Essays on Autonomy, Legality and Pluralism in European law

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6. In Search of Foundations: Ethics and Metaethics in Constitutional Adjudication

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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 common ethical reasoning ideal-types from a comparative constitutional perspective. These ideal-types are argument from *constitutional identity* (Chapter 2), *common sentiment* (Chapter 3) and *universal reason* (Chapter 4). In individual judgments where such types of ethical argument are used, they are often construed as self-standing methods of ethical argument, as this book demonstrates with reference to constitutional adjudication in several jurisdictions, including the United States, South Africa and Israel. Subsequently, Tripković attempts to show how all three ideal-types nonetheless 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).

In what follows, I first situate the book in the current literature, showing how it makes a valuable and insightful contribution to the discussion on the relationship between law, morality and constitutionalism. To grasp the metaethical arguments used in the book better, I then briefly discuss the relationship between the concepts of 'moral realism', 'mind-independency' and 'objectivity'. Thirdly, I review the three ideal-types of ethical argument discussed by Tripković, offering some thoughts on his analysis. Lastly, I discuss the book's metaethical

[1] In primarily choosing the term 'ethical argument', the book follows P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press 1982), but the terms 'ethics' and 'morality' are used interchangeably, as justified at MeCA, 5, fn. 5. In this review article, I will follow this interchangeability, as any possible distinctions between the two are not relevant for our purposes.

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

Moral Argument in Legal Reasoning

This book's main contribution to the intersection between law and morality is its metaethical perspective. It therefore aims to explore the metaphysical foundations of ethical argument in constitutional reasoning. In other words, 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 quite significantly from most existing work on the relationship between law, constitutionalism and morality, which can be roughly divided into two approaches.

One is the well-known debate in general jurisprudence on the question of the separability of law and morality.[2] This discussion has developed into highly abstract discussions on whether moral facts can be included in the criteria for legal validity,[3] and whether methodologically the concept of law is cognisable without moral assumptions.[4] While the relation between general jurisprudence and legal practice is in many ways similar to the relation between metaethics and morality, both metaethics and ethics only play a marginal role in this current legal-philosophical discussion.[5]

The other develops recent work on constitutionalism and constitutional theory, which tends to be less preoccupied by abstract questions on the nature of law, and instead takes a more normatively-laden approach by focussing on the moral features of constitutional theory and law.[6] This latter discussion often directly engages with moral argument in determining the

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[2] The contemporary legal-philosophical discussion on the separation thesis often takes as its starting point the seminal work of J. Austin, *The Province of Jurisprudence Determined* (Hackett Publishing 1998 [1832]); and H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593.

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

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

[5] See however K. Toh, 'Jurisprudential Theories and First-Order Legal Judgments' (2013) 8 *Philosophy Compass* 457.

[6] See recently e.g. V. Jackson and M. Tushnet, *Comparative Constitutional Law* (West Publishing 2014); J. Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University

morally necessary features of constitutions and constitutionalism. Some approaches in constitutional pluralism take a similar approach.[7] These approaches are typically less concerned with metaethics, or general jurisprudence as its legal equivalent.[8]

In sharp contrast, this book offers a cross-sectional analysis of ethical argument in constitutional reasoning. In other words, instead of analysing moral argument in legal reasoning 'vertically' in light of general jurisprudence or 'horizontally' against the normative benchmark of some moral theory, the book fleshes out the metaethical foundations of these ethical arguments. The approach seems sensible, if daunting, because general jurisprudence typically seems less preoccupied with the moral nature of ethical argument in law,[9] while direct moral assessment of legal reasoning raises metaethical questions which have not yet been fleshed out in detail.

Analysing the metaethical foundations of three ideal-types of ethical argument requires a methodological choice concerning the precise metaethical benchmark to apply. The philosophical debate on metaethics and the metaphysics of morality has grown exponentially in the past decades, and can safely be regarded as a semantic minefield. We can distinguish at least between cognitivist versus non-cognitivist theories of morality,[10] naturalist and non-

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Press 2016); D. Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016); and A. Sajó and R. Uitz, *The Constitution of Freedom* (Oxford University Press 2017). See also the review article by P. Eleftheriadis, 'In Defence of Constitutional Law' (2018) 81 *Modern Law Review* 154.

[7] E.g. N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317; M. Kumm, 'The Moral Point of Constitutional Pluralism' in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press 2012); M. Poiares Maduro, 'Three Claims of Constitutional Pluralism' in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012).

[8] Toh, 'Jurisprudential Theories' (n. 5).

[9] Ronald Dworkin's later work would be an exception which links legality to the morally best explanation of past political decisions. See generally R. Dworkin, *Law's Empire* (Harvard University Press 1986).

[10] Cognitivist theories of morality hold that moral statements are statements capable of being true or false (ie that they are 'truth-apt'), while non-cognitivist theories deny this. Both naturalism and non-naturalism are cognitivist theories of morality, while emotivism and error theory are non-cognitivist. For an overview, see e.g. A. Miller, *Contemporary Metaethics. An Introduction*, 2nd edn (Polity Press 2014); and K.M. DeLapp, 'Metaethics', *Internet Encyclopedia of Philosophy*, at https://www.iep.utm.edu/metaethi/.

naturalist theories,[11] and within those categories between moral realism,[12] emotivism[13] and moral error theory.[14] This book does not focus on these traditional theories of metaethics as such, although some are referred to where appropriate. Instead, in the first part Tripković aims to analyse whether the three types of ethical argument can succeed alone in reflecting *objective*, *timeless* and *mind-independent* moral truths.

After concluding that none of these types of ethical argument succeed to reflect such mind-independent truths, Chapter 5 discusses metaethics as such. This chapter concludes that morality is likely mind-dependent and contingent, making the search for metaphysical foundations unlikely to succeed. This makes the structure of the book somewhat peculiar: would it not have made more sense first to look into the metaethical debate and then, having established the unlikelihood of mind-independent moral facts, scrutinise ethical arguments against a more nuanced benchmark? In fact, Tripković's critique of the ideal-types of ethical argument in chapters 2 to 4 is largely based on elements from his own theory, in particular his anti-realist metaethics and the notion of reflection, although the theory is only introduced in detail in Chapter 5. I will return to this point.

First, let us look at the metaethical terminology more closely. While it makes sense to contrast mind-independent moral truths from contingent, mind-dependent moral claims, the metaethical debate is far richer than this bifurcation. In my view, the book would have benefitted from a more precise and nuanced theoretical framework. Taking a short detour into the concepts of 'realism', 'mind-(in)dependency' and 'objectivity' to illustrate this point allows us to obtain a richer understanding of the topics which lie at the core of MeCA's main argument.

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[11] Naturalist theories state that moral facts are either directly or indirectly reducible to facts about the natural world. This includes for example moral realism, which holds that moral facts are mind-independent features of the world, but also evolutionary ethics, which holds that moral facts are reducible to certain evolutionary benefits. Non-naturalists deny this connection, claiming that moral facts are autonomous from facts about the natural world.

[12] Moral realism holds that moral facts are propositions which can be true and exist independently of human thought. See e.g. G.E. Moore, *Principia Ethica* (Cambridge University Press 1903).

[13] Emotivism claims that moral arguments reflect emotional attitudes that are not truth-apt. See J. Ayer, *Language, Truth and Logic* (Penguin 2001 [1936]).

[14] Error theory claims that moral facts are simply a mistake and do not exist: J.L. Mackie, *Ethics: Inventing Right and Wrong* (Penguin 1977).

Realism and Objectivity in Morality

The book's metaethical benchmark is the concept of 'mind-independency'.[15] Mind-independency is understood here as the idea that moral judgments 'could be true irrespective of our contingent attitudes' (144). But this definition does not resolve all issues, for what does a moral judgment being 'true' irrespective of our 'contingent attitudes' mean? Does it mean that the fact that the overwhelming majority of people today consider, say, slavery as immoral irrelevant to slavery being immoral? By extension, does it entail that slavery was *always* immoral, with equal validity as the laws of physics or chemistry, no matter how widespread the belief that it was a natural phenomenon in earlier times? MeCA does not delve further into the philosophical discussion on this point, instead conflating the concepts of 'objective truth', '(moral) realism' and 'mind-independency'. A closer look at the concept of objectivity might help understand the arguments made by the book better.

When speaking of objectivity, most people are thinking of what is termed 'metaphysical objectivity'. For some statement to be metaphysically objective, this means that its truth or correctness[16] depends on the existence of an object in the world which has properties corresponding to the statement.[17] Objectivity thus entails that the correctness of the statement does not conflate with 'what seems correct' as a matter of subjective assessment.[18] In this sense, objectivity appears to be linked to mind-independency. However, this raises several questions: to what extent should the object concerned be independent from human thinking, and what 'mind' should the object be independent from?[19] If the object should be required to exist in the absence of any human thinking, 'cars', 'buildings' and 'nation-states' would not objectively

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[15] See e.g. in the chapter on constitutional identity, MeCA, 14, 53 and 56. See also the metaethical analysis in ch 5, in particular at 144 and 174ff.

[16] 'Truth' is one of the most complex concepts in epistemology and metaphysics. Many philosophers, in particular after W.V.O. Quine's attack on the analytic–synthetic distinction, and the advancement of coherence-based alternatives to the correspondence theory of truth, try to avoid using 'truth' altogether, instead speaking of 'correct', 'valid' or 'right'.

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

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

[19] N. Stavropoulous, 'Objectivity' in M.P. Golding and W.A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2008). For an analysis of mind-independency, see M.H. Kramer, *Moral Realism as a Moral Doctrine* (Blackwell Publishing 2009) ch. 2.

exist. Yet the existence of 'cars' surely seems 'more' objective than, say, the statement 'I think the "Tesla Model S" is a pretty car'.

Distinguishing between objectivity and realism can be helpful. (Metaphysical) realism can be described as the thesis that an objective reality exists independently of human thought about it or perception of it.[20] Using Coleman and Leiter's terminology, the existence of reality is objective in that it is not just an extension of the human mind (metaphysical independence) and second, this objective reality also does not depend on our evidentiary means of perceiving it (epistemic independence).[21] In this sense, metaphysical realism implies metaphysical objectivity, while metaphysical objectivity does not necessarily imply realism.[22] This is because metaphysical objectivity does not presuppose the 'full' mind-independency of the objects to which it refers. Countless objects which exist objectively are a matter of social construction – think of 'fashion', 'nation-states' and 'inflation' – in addition to the many objects which exist physically but are necessarily connected to human thinking, including 'cars' and 'buildings'. Objectivity, then, is perhaps best understood as requiring a certain degree of detachment, as a result of stepping back from the individual, subjective viewpoint, aspiring towards a 'view from nowhere', in Nagel's terms.[23]

To further refine the 'degree of detachment' required by objectivity, Coleman and Leiter offer a helpful distinction between strong, modest and minimal objectivity.[24] *Strong objectivity* means that what is correct about the objective reality never depends on what humans think is correct.[25] Strong objectivity, in other words, is very closely related to metaphysical realism. *Minimal objectivity*, by contrast, entails that what is correct does not depend on what an individual person thinks is correct (ie, it is not dependent on the mind of an individual), but is

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[20] Marmor, 'Three Concepts of Objectivity' (n. 17) 116, for this definition referring to M. Dummett, *The Interpretation of Frege's Philosophy* (Duckworth 1981) 434; D. Khlentzos, 'Challenges to Metaphysical Realism', *Stanford Encyclopedia of Philosophy* (2016), at https://plato.stanford.edu/entries/realism-sem-challenge/.

[21] Coleman and Leiter, 'Determinacy, Objectivity, and Authority' (n. 18) 248.

[22] Marmor, 'Three Concepts of Objectivity' (n. 17) 116–119.

[23] T. Nagel, *The View from Nowhere* (Oxford University Press 1986).

[24] Numerous other distinctions are available, sometimes using different terminology for roughly similar concepts. I confine myself to Coleman and Leiter's because it is both well-informed by contemporary philosophy and well-suited to law.

[25] Coleman and Leiter, 'Determinacy, Objectivity, and Authority' (n. 18) 252.

determined by what is conventionally considered as correct by an entire community.[26] To use Coleman and Leiter's example, fashion can be regarded as objective in the minimal sense. It makes no sense to say that something is fashionable solely because I think it is fashionable. In fact, the only manner to make sense of saying that something is fashionable is with reference to the objective fact that the majority of persons in a community conceives of it as fashionable.[27] Lastly, *modest objectivity* entails that what is correct is determined by that which seems correct under epistemically ideal conditions.[28] For example, colours can be regarded as modestly objective, since what is objectively blue corresponds to what a person sees as blue in epistemically ideal conditions: observations should be made in white light, the subject should have proper vision, etc.[29]

As applied to ethics, strong objectivity would entail that moral facts exist independently of what humans think about what morality is or requires. However, minimal and modest objectivity about ethics, respectively only require that there should be conventional agreement within a community about the content of moral facts, and that the moral facts be determined by moral reasoning in epistemically ideal conditions. A belief in the contingency of morality and value pluralism among communities, for instance, is fully consistent with the belief that value is, at least minimally, objective.[30]

The reason why all this is relevant is that Tripković's conflation of mind-independency, realism and objectivity at times leads him to imprecise conclusions about the metaethical foundations he seeks and the viability of the ideal-types of ethical argument. While I will return to this point further below, an example of such imprecision is Tripković's misqualification of Dworkin's moral thinking as based on a 'robust version of moral realism: a belief that there are mind-independent, universal and timeless moral answers' (7, fn 7). For one, Dworkin always ridiculed moral realism with his sarcastic reference to the idea of 'moral particles' or

[26] Ibid. 253; B. Leiter, 'Objectivity and the Problems of Jurisprudence' (1993) 72 *Texas Law Review* 187, 192–193.

[27] Coleman and Leiter, 'Determinacy, Objectivity, and Authority' (n. 18) 253.

[28] Ibid. 263–264.

[29] Ibid. 266.

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

'morons',[31] and considered it nonsensical to speak of metaethics at all.[32] Contrary to Tripković, I do not believe that Dworkin can be regarded as a moral realist, while the latter certainly believed in moral objectivity.[33]

Secondly, by consistently focusing on 'mind-independency' as a benchmark in the first part, Tripković appears too nihilistic towards the metaethical foundations of the ethical argument types, neglecting the sense in which they could be objective. Moreover, I believe this conflation causes him to overstate the metaethical differences between the ideal-types of ethical arguments and his own theory of constitutional ethics. To substantiate these claims, we should consider the three ideal-types of ethical arguments as the book presents them.

Three Types of Ethical Argument

Constitutional identity

Constitutional identity might be the most commonly used variant of ethical reasoning by the courts. In determining what the morally-laden concepts in the law entail, courts frequently resort to ethical argument, which is somehow linked to the constitutional language of their legal system. This is unsurprising both normatively and pragmatically: any legal order aspires towards being a closed and coherent system,[34] so that morally-laden reasoning is justified as far as possible by reference to the inner normativity of the constitutional order.[35] However, as a metaethical foundation of constitutional ethics, constitutional identity creates various problems. 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 which have a

[31] E.g. R. Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 *Philosophy & Public Affairs* 87, 104–105; and Dworkin, *Law's Empire* (n. 9) 80.

[32] Dworkin, 'Objectivity and Truth' (n. 31) 128: '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'.

[33] See also Coleman and Leiter, 'Determinacy, Objectivity, and Authority' (n. 18) 269, 274–276.

[34] See e.g. J. Bengoetxea, 'Legal System as a Regulative Ideal' (1994) 53 *Archiv für Rechts- und Sozialphilosophie* 65.

[35] See e.g. J. Gardner, '*Law as a Leap of Faith* as Others See It' (2014) 33 *Law and Philosophy* 813; and from a legal-sociological perspective, J. Přibáň, 'The Self-Referential Semantics of Sovereignty: A Systems Theoretical Response to (Post) Sovereignty Studies' (2013) 20 *Constellations* 406.

more universal validity beyond the contingency of the community itself (50–56). Examples of particular constitutional identity include the right to bear arms under the US constitution,[36] or the principle of *laïcité* in France.[37] These principles are inherent to their communities' constitutional identities, but do not necessarily have universal aspirations. In contrast, 'general constitutional identity' refers to concepts endorsed sufficiently broadly beyond the state itself that they are taken to be essential to the notion of a liberal constitution itself: for example the Rule of Law, democracy and human rights protection (54).[38]

Notwithstanding its prevalence in constitutional adjudication, Tripković concludes that both particular and general constitutional identity fail to serve as self-standing foundations for ethical reasoning, for basically two reasons: both are typically too indeterminate to command concrete ethical answers to concrete questions, and it is not clear what generates their normative force *qua* ethical reasoning.

In the context of particular constitutional identity, the problem of indeterminacy reveals itself in the distinction between constitutional identity and common emotional 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). This juxtaposition seems necessary to maintain constitutional identity as a self-standing ethical argument. The fact that in 2008, 51% of the US citizens favoured stricter gun control[39] did not require the US Supreme Court to strike down Washington's ban on handguns and the requirement that rifles and shotguns be kept 'unloaded and disassembled or bound by a trigger lock'.[40] But this also means that the particular constitutional identity is, to a greater or lesser extent, insufficiently determinate to require specific ethical outcomes, as it is unclear what it is that makes a specific principle of value part of the particular constitutional identity, and what this constitutional identity requires in individual cases (50–53, 57).

Secondly, constitutional identity as such does not explain *why* we should favour constitutional identity over common emotional sentiment in abstract terms:

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

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

[38] See also Weinrib, *Dimensions of Dignity* (n. 6).

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

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

> it 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).

I agree with Tripković that the normative relationship between constitutional identity and common moral sentiments is complex and ambiguous, if not at times hard to swallow. Constitutional identity in this sense supplies resistance to a pragmatic and ad hoc ethical assessment of what morality requires, either through an appeal to common moral sentiment or otherwise. In fact, while Tripković appears to be rather optimistic about the practical capacity of constitutional identity to provide us with a sense of our moral commitments (14; 220), there is no guarantee at all that constitutional identity has ethical merit at all. Deference to the particular constitutional identity of the community entails deference to past generations, which could be the drafters of a written constitution, or past constitutional interpretations.[41] The fundamental normative premise of constitutional identity as an ethical argument is thus that the collective wisdom of previous generations gives their values and principles the moral authority to determine our current legal questions.

This premise may well be wrong.[42] The US constitution provides the most illuminating example, which has been (and to some extent, continues to be) 'a covenant with death, and an agreement with hell', to speak with Jack Balkin.[43] Many legal generations have been, and some continue to be, convinced of the moral authority of the US constitution to allow for segregated

[41] In this regard, the question of whether constitutional identity has moral force is similar to the debate on whether the originalist meaning of a constitution has the authority to constrain its current meaning. See A. Marmor, 'Meaning and Belief in Constitutional Interpretation' (2013) 82 *Fordham Law Review* 577; and L.B. Solum, 'Originalism, Hermeneutics, and the Fixation Thesis' in B.G. Slocum (ed.), *The Nature of Legal Interpretation* (University of Chicago Press 2017).

[42] See also J. Waldron, 'Particular Values and Critical Morality' (1989) 77 *California Law Review* 561.

[43] J.M. Balkin, 'Agreements with Hell and Other Objects of Our Faith' (1997) 65 *Fordham Law Review* 1703, borrowing the words of the abolitionist William Lloyd Garrison in a resolution he introduced before the Massachusetts Anti-Slavery Society in 1843, as cited by W.M. Merrill, *Against Wind and Tide: a Biography of Wm. Lloyd Garrison* (Harvard University Press 1963) 205.

schools,[44] the prohibition of abortion[45] and anti-homosexual sodomy laws.[46] Certainly, the problem of constitutional evil is not as pressing in all jurisdictions as it is in the US. Also in the United Kingdom, however, the normative credentials of the common law constitution may be questioned insofar as it is arguably more preoccupied with property and contract rights than equality of race and gender.[47] As for EU constitutionalism, recent scholarship has questioned whether the EU's constitutional identity lives up to its foundational values,[48] and challenged the legitimacy of its political messianism.[49] 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,[50] often to the detriment of the less cosmopolitan,[51] the manner in which EU law economically benefits the older Member States at its centre to the detriment of the newer

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

[45] L.J. Reagan, *When Abortion Was a Crime Women, Medicine, and Law in the United States, 1867–1973* (University of California Press, 1998).

[46] W.N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Harvard University Press 1999). See e.g. *Bowers v Hardwick*, 478 US 186 (1986), overturned by *Lawrence v Texas*, 539 US 558 (2003).

[47] C. Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (Oxford University Press 2016). But cf. T.R.S. Allan, 'Parliament's Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective' (2006) 59 *Current Legal Problems* 27; and M. Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68 *Current Legal Problems* 85.

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

[49] 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.

[50] E.g. E. Spaventa, 'Earned Citizenship: Understanding Union Citizenship Through its Scope' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017); C. O'Brien, *Unity in Adversity* (Hart Publishing, 2017).

[51] The applicability of EU fundamental rights generally requires a 'cross-border element', which arguably entails morally questionable outcomes in family reunification cases; compare e.g. *Mary Carpenter v Secretary of State for the Home Department*, C-60/00, EU:C:2002:434 with *Shirley McCarthy v Secretary of State for the Home Department*, C-434/09, EU:C:2011:277. The same applies to the economic activity and self-sufficiency thresholds, see *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, C-200/02, EU:C:2004:639, compared to *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration*, C-86/12, EU:C:2013:645.

Member States at the periphery,[52] and generally, the core of the EU's constitutional identity arguably being rife with systemic moral weakness.[53]

Moreover, even if not inherently evil or unethical, constitutional identity can equally be used *and abused* in constitutional reasoning. The most recent example of the abuse of constitutional identity are Hungary and Poland's 'illiberal democracy' programmes, in which democracy, the rule of law and fundamental rights protection are systematically undermined by appeals to constitutional identity by both government and the judiciary.[54]

The answer to whether our constitutional identity deserves our fidelity probably, in part at least, depends on the capacity of constitutions to 'improve' their ethical merits, building on the existing constitutional framework.[55] The viability of reflection is essential in this regard, of course, or in other words, one's *optimism* regarding the self-corrective capacity of constitutional identity through reflection. This lies at the heart of Tripković's metaethical theory, to which I will return.

Overall, whether constitutional identity can withstand scrutiny as a self-standing ethical argument is questionable, as Tripković concludes. Yet it seems that his benchmark, requiring mind-independent, timeless moral truths, is perhaps all too high: is it not trivial that no constitutional identity, no matter how splendid, can ever meet this criterion? Indeed, as I will show below, Tripković's own theory of constitutional ethics (Chapter 6) certainly does not meet this threshold, for by then he has abandoned hope of finding a source of mind-independent moral truths (Chapter 5). In that regard, perhaps the analysis would have been more persuasive if based on a more nuanced metaethical discourse which departs from the rigid realism/anti-realism dichotomy. Can the argument of constitutional identity be minimally objective in that

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[52] D. Kukovec, 'Hierarchies as Law' (2014) 21 *Columbia Journal of European Law* 131.

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

[54] G. Halmai, 'National(ist) Constitutional Identity? Hungary's Road to Abuse Constitutional Pluralism' (2017) *EUI Working Papers* LAW 2017/08; D. Kochenov and P. Bárd, 'Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement' (2018) *RECONNECT Working Papers* No. 1; 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 *Common Market Law Review* 1753.

[55] J.M. Balkin, *Living Originalism* (Harvard University Press 2014). At a theoretical level, see S.J. Shapiro, *Legality* (Harvard University Press 2013) chs. 5–7. See also M. Loughlin, 'The Constitutional Imagination' (2015) 78 *Modern Law Review* 1.

it reflects what the community as a whole would gather as morally right? To what extent should minimal objectivity, in the constitutional context, reflect the community's positive morality throughout its history? There are no clear answers to these questions. We can also question whether parts of general or particular constitutional identity could be said to be modestly objective. Some elements of the liberal constitutional tradition arguably reflect values which under epistemically ideal conditions seem right irrespective of cultural or historical contingencies. This can include the basic properties of the formal Rule of Law, and the most elementary of human rights such as the prohibition of torture and the right to life. Whether or not constitutional identity can be minimally or modestly objective is a question not answered by the book, although from a metaethical perspective this remains profoundly important.

Common sentiment

The second ethical argument ideal-type analysed is argument from common (emotional) sentiment, which

> 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).

The book illustrates this with Justice Stevens' opinion in *Spaziano v Florida*.[56] This case concerned the constitutionality of Florida law which allowed judges to override juries' sentencing decisions. After Mr Spaziano had been found guilty of first-degree murder and the jury had proposed life imprisonment, the trial court instead sentenced him to death. Stevens concluded that this law was unconstitutional. In short, his analysis builds on the premise that imposing the death penalty is ultimately an ethical judgement: '[it] is ultimately understood only as an expression of the community's outrage – its sense that an individual has lost his moral entitlement to live'.[57] Consequently,

> if 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

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

[57] *Spaziano v Florida*, 468 US 447, 469 (1984) (Justice Stevens), cited in MeCA, 65.

> believe, that a representative cross-section of the community must be given the responsibility for making that decision.[58]

The premise of this chapter is that the argument from common sentiment operates and can be analysed as a stand-alone ethical argument (59–60). In the case of *Spaziano v Florida*, however, it is clear that the appeal to emotional sentiments has deep roots in constitutional identity, most notably matters of institutional competence and legitimacy. In this case, the argument from common sentiment can hardly be separated from the constitutional foundations of the jury system as part of the US's constitutional identity.

The same applies by extension to the 'shocks the conscience' test in Canadian constitutional law, which the book uses 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' because their rights are likely to be infringed.[59] Outside situations of risk of torture, the Canadian Supreme Court holds that extradition violates the principles of fundamental justice where the nature of the foreign criminal procedures or penalties 'shocks the conscience'.[60] However, semantics may be misleading in this regard. From Tripković's subsequent elaboration, it becomes apparent that the 'shocks the conscience' test does *not* involve a measurement of current moral sentiments, but rather an abstract reference to the 'conscience of Canadians', the 'public values of the community', and the 'Canadian sense of what is fair, right and just' (74). Consequently, the test appears in every sense to refer to constitutional identity rather than common sentiments.[61]

The complex interaction between constitutional identity and emotional sentiment is illustrated even more clearly by the European Court of Human Rights' *Handyside* judgment, which concerned the question of whether freedom of speech allows for prosecution of the publisher of a book targeted at children, which took an 'uncritical' stance towards sexuality. Tripković refers to this case to support his claim that the ECtHR recognises a margin of appreciation to the Contracting States because 'the requirements of morals [vary] from time to time and from place to place'.[62] Consequently, 'by reason of their direct and continuous contact

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[58] *Spaziano v Florida*, 468 US 447, 481 (1984) (Justice Stevens), cited in MeCA, 66.

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

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

[61] This seems partly acknowledged by MeCA, 74–75, fn. 53.

[62] *Handyside v United Kingdom* [1976] ECHR 5, para. 48.

with the vital forces of their countries', State authorities are better placed to assess whether freedom of speech can be limited to prohibit or prosecute a disseminator of 'immoral' viewpoints (68–72).[63]

While this passage indeed defers to the Contracting States to incorporate emotional sentiment into their legal reasoning, Tripković ignores the judgment's subsequent paragraph:

> Nevertheless, Article 10 para. 2 does not give the Contracting States an unlimited power of appreciation […] Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. *Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population*.[64]

If anything, this key passage substantially diminishes the relevance of emotional sentiment, and is more forcefully understood as an example of constitutional identity as ethical argument.

Consequently, the problem with the argument from common sentiment is that at most it can be used as an *exception* to arguments from constitutional identity. When we are speaking of constitutional rights, it would appear plainly wrong to say that the content of our rights is derived from emotional sentiment, as this would diminish the content of rights to the emotional response of the day. This would be a direct threat to the rule of law, since the common sentiment towards, say, paedophiles, murderers and rapists typically does not correspond to the procedural and substantial rights they possess. Instead, the argument from common sentiment is principally relevant when it comes to exceptions to the rights which are otherwise determined by reference to ethical arguments based on constitutional identity.[65] Common sentiment is extremely unsuitable as an *exclusive* moral argument in constitutional adjudication, provided

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[63] *Handyside v United Kingdom* [1976] ECHR 5, para. 48.

[64] *Handyside v United Kingdom* [1976] ECHR 5, para. 49 (emphasis added).

[65] In Fallon's terminology, the incorporation of common sentiment is the result of a sense of 'interpretive dissonance' felt when strictly applying constitutional rights and freedoms which entails results which would not be expected by a reasonable understanding of those rights. See R.H. Fallon, 'Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation – and the Irreducible Roles of Values and Judgment within Both' (2014) 99 *Cornell Law Review* 685.

that one believes that entrenchment beyond the sentiment of the day is a necessary element of *any* constitutional argument.

Whenever common sentiment genuinely seems to be the primary or only informant of moral content, constitutional reasoning is typically quickly discredited precisely because of its preoccupation with the day-to-day reality of social and political sensibilities instead of entrenched generalisations which are supposed to resist all-things-considered judgements.[66] The ECJ's case law on EU citizenship again provides a useful example. Over the past decade, the Court has retreated from its bold and aspirational language in cases such as *Grzelczyk*[67] and *Ruiz Zambrano*,[68] denying rights that many hypothetise the Court should have granted if it had continued the logic of the early case law.[69] As commentators have observed that the 'deservingness' of litigants seems to be a primary indicator of the outcome of cases,[70] the case law is chastised for committing to a citizenship of personal circumstances.[71] While this is only one topical example, it is perhaps not a stretch to conclude that common sentiment-based moral argument is deeply at odds with a genuine commitment to constitutional reasoning and the rule of law.

Tripković's argument against common sentiment is by contrast, mainly a philosophical one. He questions the ontology of common sentiment with reference to emotivist theories of morality. As mentioned above, emotivism is a non-cognitivist metaethical theory in that it denies that moral claims can be true or false.[72] But it does not follow that 'moral judgments are "inevitably" subjective', as Tripković claims (82–83). It is obviously true that emotions are always expressed by a subject. However, metaphysically, subjectivity means that what is

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[66] On rules as entrenched generalisations meant to resist an all-things-considered judgement even if the latter is favourable in the specific case at hand, see F. Schauer, *Playing by the Rules* (Clarendon Press 1991).

[67] *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, C-184/99, EU:C:2001:459, para. 31.

[68] *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, C-34/09, EU:C:2011:124, para. 42.

[69] E.g. Spaventa, 'Earned Citizenship' (n. 50); N. Nic Shuibhne, '(Some of) The Kids Are All Right: Comment on *McCarthy* and *Dereci*' (2012) 49 *Common Market Law Review* 349.

[70] G. Davies, 'Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication (2018) 25 *Journal of European Public Policy* 1442

[71] See e.g. D. Kochenov, 'The Citizenship of Personal Circumstances in Europe' in D. Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017). See also A. Tryfonidou, 'Redefining the Outer Boundaries of EU Law: The *Zambrano*, *McCarthy* and *Dereci* Trilogy' (2012) 18 *European Public Law* 493.

[72] See n. 13; MeCA, 82.

correct is equal to what appears correct to a subject.[73] Since emotivism denies the possibility of talking about 'correctness' or truth in general, the question of subjectivity or objectivity does not even arise and moral claims are simply *neither objective*, *nor subjective*.[74]

However, the book's argument against common sentiment proceeds by criticising judges who argue that in applying emotivist arguments, they do not argue from their own, subjective emotional sentiment arguments, but rather the common sentiment of the community. According to Tripković, these judges talk as if they refer to an objective truth, while emotional sentiments can never be objective and so the convergence in feelings explains the 'illusion of objectivity' (87). This is because the ethical status of common sentiment is only justified insofar as the ontological status of these common sentiments is justified (79). Since there is no reason to assume that our common sentiments are objective, Tripković argues, the manner in which judges discuss the ethical status of these sentiments cannot be objective either.

However, this argument cannot withstand closer scrutiny because Tripković mistakenly conflates the objectivity of constitutional ethics with mind-independency as a metaethical theory. Emotivism and emotional sentiment as metaethical theories imply that morality cannot be objective or subjective. However, whether common sentiment as an argument in *constitutional ethics* can be objective is a totally different matter. Given that empirical data about the current emotional responses of people is (at least potentially) available – if only through polls – courts can objectively establish whether there is a common sentiment on, say, the morality or immorality of the death penalty. It may well be that certain common sentiments are minimally objective in that they are shared by the community as a whole. This holds true regardless of whether these common sentiments are, metaphysically, mind-independent moral truths. Objective constitutional ethics and non-cognitivist metaethics are perfectly compatible.

Accordingly, the objection against common sentiment could either be centred on its questionable role in constitutionalism, or as a separate argument, the ontology of common sentiments as such. Regarding the latter point, the book concludes that the metaethical foundations of moral sentiment fail to explain how the descriptive facts about our contingent moral attitudes gain normative traction (95). This argument points to the well-known 'is–

[73] Coleman and Leiter, 'Determinacy, Objectivity, and Authority' (n. 18) 252.

[74] '[Emotivism], Ayer was careful to point out, was not that associated with subjectivism, that in making moral claims we are describing our feelings. This latter view would make moral claims truth-evaluable, and Ayer's moral emotivism denied that they were so evaluable' (G. Macdonald, 'Alfred Jules Ayer', *Stanford Encyclopedia of Philosophy* (2018), available at https://plato.stanford.edu/entries/ayer/. In other words, emotivism is a non-cognitivist theory of metaethics, while subjectivity about ethics presupposes a cognitivist metaethics.

ought' problem of normativity.[75] On this point, Tripković emphasises that any sense of objectivity of common sentiment collapses if there is moral disagreement:

> There is no reflection, reason, or process of justification to overcome disagreement, and there is no agreement to maintain the illusion of objectivity (89).

However, why the problem of disagreement would be more pressing in the context of common sentiment than it is in, say, constitutional identity or universal reason does not become clear. It is unobvious that more reflection and reasoning results in more convergence. Rather, it seems to me that emotional sentiments are more prone to convergence because they are unreflective and unreasoned responses which are inherent in our human nature.[76]

From a metaethical perspective, moreover, it is neither clear whether the question of convergence is really critical. Reflection and reason enter the picture of morality only if emotional sentiment as such does not have sufficient explanatory force as to the nature of morality. This claim could be defended on various grounds, by considering coherence-based theories of value[77] and consequentialists arguments against moral intuitions,[78] for instance.

I am not completely sure whether Tripković is actually making a metaethical argument, as it appears to be a constitutional-ethical one in disguise. As mentioned above, courts can be right about the objective existence of common sentiment notwithstanding the latter's emotivist ontology. The emotivist foundations of morality can also be held to be valid even if there is wide disagreement on emotional sentiments, which in turn warrants scepticism about constitutional ethics. Tripković's argument from disagreement appears to be teleological: disagreement is only a problem because it prevents a credible theory of constitutional ethics,

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[75] D. Hume, *A Treatise of Human Nature*, ed. by L. Amherst Selby-Bigge and P.H. Nidditch (Oxford University Press 1978) 469–470.

[76] This would in any case also follow from evolutionary ethics, discussed and endorsed by Tripković in ch. 5: evolutionary ethics locates morality in the automatic, emotional responses which have evolutionary benefits, such as sentiments of altruism, fairness and justice. For these sentiments to have these benefits, however, there ought to be a high degree of convergent sentiment within groups.

[77] See e.g. Rawls' reflection equilibrium, which locates justified moral beliefs in the 'mutual support of many considerations, of everything fitting together into one coherent view' (J. Rawls, *A Theory of Justice*, rev. edn (Harvard University Press 1999) 507), bringing together our moral intuitions and (reasoned) moral principles through reflection.

[78] See e.g. P. Singer, 'Sidgwick and Reflective Equilibrium' (1974) 58 *Monist* 490; and P. Unger, *Living High and Letting Die* (Oxford University Press 1996).

not because it would be metaethically problematic. Indeed, I think the unconstitutionality of emotivist morality remains the foremost challenge to reliance on common sentiment, but this argument does not require us to engage with metaethics at all.

Universal reason

As the 'most' objective of the three ethical arguments, the argument from universal reason is reason-laden and universalistic, relying '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 with reference to the actual practice of constitutional adjudication and doctrinal analysis. While courts are ordinarily infamous for being captured in the perspectivism of their self-referential legal systems,[79] the use of foreign law points precisely at an attempt to overcome a constitutional order's local and contingent perspective:

> 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).

Indeed, Tripković offers a multitude of examples to show that the use of foreign law in domestic interpretation is explicitly or implicitly premised on the idea that moral truths can be reached by detachment from one's own perspective (99–120).

Still, the use of foreign law is not the *only* form of ethical arguments based on universal reason in constitutional adjudication. The use of academic doctrinal work could certainly also be regarded as a similar form of universalistic argument where courts aspire towards finding correct answers. In public international law, doctrine is even recognised as a subsidiary source of law alongside domestic jurisprudence,[80] and at least in common law jurisdictions, courts also tend to refer incidentally to academic work to substantiate their claims.

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[79] G. Teubner, *Law as an Autopoietic System* (Blackwell Publishing 1993); 'Why EU Law Claims Supremacy', Chapter 2.

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

Moreover, while not mentioned in this book, an essential alternative ethical argument from universal reasoning would be the reliance on what Richard Fallon calls the 'real conceptual meaning' of constitutional terms.[81] The 'real conceptual meaning' argument draws on Saul Kripke's and Hilary Putnam's theory of 'natural kind' concepts.[82] Natural kinds are concepts the meaning of which is not based on how they are used, but on what they really are, i.e. the essential properties of the object to which the concept refers.[83] Likewise, some theories of constitutional and ordinary legal interpretation hold that we ought to interpret terms in constitutional provisions not by the manner in which they have been or continue to be interpreted, but instead by what they *really* mean.[84] This presumes, obviously, that at least some socially constructed concepts in law are sufficiently robust as to have certain necessary characteristics. A well-known example is the term 'cruel and unusual punishment' in the Eighth Amendment of the US Constitution and whether it applies to the death penalty. It is clear that historically, the framers of the US Constitution did not consider the death penalty cruel and unusual. Some people today would agree. Nonetheless, according to some theorists, this historical and current use is irrelevant because *in reality* the death penalty *is* a cruel punishment.[85]

Another example of universalised reasoning based on 'real conceptual meaning' is the idea of a necessary connection between 'citizenship' and 'equality' or 'equal respect'. Well-known in the jurisprudence of Ronald Dworkin,[86] among numerous others, the moral idea that citizenship implies equality among those who hold the status has informed the ECJ's early case law on EU citizenship. The introduction of EU citizenship in the Treaty of Maastricht

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[81] R.H. Fallon, 'The Meaning of Legal "Meaning" and its Implications for Theories of Interpretation' (2015) 82 *University of Chicago Law Review* 1235, 1248–1249, 1257–1258.

[82] H. Putnam, 'The Meaning of "Meaning"' (1975) 7 *Minnesota Studies in the Philosophy of Science* 215; S. Kripke, *Naming and Necessity* (Blackwell Publishing 1980).

[83] Natural kind concepts are principally juxtaposed with concepts whose meaning is dependent on how they are used. The pragmatism of meaning is primarily associated with L. Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (Blackwell Publishing 1986).

[84] Notably, R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996); R. Dworkin, 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve' (1997) 65 *Fordham Law Review* 1249.

[85] Fallon, 'The Meaning of Legal "Meaning"' (n. 73) 1257–1258; M. Greenberg and H. Litman, 'The Meaning of Original Meaning' (1998) 86 *Georgetown Law Journal* 569, 603–613.

[86] See generally R. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2002).

motivated the Court to prohibit any discrimination on the basis of nationality within the ratione materiae of EU law,[87] to require of Member States 'a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States'.[88] Arguably, the early years of the EU citizenship case law reveal a particular conception of EU citizenship which is in part rooted in the *idea* of citizenship rather than the black-letter law as such.[89]

It seems, therefore, that there is much more to say about the various types of universalised reason in moral argument than the notion of foreign law. Within MeCA's constrained framework, however, Tripković draws on jurisprudence from the United States, South Africa and Israel, which rely on foreign law and case law to make ethical arguments (99–120). This comparative analysis very nicely illustrates how courts use foreign law as an ethical argument to elucidate vague moral concepts in their own constitution, to obtain confirmation for the ethical merits of their own constitutional identity, or to improve their constitution's moral virtues. The contrast between the practice of courts in the United States, South Africa and Israel is illuminating in reflecting their distinct constitutional confidence and concerns.

Subsequently, two normative justifications are provided which could justify the use of foreign law as an argument from universal reason.[90] According to the 'deductive view', there is a direct, robust 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 argues that the analogy does not hold here, because ethical convergence, even at a global scale, 'may well be explained by the shared circumstances of human life and our contingent psychological setup' (123). He is therefore sceptical of the probative value of convergence, responding to the claim that values are part of the 'fabric of the universe' (124).

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[87] *María Martínez Sala v Freistaat Bayern*, C-85/96, EU:C:1998:217.

[88] E.g. *Grzelczyk*, C-184/99, EU:C:2001:459, para. 44; and *R on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, C-209/03, EU:C:2005:169, para. 56.

[89] See generally e.g. D. Kochenov and R. Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 *European Law Review* 369; and F. Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 *European Law Journal* 1. The ECJ never pushed this idea towards its full implications, however, see D. Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2010) *Jean Monnet Working Paper* (NYU Law School) No. 08/10; and see also n. 64–67 above and accompanying text.

[90] See also B. Tripković, 'The Morality of Foreign Law' (2019) 17 *International Journal of Constitutional Law* 732.

The terminology of objectivity might again be of more use than realist terminology such as 'fabric of the universe'.[91] Sustained ethical convergence might well point to the minimal or modest objectivity of values without requiring a belief in the full mind-independency of value. Consequently, the deductive view does not seem to require a metaethical belief in naturalistic moral realism insofar as the metaethical framework is more nuanced. For example, one alternative metaethical position which could justify the deductive view draws on John McDowell's work. Confusingly, McDowell speaks of 'realism' and 'truth' about morality, but this is not meant as a naturalistic claim that moral facts are part of the 'fabric of the universe'. Rather, McDowell understands the truth of moral facts to consist in 'sufficiently substantial conception of reasons'.[92] Hence, while mere convergence of attitude is insufficient for moral truth, because the convergence could be 'a mere coincidence of subjectivities rather than agreement on a range of truths – the sort of view that would be natural if everyone came to prefer one flavor of ice cream to any other', we can still speak of moral truth, insofar as convergence is rooted in it being substantially backed by reasons.[93] In other words, objectivity – modest objectivity in McDowell's case – need not collapse into naturalistic objectivity or metaphysical realism.[94]

The second justification for the use of foreign law as an argument from universal reason is called the 'reflective view', which holds that while foreign law and moral truth might not be directly connected, looking at foreign law can help courts find morally correct answers (130). The reflective view is more dominant in constitutional practice and academic commentary (130–132 with references). Tripković explains how looking at foreign law can have moral virtues because it gives courts more information about the available moral positions. It also gives courts more flexibility in deciding on ethically sensitive issues, being less constrained by their own constitutional structure. Thirdly, it can bring greater coherence to the manner in which moral questions are addressed at a global level. It can also avoid tunnel vision of the

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[91] Presumably Tripković borrowed the term 'fabric of the universe' from Dworkin, *Law's Empire* (n. 9) 80. However, Dworkin uses that term to *ridicule* moral realism (see n. 31).

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

[93] McDowell, 'Projection and Truth' (n. 80) 8.

[94] On McDowell's metaethics as reflecting a non-naturalist conception of objectivity, see Leiter, 'Objectivity, Morality and Adjudication' (n. 80).

domestic constitutional system, and can be thought to reflect the system's greater maturity in exposing itself to outside influences (132–136).

Notwithstanding these and other virtues, Tripković concludes that even the reflective view cannot provide an explanation for *why* the descriptive facts about moral practices are normatively valid (140). Recognising that there is no guarantee that reflection on our and foreign moral practices brings us closer to universal and timeless truths, the reflective view does not provide sufficient reason for the normativity of foreign law.

In fact, here it is also unclear whether we have succeeded in climbing outside of morality to take a metaethical perspective. Almost all of the virtues of the reflective view that Tripković mentions are *moral* values, so the question of how foreign law can get normative traction is no longer even relevant to his argument: the analysis reveals that we are already engaging profoundly in moral evaluation. Consequently, the chapter's concluding remarks are less persuasive, if not contradictory. Discussing the moral virtues of the reflective view – such as coherence, maturity and imagination – already presupposes its normative weight, which complicates maintaining that we need an argument for why we ought to reflect on our contingent moral attitudes.

Nonetheless, as an interim conclusion of its first part, the book concludes that the three ideal-types fail as self-standing ethical arguments as their metaethical foundations are inadequate. Because '[c]onstitutional courts need a sound theory of value around which their ethical arguments could be constructed […] [w]e must therefore ponder the nature of value and normative judgment' (143). This is the objective of the book's last two chapters.

Confidence and Reflection as Metaethical Theory

Chapter 5 aims to provide a self-standing metaethical theory. This metaethical theory is premised on the tension between the practical and the theoretical perspectives on values. In our practical way of reasoning about what the right thing to do is, 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 attitudes. However, theoretical analysis of precisely the same values may lead us to explain them largely as a matter of contingent attitudes influenced by evolution, history and culture.

Early in this chapter, Tripković explores the theoretical perspective on value by looking at the evolutionary origins of our current ethical values. This evolutionary perspective aims 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). While Tripković resists radical subjectivism or cultural relativism about morality, he does claim that 'there are no ethical truths external to our existing attitudes' (*ibid*).

Evolutionary ethics has undeniably had significant influence on the metaethical debates.[95] According to evolutionary ethics theories, our current ethical values can be explained by the evolutionary benefit of certain normative capacities and moral emotions.[96] Drawing mainly on the work of Allan Gibbard and Sharon Street, Tripković illustrates how natural selection benefits coordination and a sense of altruism in groups, and thus how evolution affects our unreflective behavioural dispositions (158). According to Street, these evolutionary mechanisms thoroughly saturate our moral attitudes, which would complicate arguing that our moral attitudes reflect mind-independent moral truths.[97]

However, evolutionary ethics is not without criticism. For instance, it draws mainly on research by Frans de Waal, Sarah Brosnan and others, into the development and existence of moral behaviour in primates and other species. This research has made great contributions to the evolutionary functions of a sense of justice and fairness within animal groups, including fish and crows.[98] However, these research programmes are purely empirical. Consequently, they do not say anything about morality as a *normative* enterprise, for this would derive an 'ought' from an 'is'. Secondly, evolutionary ethics does not appear to be a metaethical theory itself, as it merely offers causal explanations regarding our moral intuitions and beliefs, rather than offering an explanation of what moral claims *are*. Insofar as evolutionary ethics claims to be a metaethical theory, it would mistakenly purport to draw metaphysical conclusions from descriptive research. If we accept that all our moral claims are caused by their evolutionary

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[95] For an overview see P.L. Farber, *The Temptations of Evolutionary Ethics* (University of California Press 1994).

[96] See e.g. the groundbreaking M. Ruse and E.O. Wilson, 'Moral Philosophy as Applied Science' (1986) 61 *Philosophy* 173.

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

[98] F. de Waal, *Good Natured: the Origins of Right and Wrong in Humans and Other Animals* (Harvard University Press 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, 'Nonhuman Species' Reactions to Inequity and Their Implications for Fairness' (2006) 19 *Social Justice Research* 153; S.F. Brosnan and F. de Waal, 'Fairness in Animals: Where from Here?' (2012) 25 *Social Justice Research* 336.

benefits, in metaethical terms this would most likely correspond to Mackie's error theory (belief in moral claims is simply a mistake) or Ayer's emotivism (moral claims are simply emotional attitudes).[99]

An argument against evolutionary ethics that Tripković considers, but ultimately rejects, is that evolution can explain how ethics came into existence, but that we have developed our ethical thinking by further reflecting on our values (170–173). Indeed, one fundamental distinction between the evolutionary benefits of ethical thinking and our current ethical thinking is that the former only apply within small, well-defined groups, while the latter include deeply universalistic and cosmopolitan elements.[100] Of course, our thinking might simply be based on a mistake.[101] From an ontological perspective, however, coordinative and altruistic behaviours within a group seem radically different from the normative claims of morality. In other words, to say that torturing babies is morally wrong is not to say that torturing babies within your own group is wrong but torturing other groups' babies is fine. This point is not just theoretical: fascinating empirical research has shown that rival chimpanzee groups can engage in systematic warfare, and that this might well be adaptive, i.e. innate, behaviour.[102] Insofar as we are evolutionarily disposed to doing both good and evil, evolutionary ethics seems incapable of both showing *which* behavioural dispositions count as ethical facts, and explaining how some of our firmly held moral beliefs are deeply at odds with our evolutionary dispositions.

While this ongoing debate is fascinating in itself, the intricacies of this discussion need not concern us further here. Suffice to say that Tripković uses evolutionary ethics to maintain his doubts regarding the existence of universal, mind-independent moral truths. Thus the rather dramatic conclusion is that:

> the practical perspective is inescapable and includes value-judgments; we can only make these judgments on the basis of our contingent values which are disconnected from the presupposed realm of robustly true values; what we *ought* to do (reason from robustly true

[99] Mackie, *Ethics* (n. 14); Ayer, *Language, Truth and Logic* (n. 13).

[100] A. Buchanana and R. Powell, 'The Limits of Evolutionary Explanations of Morality and Their Implications for Moral Progress' (2015) 126 *Ethics* 37.

[101] Mackie, *Ethics* (n. 14).

[102] 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* (Houghton Mifflin 2010).

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.[103] Believing in the objectivity of morality does not require commitment to a caricatured moral realism, as presented by MeCA.[104]

Regardless, Tripković has opted for a different strategy, namely to liberate ourselves from the illusion of finding mind-independent moral truths. Drawing on Bernard Williams' work, he claims:

> [I]nstead 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).

This confidence 'includes the feeling that one can rely on one's own values that comes from the realization that there is nothing to support them further and that the practical perspective is inescapable' (*ibid*, fn 104). However, we also require *reflection* to counterbalance our confidence and accommodate the idea that our moral values – notwithstanding our confidence in them – are contingent and subject to critical analysis (174). The critique of the three ethical arguments – that there are reasons to doubt that any of them is founded on a mind-independent

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[103] See e.g. Nagel, *The View from Nowhere* (n. 23) (proposing a non-naturalist theory of moral objectivity); R. Shafer-Landau, *Moral Realism: A Defense* (Clarendon Press 2003) (advancing non-naturalist moral realism); S. Blackburn, *Essays in Quasi-Realism* (Oxford University Press 1993), and A. Gibbard, *Wise Choices, Apt Feelings* (Harvard University Press 1990) (advancing variants of non-cognitivist metaethics).

[104] Eg J. McDowell, 'Anti-Realism and the Epistemology of Understanding' in H. Parret and J. Bouveresse (eds.), *Meaning and Understanding* (de Gruyter 1981); Nagel, *The View from Nowhere* (n. 23); Kramer, *Moral Realism* (n. 19). 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* (Cornell University Press 1988) (advancing naturalist moral realism).

theory of value – applies with equal force to the conjunction of confidence and reflection. Tripković's move to evade nihilism is interesting and deserves repetition:

> [T]he practical perspective […] ought to reject the commitment to absolute moral truths as a parasite that threatens its existence […] 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 does not deduce anything from 'is' to 'ought' and 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 search for foundations, it appears we resolve the problem by becoming pragmatists. As a metaethical theory this is somewhat problematic. First, the entire reasoning is based on normative assumptions, namely that (C) ought to be rejected *if it is normative unacceptable*. It seems therefore that we are reasoning 'from the inside'[105] and the reasoning is a full-blown moral argument. This suspicion is confirmed by the concluding remarks of Chapter 5, summarising the relevance of reflection upon confidence:

> It is an illusion to think that a mere realization that absolute truths are beyond our reach will prevent radical conflicts of evaluative perspectives. However, if such a conflict comes, a reflective attitude may prepare us to ask the right questions […] 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).

[105] M.H. Kramer, 'Working on the Inside: Ronald Dworkin's Moral Philosophy' (2013) 73 *Analysis* 118.

The first sentence is already naively self-contradictory: the claim that absolute truths are beyond our reach is *itself* a claim about absolute reality.[106] In developing the interaction between confidence and reflection, Tripković has silently moved from metaethics to ethics. The only metaethical test in the analysis is precisely the practical perspective: are we practically able to live with our views? But it is not hard to see that this question is a moral test. Indeed, 'once this assumption [of mind-independence of value] is rejected, we enter a *process* of reaffirming and curtailing our practical *confidence* through *reflection*. It is in this process that values are revealed and shaped' (189). Revealing and shaping value is not about what morality *is*, it is about what morality *requires*.

To illustrate this point further, the interaction between confidence and reflection can be compared to Rawls' reflective equilibrium. According to Rawls, moral theories 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 moral judgments match.[107] Reflective equilibrium is quite neutral regarding metaethics, since it is compatible with both realist and constructivist theories of morality.[108] Rawls himself, however, appeared to interpret reflective equilibrium both as an ethical *and* a metaethical theory:

> moral objectivity is to be understood in terms of a suitably constructed social point of view that all can accept. Apart from the procedure of constructing principles of justice, there are no moral facts.[109]

In other words, reflective equilibrium is at the same time a coherence-based justification of our moral claims but also a claim about what morality is. Tripković's analysis of confidence and reflection seems to follow a similar line of argument, and would indeed operate similarly to reflective equilibrium. The metaethical component of his theory is that there are probably no mind-independent, timeless truths. However, the interaction between confidence and reflection is, like Rawl's reflective equilibrium, perfectly compatible with theories of moral realism. The

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[106] In order to make the point that there are no absolute ethical truths, Tripković would have to say that there is only one absolute truth about ethics, namely that apart from this statement itself there are no absolute ethical truths. However, in reality these are two statements which cannot both be true without violating the first statement ('there is only one absolute ethical truth'), again leading to contradiction.

[107] Rawls, *A Theory of Justice* (n. 69) 42–45.

[108] See S. de Maagt, 'Reflective Equilibrium and Moral Objectivity' (2017) 60 *Inquiry* 443, 446.

[109] J. Rawls, 'Kantian Constructivism in Moral Theory' (1980) 77 *Journal of Philosophy* 515, 519.

metaethical foundations of confidence and reflection could be further explored by precisely fleshing out the nature of the ethical commitments which result from their interaction. We could ask whether the process of confidence and reflection could lead over time to minimally objective moral claims. A more challenging question is whether confidence and reflection are capable of serving as part of the epistemically ideal conditions under which we are able to find modestly objective moral facts. Despite the metaethical emphasis of this book, these and similar questions are not explored by the book and deserve further scrutiny.

The elusive connection between ethics and metaethics in Chapter 5 also points at the potentially difficult relationship between the theoretical, metaethical perspective from evolutionary ethics, and the ethics of confidence and reflection. Reflection has a central role in Tripković's account because it allows and requires us to be critical towards dogmatism and self-deception, and thus allows us to take a more flexible perspective and overcome, counterbalance and revaluate our perhaps excessive confidence. However, the argument from evolutionary ethics would precisely limit our capacity to reflection severely, as Tripković admits in his theoretical perspective:

> most 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).

The resulting problem is how the notion of reflection is *possible* in our moral thinking, if that thinking is profoundly shaped by evolutionary forces which have limited its transformative potential. If our confidence is saturated by evolutionary influence, how we can *seriously* reflect on it given our incapability to transcend our evolutionary attitudes. Evolutionary ethics indeed pays particular attention to the emotive aspects of morality; this seems almost inevitable because evolutionary benefit generally requires automatic, intuitive responses.[110] It is not entirely clear how Tripković would respond to this apparent irregularity between his theoretical metaethics and his (meta)ethical theory of confidence and reflection.

[110] See e.g. 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* (Harvard University Press 1975) 3.

A related, but different point is how the evolutionary origins of our ethical thinking relate to the possibility of developing any theory of *constitutional* ethics. The constitutional context does not just present the problem of 'defying evolution' through reflection (170–173), but also the alleged inability of evolutionary ethics to explain the cosmopolitan nature of morality. Constitutional ethics by definition applies to far larger groups than those in which evolutionary influences affect our behavioural dispositions. From an evolutionary perspective, there is no reason why, say, an American from Philadelphia would extend the scope of her moral dispositions towards an American in San Francisco whom she does not know nor ever will. Moreover, it does not seem completely convincing as a matter of constitutional ethics to justify our ethical argument by reference to imagined communities,[111] if only because this would immediately crush all our confidence.

To sum up, the relationship between the theoretical and the practical, and between evolutionary ethics and the notion of reflection, appear to raise more questions than they answer. This does not make the chapter any less stimulating to the mind, however; on the contrary. That said, let us turn to the final chapter, in which Tripković elaborates on the role of confidence and reflection in constitutional ethics.

Confidence and Reflection in Constitutional Ethics

The final chapter uses the interaction between confidence and reflection to develop a theory of constitutional ethics. As Tripković explains, this requires a translation of the applicable ethical and meta-ethical principles to the constitutional context, because the reasoning of constitutional ethics is distinctly different from ordinary ethical reasoning:

> 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
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> presupposed by the argument from universal reason is directed at a better self-understanding and development of the deep moral commitments of the constitutional system (193).

[111] B. Anderson, *Imagined Communities* (Verso 1983).

Under this model, constitutional identity serves as a set of *topoi* from which to identify the specific values of the constitutional system justified from its own practical perspective. In the absence of claims of universality or mind-independency, constitutional identity points to the primary confidence we have in our values: this, notwithstanding the need to critically reflect upon our values.

Constitutional identity can and 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 cannot be understood in terms of objectivity, it can be accepted as *inevitable*: courts have to accept the existence of certain common sentiments, 'but with a dose of skepticism, and with a critical and open mind' (201). It follows that common sentiment and constitutional identity become even more closely interlinked, since common sentiments which survive critical reflection are likely to become part of a polity's constitutional identity. Tripković suggests that constitutional identity should evolve by drawing from new common sentiments to the extent that:

> 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).

This analysis of the interaction between identity and sentiment seems both descriptively and normatively sound. Constitutional identity cannot be an excuse for eternal injustices – no matter how convinced we initially were about its truth. Any theory should therefore account for ethical change in the constitutional order through reflection. Without such reflection, *Brown v Board*[112] and *Griswold v Connecticut*[113] remain inexplicable. In this jurisdiction, judgments like *Bugdaycay*[114] and *Jackson*[115] illustrate the practical importance of reflection to develop constitutional identity.[116]

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

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

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

[115] *R (on the application of Jackson and others) v Attorney General* [2005] UKHL 56.

[116] My assumption here is indeed that both the changing intensity of *Wednesbury* review through 'anxious scrutiny' in cases involving fundamental rights (*Bugdaycay*), and the reinvigoration of common law constitutionalism (*Jackson*) are examples of reflection upon the nature of the common law. On 'top-down'

A similar role is ascribed to the argument from universal reason. Arguments from universal reason help courts remain critical of both our constitutional identity and our common sentiments. While courts ought to remain confident in the practical value of the latter two's ethical content, constant reflection on our values helps to maintain our confidence and repair 'the ship of constitutional ethics while at sea, but the ship must constantly be repaired to be able to sail' (204). Engaging with other constitutional systems, to Tripković remains 'one of the best ways to achieve [greater self-awareness but also the imaginative development of the (collective and political) self]' (205).

The final part of Chapter 6 is devoted to diachronic and synchronic differences in moral attitudes as constitutional dilemmas. Diachronic differences point to changes in our moral attitudes within a community through time. Such changes are often analysed at the level of constitutional interpretation, evidenced by the continuing debate between originalist theories of interpretation and theories of living constitutionalism.[117] Tripković observes 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*,[118] concerning Texas' anti-sodomy laws, Tripković states 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). However, he also warns that courts should not be excessively confident in their own judgments, for constitutional identity is already the result of a reflective process.

Synchronic differences refer to disagreements in moral attitudes at the same moment, which can occur both within a community and between communities. Within a community, courts should primarily deal with such divergence in moral attitudes by taking the perspective of the 'impartial spectator', which boils down to reasoning from and building on existing constitutional identity. This might result in a non-reflective outcome: notwithstanding the equal validity – from a reflective viewpoint – of two competing moral attitudes, courts should sometimes return to their confidence in the already well-established principles of their constitutional identity (214).

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constitutional change, see also A. Perry and A. Tucker, 'Top-Down Constitutional Conventions' (2018) 81 *Modern Law Review* 765.

[117] See e.g. A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1998); Dworkin, *Law's Empire* (n. 9); J. Balkin, *Living Originalism* (Harvard University Press 2012).

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

Synchronic differences between communities increasingly have attracted academic attention, mainly in the context of the relationship between European Union law and the constitutional law of the Member States.[119] Tripković conceives of these interactions as examples of confidence and reflection in the respective viewpoints of the courts involved. Accordingly, while constitutional courts always reason from their own perspective, keeping pace with their confidence in their constitutional orders, a reflective attitude is evident in the emerging dialogue among European courts (217). While I am not convinced that the dialogue between national constitutional courts and the ECJ and the ECtHR is genuinely reflective in nature,[120] it is certainly clear that the *idea* of dialogue and pluralism is deeply rooted in the need for reflection in constitutional adjudication and constitutional conflict.[121]

All in all, MeCA appears to grant special importance to constitutional identity as a metaethical foundation of constitutional ethics, as it is already the result of a longer-term process of confidence and reflection:

> Empirically, constitutional identity has proved to be more robust than it may appear at first; it arises precisely from the clashes of different identities as the most viable way to resolve the problem of collective action and political organization of a particular society, and has survived many (although certainly not all) such challenges […] In other words, constitutional 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 raises the question of whether perhaps Tripković's position is not as far removed from that of Dworkin as might appear to be the case. Metaethically, the two hold quite opposite positions, with Dworkin sceptical of metaethics but a firm believer in moral objectivity, and Tripković precisely searching for the foundations of our ethical arguments while being sceptical about moral objectivity and truth. From the practical perspective of constitutional adjudication and normative jurisprudence, however, their positions appear to be very closely related. Dworkin's theory of law as integrity conceives of legality as the morally

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[119] See n. 7 above.

[120] See 'Why EU Law Claims Supremacy', Chapter 2.

[121] See Walker, 'The Idea of Constitutional Pluralism' (n. 7); Kumm, 'The Moral Point of Constitutional Pluralism' (n. 7); N. MacCormick, *Questioning Sovereignty* (Oxford University Press 1999) ch. 7.

best interpretation of past political and judicial decisions.[122] In the context of adjudication, Dworkin famously referred to the dimension of 'fit' which requires courts to favour the interpretation which best fits the chain of past judicial decisions. This points to the importance of the confidence that our constitutional identity, as expressed by the whole body of past political and judicial practice, reflects our practical moral values.

Further, when an interpretive choice fits a chain of precedent but clearly does not match the best interpretation of our set of moral principles, integrity can require the court to 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 akin to the process of balancing *confidence* in our constitutional values and *reflection* on whether these values are still morally valid.[123] If this comparison is right, it confirms that Tripković's theory of confidence and reflection is indeed somewhat neutral towards metaethics, as it is equally compatible with moral objectivity and non-naturalist theories of moral realism. Moreover, since Tripković cannot avoid using profoundly moral arguments in justifying his metaethical framework, he will have to face the charge that he actually keeps working from the inside.[124]

Concluding Remarks

MeCA is an original and thought-provoking book which is recommended to readers interested in the intersections between law and morality. In this review article, I have focussed on the book's most notable assertions and tried to offer some reflections. In doing so, I have obviously emphasised those aspects with which I would be inclined to disagree, or which in my view are not sufficiently substantiated. However, I hope the reader will understand that my engagement with the book is a recognition of the challenging contribution it makes to the literature. The limited space in this review article inevitably results in it failing to do full justice to the book's

[122] Dworkin, *Law's Empire* (n. 9) chs. 6 and 7.

[123] For the terms 'respect' and 'regret', see G.J. Postema, 'Integrity: Justice in Workclothes' in J. Burley (ed.), *Dworkin and His Critics: With Replies by Dworkin* (Blackwell Publishing 2004).

[124] Kramer, 'Working on the Inside' (n. 92).

refined argument, for the enjoyment of which the reader is wholeheartedly directed towards the book itself.

This book is not the definitive statement of the metaethics of constitutional adjudication. Rather, I believe it is perhaps the start of a more explicit debate on the foundations of ethical argument in constitutional reasoning, the importance of which cannot be overstated. Future discussion would likely benefit from a more precise and nuanced account of the metaphysics of morality, further to clarify the extent to which moral argument in constitutional reasoning can be objective. MeCa, meanwhile, points the way.