf T.R.S. Allan, 'Parliament's Will and the Justice of the Common Law: the Human Rights Act in Constitutional Perspective' (2006) 59 CLP 27.

values,[37] and the challenged the legitimacy of its political messianism.[38] Notable examples include the fact that the European Court of Justice's interpretation of EU citizenship does not guarantee equal rights for all EU citizens,[39] often to the detriment of the less cosmopolitan,[40] the manner in which EU law economically benefits the older Member States at its centre to the detriment of the newer Member States at the periphery,[41] and generally, the core of the EU's constitutional identity arguably being rife with systemic moral weakness.[42] Even if not inherently immoral, constitutional identity can be abused in constitutional reasoning. Consider Hungary and Poland's 'illiberal democracy' programmes, in which democracy, the rule of law and fundamental rights protection are systematically undermined by governmental, as well as judicial, appeals to constitutional identity.[43]

[37] In particular Arts. 1 and 2 of the Treaty on European Union.

[38] J.H.H. Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34 *Journal of European Integration* 825.

[39] Eg E. Spaventa, 'Earned Citizenship: Understanding Union Citizenship Through its Scope' in D. Kochenov (ed), *EU Citizenship and Federalism: the Role of Rights* (Cambridge: CUP, 2017); C. O'Brien, *Unity in Adversity* (Oxford: Hart Publishing, 2017).

[40] The applicability of EU fundamental rights generally requires a 'cross-border element', which arguably entails morally questionable outcomes in family reunification cases; compare eg Case C-60/00 *Carpenter* [2002] ECR I-6279 with Case C-434/09 *McCarthy* [2011] ECR I-3375. The same applies to the economic activity and self-sufficiency thresholds, see Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 compared to Case C-86/12 *Alokpa and Moudoulou* EU:C:2013:645.

[41] D. Kukovec, 'Hierarchies as Law' (2014) 21 CJEL 131.

[42] M.A. Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76 MLR 191; A.J. Menéndez, 'The Existential Crisis of the European Union' (2013) 14 German LJ 453; D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's Justice Deficit?* (Oxford: Hart Publishing, 2015).

[43] G. Halmai, 'National(ist) Constitutional Identity? Hungary's Road to Abuse Constitutional Pluralism' (2017) *EUI Working Papers* LAW 2017/08; T.T. Koncewicz, 'Of Institutions, Democracy, Constitutional Self-defence and the Rule of Law: the Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond' (2016) 53 CML Rev 1753.

Overall, Tripković's scepticism concerning whether constitutional identity deserves our fidelity[44] seems warranted. However, it is doubtful whether any normative theory of constitutional ethics (including Tripković's own) could satisfy his benchmark, requiring mind-independent, timeless moral truths. MeCA's analysis would have been more persuasive if based on more nuanced metaethical theorising. The status of moral realism cannot settle other metatethical questions, such as whether the argument from constitutional identity could be minimally or moderately objective. Some elements of the liberal constitutional tradition, for example, may reflect values which seem valid under epistemically ideal conditions irrespective of cultural or historical contingencies.[45] This objective core of constitutionalism could plausibly include the basic properties of the formal rule of law and elementary human rights, such as the prohibition of torture and the right to life.

Common sentiment

The argument from common (emotional) sentiment 'holds that moral sentiments of the people in a particular community constitute the right solution to moral problems … It looks at existing moral feelings, internal dispositions and psychological tendencies' (59). Tripković illustrates this second ideal-type with Justice Stevens' opinion in *Spaziano*,[46] addressing the constitutionality of a Florida law empowering judges to override juries' sentencing decisions. Spaziano was found guilty of first-degree murder. The jury proposed a sentence of life imprisonment, but the trial court instead sentenced him to death. Justice Stevens concluded that

[44] See also J.M. Balkin, *Living Originalism* (Cambridge, MA: Harvard UP, 2014); M. Loughlin, 'The Constitutional Imagination' (2015) 78 MLR 1.

[45] In elucidating 'epistemically ideal conditions', Habermas' ideal speech situation could be a viable starting point: see J. Habermas, 'Wahrheitstheorien' in H. Fahrenbach (ed), *Wirklichkeit und Reflexion* (Pfüllingen: Neske, 1973).

[46] *Spaziano v Florida*, 468 US 447 (1984).

state law was unconstitutional, given that imposing the death penalty rests ultimately on an ethical judgement:

> [I]f the decision that capital punishment is the appropriate sanction in extreme cases is justified because it expresses the community's moral sensibility… it follows, I believe, that a representative cross-section of the community must be given the responsibility for making that decision.[47]

Tripković treats the argument from common sentiment as a stand-alone ethical argument (59–60). The appeal to emotional sentiments in *Spaziano*, however, was deeply rooted in constitutional identity, and implicated questions of institutional competence and governmental legitimacy. In other words, the argument from common sentiment in *Spaziano* can hardly be separated from the constitutional tradition of jury trial.

The same objection extends to the 'shocks the conscience' test in Canadian constitutional law, which MeCA invokes as another example of common sentiment (72–76). This test is applied to determine whether extradition of a person to another country for trial breaches 'principles of fundamental justice'.[48] According to the Canadian Supreme Court, it would do so when the nature of foreign criminal procedures or penalties 'shocks the conscience'.[49] From Tripković's subsequent elaboration, however, it becomes apparent that the 'shocks the conscience' test refers, not to current moral sentiments, but rather to an abstract 'conscience of Canadians', the 'public values of the community', and the 'Canadian sense of

[47] *ibid* 481 (Stevens), cited in MeCA, 66.

[48] MeCA, 72–73; Canadian Charter of Rights and Freedoms, s 7.

[49] *Canada v Schmidt* [1987] 1 SCR 500, para 47, cited in MeCA, 73.

what is fair, right and just' (74). The test, in other words, channels constitutional identity rather than common sentiments.[50]

The interaction between constitutional identity and emotional sentiment is further illustrated by the European Court of Human Rights' *Handyside* judgment, in which the applicant had been convicted under the Obscene Publications Acts 1959 and 1964 for publishing a schoolbook with sexual content and complained, unsuccessfully, that his freedom of expression had been violated. For Tripković, *Handyside* demonstrates that a 'margin of appreciation' is conceded to contracting states because 'the requirements of morals [vary] from time to time and from place to place' and 'by reason of their direct and continuous contact with the vital forces of their countries',[51] state authorities are better placed to assess the scope of freedom of expression (68–72). While this passage does express deference to Contracting States' moral judgements, and indeed the Court found no violation of Article 10 in this specific case, Tripković ignores the subsequent paragraph declaring that '[f]reedom of expression constitutes one of the essential foundations of… society' and must extend to information and ideas that 'offend, shock or disturb the State or any sector of the population'.[52] This key passage downplays emotional sentiment and underscores the ECHR's constitutional identity as the primary source of moral content.[53]

More generally, it seems plainly wrong, from a rule of law perspective, to say that the content of our constitutional rights is derived from emotional sentiment. Prevailing sentiment

[50] Seemingly acknowledged by MeCA, 74–75, fn 53.

[51] *Handyside v United Kingdom* (1979-80) 1 EHRR 737, [48].

[52] ibid [49].

[53] The ECtHR applies the margin of appreciation with varying intensity, which may reflect different conceptions of morally salient facts. Cf *Lautsi v Italy*, (2012) 54 EHRR 3, holding that displaying crucifixes on state schoolroom walls does not infringe freedom of religion. From the ECHR perspective, this interpretation arguably accommodates common emotional sentiment, although from the perspective of the Italian state the crucifix is part of Italy's constitutional identity; further complicating the connection between ethical argument types. I owe this point to Sara Bertotti.

towards, say, paedophiles, murderers or rapists typically does not correspond to the rights they possess. Given the durability and counter-majoritarian bias inherent to constitutional rights, common sentiment appears unsuitable as a basis of ethical argument in constitutional adjudication. By contrast, Tripković's objection to common sentiment is mainly philosophical, drawing on emotivism. However, although emotivism denies the truth or falsity of moral claims,[54] it does not follow that moral judgements are subjective, as Tripković states (82–83). According to emotivism, questions of subjectivity or objectivity simply do not arise.[55]

MeCA is critical of judges who claim to apply the common sentiment of the community rather than their own, moral sentiments. According to Tripković, these judges talk as if they refer to an objective truth, whereas convergent feelings support the mere 'illusion of objectivity' (87). The ethical status of common sentiment pivots on its ontological status (79). Since there is no reason to assume that common sentiments are objective, Tripković argues, judges' reliance on these sentiments in ethical argument cannot be objective either.

Tripković here mistakenly conflates the objectivity of constitutional ethics with mind-independency as a metaethical theory. Emotivism and emotional sentiment as metaethical theories imply that morality is neither objective nor subjective. Whether common sentiment as the basis for *constitutional ethics* can be objective is a different matter. Since prevailing popular sentiment is, at least in principle, a matter of empirical investigation, courts could consult objective data on, say, society's views of the (im)morality of the death penalty in order to decide on the latter's constitutionality. Common sentiments are minimally objective to the extent that they are shared by the community as a whole, irrespective of any metaphysical claims to mind-

[54] n 13 above; MeCA, 82.

[55] In other words, emotivism is a non-cognitivist theory of metaethics, while subjectivity about ethics presupposes a cognitivist metaethics. See G. Macdonald, 'Alfred Jules Ayer' in *Stanford Encyclopedia of Philosophy* (2018), https://plato.stanford.edu/entries/ayer/.

independent moral truths. In other words, objective constitutional ethics and non-cognitivist metaethics are perfectly compatible.

MeCA further presses its metaethical agenda by questioning how descriptive facts about contingent moral attitudes gain normative traction (95). According to Tripković, any sense of objectivity collapses in the face of moral disagreement, since '[t]here is no reflection, reason, or process of justification to overcome disagreement, and there is no agreement to maintain the illusion of objectivity' (89). Why disagreement should pose a more serious threat to common sentiment than to constitutional identity or universal reason remains unclear. More reflection and reasoning do not necessarily promote convergence. Conversely, to the extent that emotional sentiments are unreflective and unreasoned products of human nature, they are primed for stable convergence.[56] Tripković's ostensibly metaethical argument appears to be an ethical-constitutional argument in disguise, and one with a reverse teleology: disagreement is a problem because it undermines a credible theory of constitutional ethics, not because it would be metaethically problematic. The unconstitutionality of emotivist morality remains the foremost challenge to judicial reliance on common sentiment, in my opinion, but this argument stands on its own normative ground without requiring any engagement with metaethics.

Universal reason

The third argument type relies on the idea that 'morality is *universal*, or at least more detached from particular communal, cultural, or individual experiences' (97). Tripković conceptualises the argument from universal reason in constitutional adjudication as the use of foreign law in the interpretation of domestic provisions. This choice is substantiated by reference to the

[56] As evolutionary ethics, discussed and endorsed by Tripković in ch 5, would also suggest, since evolutionary benefits of moral sentiments require convergence within groups.

practice of constitutional adjudication and doctrine. While courts are ordinarily ensconced within their own self-referential legal orders,[57] reference to foreign legal sources indicates an aspiration to rationality beyond the local and contingent:

> Both case law and academic commentary share the notion that the use of foreign law has to do with the idea of reasoned judgment in morally sensitive issues, and that this phenomenon depends on a more cosmopolitan understanding of the nature of value (98).

Tripković offers multiple examples, drawn from the United States, South Africa and Israel, linking the use of foreign law in domestic constitutional interpretation to a quest for moral truths detached from domestic perspectives (99–120). This comparative survey illustrates how courts mine foreign law for ethical resources to elucidate moral concepts in domestic legal orders, to confirm the ethical merits of their own constitutional identities, or to refine their constitution's moral virtues.

Still, foreign law is not the *only* source of universal reason in ethical argument in constitutional adjudication, and it is surprising that MeCA so quickly equates them. Direct appeals to (universalistic) normative legal or ethical theory are not uncommon in legal argument. Theory is even formally recognised as a subsidiary source of international law, alongside domestic judicial decisions.[58] Another candidate form of universalistic judicial reasoning is what Richard Fallon identifies as the search for the 'real conceptual meaning' of constitutional terms.[59] According to this viewpoint, constitutional interpretation should seek to

[57] G. Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993); J. Lindeboom, 'Why EU Law Claims Supremacy' (2018) 38 OJLS 328.

[58] Art. 38(1)(d) Statute of the International Court of Justice, 18 April 1946, 33 UNTS 993.

[59] R.H. Fallon, 'The Meaning of Legal "Meaning" and its Implications for Theories of Interpretation' (2015) 82 U Chi LR 1235.

identify what constitutional provisions *really* mean rather than being beholden to conventional understandings.[60] A widely debated example is whether the death penalty is 'cruel and unusual punishment' contrary to the Eighth Amendment of the US Constitution. Historically, the framers of the US Constitution plainly did not consider the death penalty cruel and unusual, and wider moral debates continue today. Nonetheless, according to theorists propounding objective conceptions of real meaning, historical and current social attitudes are both largely irrelevant, because *in reality* the death penalty *is* a cruel punishment.[61] Tripković pre-empts discussion of these theories by narrowly equating universal reason with deploying foreign law.

Within this restricted theoretical framework, Tripković considers two normative justifications for treating comparative jurisprudence as a source of robust moral truths.[62] According to the 'deductive view', there is a direct connection between foreign law and morality or morally correct answers (120–121). This view assumes that 'moral facts exist in reality and can be traced by reasoning, which is supposed to be analogous to the scientific method' (123). Tripković rejects the analogy, since even global ethical convergence 'may well be explained by the shared circumstances of human life and our contingent psychological setup' (123). Convergence does not prove that values are part of the 'fabric of the universe' (124), but once again objectivity is better disentangled from the language of moral realism. Stable ethical convergence may support minimally or modestly objective values without implying mind-independency. As McDowell notes, convergence *might* be 'a mere coincidence of subjectivities rather than agreement on a range of truths – the sort of view that would be natural if everyone

[60] eg R. Dworkin, *Freedom's Law: the Moral Reading of the American Constitution* (Cambridge, MA: HUP, 1996).

[61] Fallon, n 60 above, 1257–1258; M.D. Greenberg and H. Litman, 'The Meaning of Original Meaning' (1998) 86 Georgetown LJ 569, 603–613.

[62] See also B. Tripković, 'The Morality of Foreign Law' (2019) 17 I•CON (forthcoming).

came to prefer one flavor of ice cream to any other'.[63] Unlike ice cream preferences, however, convergence of some ethical stances is also sufficiently substantiated by reasons to warrant the status of moral truth. Modest moral objectivity and truth may be claimed for sustained, supranational jurisprudential convergence without presupposing naturalistic objectivity or metaphysical realism.

A second justification, dubbed the 'reflective view' and said to be more prevalent in constitutional practice and academic commentary, posits a more indirect relationship between foreign law and moral truth (130–2). Tripković suggests that foreign law affords access to a wider range of moral options, offers greater flexibility in deciding ethically sensitive issues, and promotes coherence at a global level. In avoiding tunnel vision, a domestic constitutional system demonstrates greater maturity by exposing itself to outside influences (132–136). Notwithstanding these and other virtues, Tripković concludes that even the reflective view fails to explain *why* descriptive facts about moral practices generate normative validity (140). If there is no guarantee that reflection on foreign moral practices will bring us any closer to universal timeless truths than contemplating local laws, the reflective view cannot derive normativity from foreign law. Notably, the virtues of the reflective view, such as coherence, maturity and imagination, that Tripković describes are *ethical* attributes. However, once the benefits of the reflective view are recognised as 'virtues of good moral judgment' (130–40), the question of how foreign law achieves normative traction is no longer relevant to the argument.[64] The analysis is already profoundly engaged in normative evaluation and cannot recover the standpoint for a sceptical metaethics.

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[63] J. McDowell, 'Projection and Truth in Ethics', Lindley Lecture, Department of Philosophy, University of Kansas (1988) 8. For analysis, B. Leiter, 'Objectivity, Morality and Adjudication' in *Naturalizing Jurisprudence* (Oxford: OUP, 2007).

[64] The warning that these ethical virtues 'do not guarantee full detachment from the contingent moral experience' (132) surely does not deny all normative force. Such denial, amounting to radical nihilism about normativity, would come at the cost of making discussion of the reflective view's virtues (130–140) deeply ironic.

CONFIDENCE AND REFLECTION AS METAETHICAL THEORY

After three chapters of critical exposition, MeCA concludes that all three ideal-typical ethical arguments lack adequate metaethical foundations and must be rejected. The task for the remaining two chapters is to supply constitutional courts with 'a sound theory of value around which their ethical arguments could be constructed', necessitating further inquiry into 'the nature of value and normative judgment' (143).

In setting out to construct a self-standing metaethical theory, Chapter 5 is the most abstract in the book. Discussion is premised on the tension between practical and theoretical perspectives. In our practical way of reasoning about the right thing to do, the values to which we are committed seem undeniably true: no one would deny that torturing babies is wrong, and has always been wrong regardless of contingent social attitudes. However, theoretical reanalysis brings out the contingency of moral judgements influenced by evolution, history and culture. Early in this chapter, Tripković introduces an evolutionary perspective to demonstrate that '[t]here are good theoretical reasons to believe that *values are mind-dependent and contingent*: in other words, that there are no reasons for action independent from valuing attitudes present in our psychological sets' (152).

Evolutionary theories explain current ethical values in terms of the evolutionary benefit of certain normative capacities and moral emotions.[65] Drawing mainly on the work of Allan Gibbard and Sharon Street, Tripković illustrates how natural selection rewards coordination and altruism within groups (158). According to Street, these evolutionary mechanisms thoroughly saturate our moral attitudes, without presupposing any mind-independent moral

[65] See eg M. Ruse and E.O. Wilson, 'Moral Philosophy as Applied Science' (1986) 61 *Philosophy* 173.

truths.[66] Biological research into moral behaviour of primates and other animals has identified dispositions towards 'justice' and 'fairness' within several non-human species, including fish and crows.[67] As critics of evolutionary ethics point out, however, these research programmes are purely empirical: they do not address the *normative* nature of morality. Moreover, evolutionary ethics merely offers causal explanations for existing moral intuitions and beliefs, and this is not metaethical theorising. Translating the evolutionary account into metaethical terms might correspond to Mackie's error theory (moral claims as mistakes) or Ayer's emotivism (moral claims as truth-inapt emotional attitudes).[68]

An argument against evolutionary ethics, that Tripković considers but rejects, is that even if evolution explains the origin of ethical behaviour, we have further developed our ethical thinking through critical reflection (170–3). Although evolutionary explanations seem plausible when applied to ethical thinking within small, well-defined groups, morality's universalistic and cosmopolitan elements seem to require another explanation which properly captures their normativity. To say that torturing babies is morally wrong surely is very different from saying that torturing babies within your own group is wrong but torturing strangers' babies is unproblematic. This point is not just theoretical: fascinating empirical research has shown that rival chimpanzee groups can engage in systematic warfare, suggesting that this might be adaptive, ie innate, behaviour.[69] Insofar as we are evolutionarily disposed to doing both good

[66] S. Street, 'A Darwinian Dilemma for Realist Theories of Value' (2006) 127 *Philosophical Studies* 109, 114.

[67] F. de Waal, *Good Natured: the Origins of Right and Wrong in Humans and Other Animals* (Cambridge, MA: Harvard UP, 1996); S.F. Brosnan and F. de Waal, 'Monkeys Reject Unequal Pay' (2003) 425 *Nature* 297; N.J. Raihani, A.S. Grutter and R. Bshary, 'Punishers Benefit from Third-Party Punishment in Fish' (2010) 327 *Science* 171; S.F. Brosnan and F. de Waal, 'Fairness in Animals: Where from Here?' (2012) 25 *Social Justice Research* 336.

[68] Mackie, n 14 above; Ayer, n 13 above.

[69] M.L. Wilson et al, 'Lethal Aggression in *Pan* Is Better Explained by Adaptive Strategies Than Human Impacts' (2014) 513 *Nature* 414. For a documentation of the 1974–1978 Gombe Chimpanzee War, see J. Goodall, *Through a Window: My Thirty Years with the Chimpanzees of Gombe* (Boston, MA: Houghton Mifflin, 2010).

and evil, evolutionary ethics seems incapable of distinguishing *which* behavioural dispositions should count as ethical facts and cannot explain why some of our firmly held moral beliefs seem deeply at odds with our evolutionary dispositions.

Tripković nonetheless believes that evolutionary theories of ethics undermine the existence of universal, mind-independent moral truths, leaving no option but to fall back on contingent value judgements inescapably severed from the 'realm of robustly true values':

> what we *ought* to do (reason from robustly true values) bears no systematic connection to what we *can* do (reason from our own values), hence the ought-talk is completely confused as we have no hope of ever willingly doing what we ought to do (173).

This unfortunate conclusion seems to result from the false choice, pervading MeCA, between the mind-independent values of moral realism and a moral scepticism resembling error theory: when the former is found wanting, we are cast back upon the latter. Diving deeper into contemporary metaethics, including variants of non-naturalism and non-cognitivism, might have saved Tripković from abandoning all hope for theoretical progress.[70] Believing in the objectivity of morality does not require commitment to a caricatured moral realism, as presented by MeCA.[71]

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[70] See eg T. Nagel, *The View from Nowhere* (Oxford: OUP, 1986) (proposing a non-naturalist theory of moral objectivity); R. Shafer-Landau, *Moral Realism: A Defense* (Oxford: Clarendon, 2003) (advancing non-naturalist moral realism); S. Blackburn, *Essays in Quasi-Realism* (Oxford: OUP, 1993), and A. Gibbard, *Wise Choices, Apt Feelings* (Cambridge, MA: Harvard UP, 1992) (advancing variants of non-cognitivist metaethics).

[71] Eg J. McDowell, 'Anti-Realism and the Epistemology of Understanding' in H. Parret and J. Bouveresse (eds), *Meaning and Understanding* (Berlin: de Gruyter, 1981); Nagel, n 70 above; M.H. Kramer, *Moral Realism as a Moral Doctrine* (Oxford: Blackwell, 2009). Also see P. Railton, 'Moral Realism' (1986) 95 *Philosophical Review* 163, and R. Boyd, 'How to be a Moral Realist' in G. Sayre-McCord (ed), *Essays on Moral Realism* (Ithaca, NY: Cornell UP, 1988) (advancing naturalist moral realism).

Regardless, Tripković persists in his aim of liberating theorists from the illusion of mind-independent moral truths, claiming that:

> instead of hopelessly trying to reach the values that are completely beyond us, we need *confidence* in our existing values, and – in fact – confidence is inescapable because the only thing we can do is practically reason from our own values (173–174).

Confidence bolstered by the absence of any practical alternative must be counterbalanced by *reflection* to accommodate the idea that our moral values are contingent and subject to critical analysis (174). The assault on mind-independence and moral realism, which demolished the three models of ethical argument considered in earlier chapters, applies with equal force to the conjunction of confidence and reflection. But Tripković regards the idea of mind-independent moral truths itself as poisonous for our confidence in first-order moral judgements:

> As long as we believe in the correspondence of our moral attitudes with mind-independent truths we are bound to lose confidence in our values; but if we abandon this assumption, the practical perspective is not in peril … The reasoning … takes the following form. The normative premise is: (P1) to know how to live or what to do, one should grasp mind-independent normative truths. P1 is then combined with a descriptive premise supplied by the theoretical perspective: (P2) we cannot grasp mind-independent normative truths. This leads to a normatively unacceptable conclusion: (C) we do not know how to live or what to do. Since the conclusion is unacceptable, we drop the first premise (176).

After a long and unfruitful search for metaethical foundations, the solution, apparently, is pragmatism. Yet the argument is thoroughly normative: (C) ought to be rejected *because it is*

normatively unacceptable. This looks like full-blown moral reasoning 'from the inside'[72] rather than metaethical argument. The suspicion is confirmed by Chapter 5's concluding remarks, where Tripković confronts the enduring nature of conflicts of value, and offers this advice:

> It is an illusion to think that a mere realization that absolute truths are beyond our reach will prevent radical conflicts of evaluative perspectives … If another evaluative standpoint violates the core of our values, we need to ask: is it justified in this particular case to force others into our own world view, to impose our own identity on them? …We will then need to inquire whether we are practically able to live with the fact that we may be merely affirming our own views, and understand how that fits with our other ethical convictions. This will be the ultimate test of confidence (188–189).

In elucidating the interaction between confidence and reflection, Tripković has silently moved from metaethics to ethical questions of justification. The benchmark of whether we are able to live with our views is evidently a moral test.[73]

Tripković's analysis of confidence and reflection appears to operate in similar fashion to Rawlsian reflective equilibrium. According to Rawls, moral values become justified through a process of reflective deliberation in which we revise our judgements and principles until we reach a point where our moral principles and particular judgements cohere.[74] Reflective equilibrium is metaethically neutral, being compatible with both realist and constructivist

[72] M.H. Kramer, 'Working on the Inside: Ronald Dworkin's Moral Philosophy' (2013) 73 *Analysis* 118. Following Dworkin, Kramer contends that metaethical theories are first-order moral positions.

[73] Tripković's claim that 'absolute truths are beyond our reach' is also naively self-defeating, since if it were true, there would be at least one accessible metaethical truth, viz. that there are no absolutely true (first order) ethical claims.

[74] J. Rawls, *A Theory of Justice*, rev edn (Cambridge, MA: HUP, 1999) 42–45.

theories of morality.[75] The metaethical component of Tripković's theory (the conclusion that there are no mind-independent, timeless moral truths) then drops out of the picture, because – like Rawlsian reflective equilibrium – the interaction between confidence and reflection is compatible with moral realism.[76] It remains to flesh out the nature of ethical commitments resulting from this interaction. For example, we could ask whether the confidence/reflection dynamic could lead over time to minimally objective moral claims, or whether the process of confidence and reflection may be part of the epistemically ideal conditions producing modestly objective moral facts. These and similar questions are left unanswered by Tripković.

A related problem for MeCA's central thesis is the tension between evolutionary ethics and the notion of reflection. Reflection has a central role in Tripković's account because it requires critical attention to the dangers of dogmatism and self-deception. Yet the argument from evolutionary ethics downgrades and marginalises reflection, as Tripković recognises:

> [M]ost of the people most of the time do not engage in or are not capable of such reflection, and so the transformative potential of reflection is limited. There are thus serious doubts about the ability of reflection to generate a radical disconnect with evolutionarily affected moral attitudes (163).

But how, it might be asked, is reflection even *possible* in our moral thinking, if that thinking is profoundly shaped by stubborn evolutionary forces saturating confidence? Evolutionary

[75] S. de Maagt, 'Reflective Equilibrium and Moral Objectivity' (2017) 60 *Inquiry* 443. For Rawls, '[a]part from the procedure of constructing principles of justice, there are no moral facts': J. Rawls, 'Kantian Constructivism in Moral Theory' (1980) 77 *Journal of Philosophy* 515, 519.

[76] Cf D. Brink, *Moral Realism and the Foundations of Ethics* (Cambridge: CUP, 2010), combining reflective equilibrium and moral realism.

benefits presuppose automatic, intuitive responses,[77] rather than the critical reflection central to Tripković's (meta)ethical theory. A further puzzle concerns the extrapolation of evolutionary ethics to *constitutional* adjudication. The constitutional context not only presents the challenge of 'defying evolution' through reflection (170–173), but also begs the question of cosmopolitan morality across large groupings such as states. From an evolutionary perspective, there is no reason why a resident of, say, Philadelphia should have particular moral concern for west coast Californians whom she does not know and will never meet. Grounding constitutional ethics in *imagined* communities[78] is not a promising alternative strategy, if only because fictional communities cannot supply empirical support for confidence in moral judgements and do not confer evolutionary benefit.

CONFIDENCE AND REFLECTION IN CONSTITUTIONAL ETHICS

MeCA's final chapter applies metaethical theorising on confidence and reflection to develop a theory of constitutional ethics. As Tripković explains, the general argument applicable to ordinary moral reasoning requires translation to the special constitutional context:

> The identity that courts refer to is not personal but constitutional: it is supposed to be attributable to the constitutional community as a whole. Common sentiments are not the private feelings of a judge but the dominant sentiments of the public. Reflection presupposed by the argument from universal reason is directed at a better self-

[77] See eg J. Haidt, 'The Emotional Dog and Its Rational Tail: a Social Intuitionist Approach to Moral Judgment' (2001) 108 *Psychological Review* 814; P. Singer, 'Ethics and Intuitions' (2005) 9 *Journal of Ethics* 331. See also E.O. Wilson, *Sociobiology: the New Synthesis* (Cambridge, MA: HUP, 1975) 3.

[78] B. Anderson, *Imagined Communities* (London: Verso, 1983).

> understanding and development of the deep moral commitments of the constitutional system (193).

Under this model, constitutional ethics frames a set of themes from which to identify the specific values of the constitutional system justified from its own practical perspective. Shorn of claims to universality or mind-independency, constitutional identity points to the confidence we have in our values. Constitutional identity should then be supplemented with arguments from common sentiment and universal reason to bring additional content to constitutional ethics. Common sentiment, for example, may be relevant to constitutional adjudication insofar as it is reflective (200–202). By this Tripković means that while common sentiment is not objective, courts may be obligated to accept its existence, 'but with a dose of skepticism, and with a critical and open mind' (201). Indeed, courts should give effect to common sentiments contrary to constitutional identity when

> these new sentiments can be ascribed to the community as a whole and … they are a consequence of a thoughtful process that did not succumb to initial and pre-reflective emotive reactions without thinking them through in an open and flexible process. (202)

The possibility of ethical development through social progress accounts for judicial landmarks such as *Brown v Board of Education*[79] and *Griswold*.[80] Less dramatic refinements of the UK's constitutional identity may be visible in the changing intensity of *Wednesbury* review through

[79] *Brown v Board of Education of Topeka*, 347 US 483 (1954).

[80] *Griswold v Connecticut*, 381 US 479 (1965).

'anxious scrutiny',[81] and recent reinvigoration of common law constitutionalism.[82] Arguments from universal reason are ascribed a similarly supporting role in judicial reasoning. Constant reflection augments confidence in subsisting ethical judgements, whilst critical engagements with other constitutional traditions promotes 'greater self-awareness but also the imaginative development of the (collective and political) self' (205).

The final part of Chapter 6 considers constitutional dilemmas arising from ethical conflicts. Diachronic shifts in moral attitudes occur through time, sometimes producing controversies at the level of constitutional interpretation.[83] Tripković argues that 'courts ought to give effect to deep and reflective transformations in moral attitudes that are not excessively confident' (210). Referring to Justice Kennedy's opinion in *Lawrence v Texas*,[84] he suggests that '[a] clear sign that the change is deep enough is that it is not possible to imagine that a different conclusion could be justified; some attitudes become so obvious over time to the extent that other possibilities seem plainly "wrong"' (210–211).

Synchronic disagreements in moral attitudes occur simultaneously, within a single community or between communities. They have attracted recent academic attention, mainly in the context of the relationship between European Union law and the constitutional law of the Member States.[85] Framing these interactions within his matrix of confidence and reflection, Tripković argues that, even though constitutional courts always reason from their own perspective, a reflective attitude is evident in the emerging dialogue among European courts

[81] See eg *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514.

[82] See eg *R (on the application of Jackson) v Attorney General* [2005] UKHL 56. Also see A. Perry and A. Tucker, 'Top-Down Constitutional Conventions' (2018) 81 MLR 765.

[83] See eg A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton UP, 1998); R. Dworkin, *Law's Empire* (Cambridge, MA: HUP, 1986); J. Balkin, *Living Originalism* (Cambridge, MA: HUP, 2012).

[84] *Lawrence v Texas*, 539 US 558 (2003).

[85] n 8 above.

(217). While I am not convinced that dialogue between national constitutional courts and the ECJ and the ECtHR is genuinely reflective,[86] the *idea* of reflective dialogue and pluralism indeed seems entrenched in modern constitutional theory.[87] For synchronic disputes within a community, Tripković advocates the perspective of 'impartial spectator' from which to reason and build on existing constitutional identity. Notwithstanding the equal validity – from a reflective viewpoint – of two competing moral attitudes, courts should sometimes fall back on their confidence in well-established principles of constitutional identity (214).

All in all, constitutional identity, as already a product of an enduring process of confidence and reflection, is accorded special metaethical status:

> [C]onstitutional identity sometimes *is* the point of intersection between confidence and reflection: it embodies the optimal level of attachment and detachment that is appropriate for a disenchanted normative perspective (220).

This intriguing conclusion brings Tripković close to the moral and jurisprudential positions of Rawls and, especially, Dworkin, notwithstanding their metaethical differences. Dworkin was sceptical of metaethics but a firm believer in moral objectivity; Tripković reaffirms the foundations of ethical argument in constitutional adjudication while rejecting moral objectivity and truth. However, in his theory of law as integrity, Dworkin locates legality in the morally best interpretation of past political and judicial decisions.[88] His criterion of jurisprudential 'fit' is mirrored, for Tripković, in the need for confidence in our constitutional identity, as expressed by the entire body of past political and judicial practice. Further, integrity can require courts to

[86] See Lindeboom, n 57 above, 346–349.

[87] See Walker, n 8 above; Kumm, n 8 above; N. MacCormick, *Questioning Sovereignty* (Oxford: OUP, 1999) ch 7.

[88] Dworkin, n 83 above, chs 6 and 7.

change course and overturn previous jurisprudence, not unlike the reflective process by which entrenched common sentiments or universal reason require divergence from constitutional identity. In other words, integrity's balancing between *respecting* and *regretting* past political and judicial practice is strikingly similar to the process of balancing *confidence* in our constitutional values and *reflection* on whether these values remain morally valid.[89] If this comparison is warranted, it confirms the metaethical neutrality of Tripković's theory of confidence and reflection. Moreover, since normative arguments saturate his metaethical framework, Tripković must face the charge that he is 'working on the inside' of normative argumentation.[90]

CONCLUDING REMARKS

MeCA offers an original and thorough analysis of ethical arguments in constitutional adjudication and their metaethical foundations. This review article has focussed on the book's most notable assertions and highlighted areas of uncertainty and controversy. It cannot claim to do justice to every subplot or refinement of Tripković's argument. MeCA is not the definitive statement of the metaethics of constitutional adjudication. Hopefully, it rather presages a more explicit debate on the foundations of ethical argument in constitutional reasoning, the importance of which cannot be overstated for constitutional legal theory and practice. Future discussion of the ethics and metaethics of constitutional reasoning would benefit from a more precise and nuanced account of the metaphysics of morality, further clarifying the nature of objectivity in moral argument. MeCA, meanwhile, points the way.

[89] On 'respect' and 'regret', see G.J. Postema, 'Integrity: Justice in Workclothes' in J. Burley (ed), *Dworkin and His Critics* (Oxford: Blackwell, 2004).

[90] Kramer, n 72 above.