

Getting Morality Right in Constitutional Adjudication

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Boško TRIPKOVIĆ, *The Metaethics of Constitutional Adjudication* (Oxford University Press 2017) pp. 272.

In *The Metaethics of Constitutional Adjudication*, Boško Tripković attempts to ‘offer a theory of ethical arguments in constitutional adjudication that would be supported by a sound understanding of value’ (p. 6). The book is a revised version of the author’s PhD thesis. The book seeks to take moral argument in constitutional reasoning seriously on its own terms. Tripković asks whether, instead of specific moral judgments in specific legal disputes, judges might have got ‘*morality itself* wrong’ (p. 8).

Hence, this book raises a Socratic challenge: the confrontation with the figure of the philosopher who challenges the judicial establishment to demonstrate that their conception of value in constitutional reasoning is ultimately justified. The author observes that ‘there is much confusion and uncertainty about the nature of value in comparative constitutional adjudication’ (p. 2). The danger is that the ethical value judgments which constitutional judges routinely make in the context of vague and indeterminate constitutional texts – for example, in cases related to the death penalty or to abortion – could potentially be unjustified because of a flawed theory of moral value. At first glance, one might be tempted to think that Tripković thereby attempts to make a contribution to the debate surrounding the legitimacy of judicial review. This is not the case; his ambition is better understood as situated in the tradition of grand philosophical theory: ‘If we inquired about the metaethical foundations of judicial value-based arguments we would not only see some of the old problems of constitutional adjudication in a new light, and possibly resolve them, but we might also reach a non-question-begging justification of our values. Our philosophical spade would reach bedrock, and we would have a mechanism by which we could assess and refine’ moral arguments in

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constitutional adjudication (p. 3). The aim of the book is thus the rather more theoretical endeavour of analysing plausible conceptions of value that could be used to ground constitutional adjudication, and presenting an argument in favour of one particular conception of value that the author deems most plausible.

Tripković's work is exciting because it sheds a novel light on the phenomenon of moral argument in constitutional adjudication. The author tackles the challenge of engaging with the relevant legal and philosophical literature with brio, even if his analysis of certain thinkers is too concise at times to be fully convincing. The heart of the work is the author's own vision of a plausible theory of value, and it is an impressive contribution to the literature. If one had to quibble with the result, one might perhaps suggest that the real-world implications of the author's considerable theoretical accomplishments remain surprisingly wedded to the *status quo*. Do not expect militant views on, say, the death penalty or radical proposals on the reform of judicial decision-making. Moral reasoning in constitutional adjudication provides the author with an occasion to engage with deeper theoretical problems. This will appeal to the philosophically inclined but perhaps less to the hard-nosed constitutional lawyer who is preoccupied with the outcome of the upcoming cases of her or his constitutional court.

The tension between an emotivist and a rationalist account of moral value is a central aspect of the book. The first finds in our emotions a plausible source of moral value, whereas the latter finds it in reason. While both sources of value may appear in harmony when we consider certain specific moral questions, the two conceptions are at odds with each other. And they make moral argument in constitutional adjudication particularly vulnerable to Socratic challenge. Indeed, while analysing the most plausible accounts of value in legal reasoning, Tripković routinely stumbles upon this tension. In the first part of the book, Tripković investigates the three most plausible accounts of the source and nature of values in constitutional adjudication, as they are suggested by relevant samples of contemporary constitutional case law from a variety of prominent jurisdictions: the arguments from constitutional identity, from common sentiment and from universal reason respectively. At the end of the first part of the book, Tripković concludes that constitutional ethics is 'metaethically unstable' because of this tension: we have no account that explains why our 'contingent intuitions' are 'morally relevant' – but we also don't know why 'reasoning and reflection' is morally valuable in constitutional adjudication (p. 142). Tripković then sets forth his own theory of value in the second part of the book – a dialectic between intuition and reason, between confidence in and reflection about our moral judgments – which aims to respond to these challenges. The structure of this book

review mirrors that of the book: it starts with an analysis of the author's assessment of the arguments from constitutional identity, common sentiment and universal reason. Subsequently, it analyses Tripković's own take on the meta-ethics of constitutional adjudication and its institutional implications.

CONFUSED CONSTITUTIONAL IDENTITY

The book starts out with an analysis of perhaps the most common form of moral argument in constitutional adjudication: the argument from constitutional identity. According to this argument, the source of value of moral argument is to be found in the 'set of deep and self-identifying evaluative commitments that develop in a society in virtue of the fact that it has a constitution' (p. 13) as well as the constitutional practices that it engenders. Arguments from constitutional identity will be familiar from landmark constitutional cases in numerous jurisdictions. In the U.S., Justice Powell's opinion in *Bakke*¹, a case which raised the question of constitutional protection for students from racial minorities, appealed to the 'colour-blind' identity of the U.S. constitution to impose a strict scrutiny test on quota-based systems linked to race (p. 34). In South Africa, Justice Mahomed's opinion in *Makwanyane*² argued that the death penalty was inconsistent with South Africa's 'shared aspirations as a nation' (p. 39). European legal scholars will be familiar with the German Federal Constitutional Court's doctrine of 'identity review' as set out, for instance, in its *Lisbon* judgment³, in which the court verifies whether Germany's adherence to the European Union remains compatible with Germany's constitutional identity.

Tripković criticises the argument from constitutional identity for being 'under-determined': it is too 'fluid and imprecise' to guide the actual process of judicial decision-making (p. 57). But this concern quickly gives way to a more fundamental objection: the argument from constitutional identity cannot serve as a self-standing source of value for constitutional adjudication. Indeed, the indeterminacy of this type of argument means in practice that it is given greater practical bite through more determinate variations on the theme of the argument: particular and general constitutional identity. *Particular* constitutional identity 'locates the source of value in evaluative commitments of a constitutional community' (p. 50), whereas *general* constitutional identity 'aspires to offer moral solutions that are more detached' from the contingency of specific constitutional traditions and aspires, instead, to reflect universal reason (p. 53). Both in its particular and general flavours, the author doubts whether the argument can offer constitutional ethics a solid foundation, without having to rely on the other accounts of value developed in the book (the arguments from common sentiment and from universal reason).

¹*Regents of the University of California v Bakke*, 438 US 265 (1978).

²*S v Makwanyane and Another* 1995 (3) SA 391.

³2 BvE 2/08.

The argument from particular constitutional identity suffers from two at least main problems. Tripković ponders over, for instance, the specific meaning of the notion of human dignity in post-War German constitutional law. First of all, and despite its greater specificity, the argument from particular constitutional identity is indeterminate in that it will rarely dictate an answer in constitutional cases (p. 51). How are judges to determine what 'human dignity' implies in the context of concrete constitutional disputes? The answer is not obvious. In the quest for concrete answers, it becomes tempting to build upon the moral opinions of a community regarding specific moral questions. But which moral opinions should we consider? It is unclear which moral opinions are fundamental enough to be deemed a part of a community's particular *constitutional* identity. We lack a theory which could identify the views that carry enough weight to separate the 'ordinary' identity of a community from a 'constitutional' identity which would be deemed more fundamental. In addition, by incorporating the moral opinions of a community the argument from particular constitutional identity would become a barometer of a community's moral sentiments. The boundary with the argument from common sentiment would become blurred. Second, it is unclear why arguments from particular constitutional identity ought to be preferred over arguments based upon universal morality (p. 53). Can we reasonably justify reliance on mere sentiment, even when we are dealing with the 'constitutional' moral intuitions of a community? Our inability to answer this question ought to trouble us. Here, we see the tension between emotivism and rationalism rear its head. For both of these reasons, the argument from particular constitutional identity is problematic.

The argument from general constitutional identity incorporates references to general values which at first glance appear to be intrinsically connected with constitutionalism, such as equality, the rule of law or fundamental rights. This variation of the argument also suffers from several flaws. First of all and – once more – in spite of its greater specificity, it is indeterminate in that it only 'rarely commands unique and specific' authoritative moral answers in hard cases (p. 54–55). It is likely to find additional guidance in particular constitutional identity, which risks blurring the boundary between particular and general constitutional identity. Second, it suggests that its propositions are justified by universal moral values and are true independent of a specific constitutional tradition. Yet this would be a mistake: its arguments are neither universal nor based upon mind-independent moral values. For better or for worse, even arguments from general constitutional identity remain tied to specific communities. The argument from general constitutional identity therefore falls short of realising its aspiration to reflect universal reason – in contrast to the argument from universal reason – to the extent that the latter would seek greater detachment from the contingency of a particular constitutional tradition. General constitutional identity is *more* universal than particular constitutional identity – read: yet not *fully* universal. Indeed, references to the rule of law and fundamental rights might be widely shared in

different constitutional traditions, but that does not imply that it is conceptually necessary for all constitutions to incorporate such requirements or to interpret them in the same way. Because there 'could be constitutional systems that do not entail' the kind of commitments we categorise as general constitutional identity, they 'cannot be seen as being universally accepted' (p. 55).

In summary, Tripković argues that as a source of value, the argument from constitutional identity is flawed because it is 'neither completely attached to current moral values of a constitutional community nor can it aspire to reveal universal and timeless moral answers that are detached from contingent moral commitments of such a community' (p. 49). Because it refuses to identify either common sentiment or universal reason as the ultimate source of value of ethical judgments, it is neither fish nor fowl. That ultimately makes the argument from constitutional identity unsatisfactory. The argument from constitutional reason remains a confused mixture between the argument from common sentiment and the argument from universal reason, two arguments discussed in the subsequent chapters of the book. If we take the question of the source of moral values seriously, we should evaluate whether each of these arguments can offer a self-standing source of value – which is exactly what the author does next.

COMMON SENTIMENT

Tripković goes on to analyse a second plausible source of moral value, the argument from common sentiment, according to which the 'moral sentiments of the people in a particular community constitute the right solution to moral problems' (p. 59). This approach is empirically relevant, for example, in light of the case law of the U.S. Supreme Court regarding the cruel and unusual nature of the death penalty, and in light of the margin of appreciation doctrine of the European Court of Human Rights. Because of the thematic proximity of the theme of the moral sentiments of a particular community to the theme of popular constitutionalism, it might appear that Tripković is making an intervention in the debate surrounding the legitimacy of judicial review. Yet the author insists that the argument from common sentiment must be distinguished from the debate surrounding popular constitutionalism, because it is not so much concerned with questions of legitimacy or institutional competence, but with a more theoretical question: can the moral sentiments of a community be a plausible source of value?

Tripković argues that the argument from common sentiment is fatally flawed because it 'underappreciates the role of reason in moral judgments' (p. 95). He identifies two elements upon which the argument from moral sentiment rests: an emotivist and a relativist element. The reliability of this argument as a source of value rests on 'the plausibility and compatibility of emotivism and relativism'. Emotivism implies that moral views are the consequence of an emotional

response. Relativism implies that moral views may be true but only in the context of a specific frame of reference, such as a specific community. The author believes the argument from common sentiment ultimately fails because emotivism and relativism are implausible on their own terms as well as incompatible.

The emotivist argument suffers from a 'schizoid attitude'⁴ because it expresses a moral sentiment (for instance, that the death penalty is morally wrong) yet is conscious of the fact that this moral commitment is ungrounded (p. 83). Because of its lack of grounding, it is unclear why, upon a reasonable analysis, we should take the argument from moral sentiment seriously at all. In other words, the emotivist element expresses a form of subjectivism which renders it difficult to justify its usage in a judicial setting. One apparent way out of this conundrum is the belief that certain moral sentiments are shared by the relevant community. Tripković reconstructs this idea with the help of Hume's emotivist moral philosophy, which suggests a way out: supposing a universally human sentiment of sympathy. Although this apparently offers a solution, Tripković underlines that if the emotivist sentiment is reconstructed in this way, it ends up contradicting the relativist element of the argument from common sentiment. Indeed, Hume's theory of sympathy implies it is a universally shared human characteristic, and therefore contradicts the relativist impulse according to which different communities would have different moral conceptions. Thus, Tripković suggests there really is no way out of this conundrum.

The relativist component of the argument from common sentiment is similarly problematic. Tripković argues that the relativist component is stuck in a dilemma between agent and appraiser relativism. In the legal context, the agent relativist view implies that the moral sentiments of the community in which the judgment is being made (for instance, the United States or the Contracting Parties to the European Convention on Human Rights) will be decisive. By contrast, according to the appraiser relativist view the moral sentiments of the appraisers – in our case often judges – will be decisive. To the extent that we associate the argument from common sentiment with the idea that judges ought to defer to the views of the majority in any given community, the agent relativist view seems empirically plausible. However, agent relativism cannot justify the inference that we ought to decide in accordance with the views of the community. Indeed, it is unclear what 'the' moral sentiments of the community are: the unanimous views of the entire community? Of 80%? Of the majority? A decision rule is needed. Appraiser relativism could justify recourse to the majority rule, in that the appraiser can simply decide for himself what the appropriate benchmark should be (p. 90). Appraiser relativism might therefore be a more plausible theory by which to understand the relativist element in the argument from common sentiment. However, appraiser

⁴The expression 'schizoid attitude' is Simon Blackburn's.

relativism is also unconvincing to the extent that it does not correspond to commonly held moral beliefs. A concrete example illustrates this: we are unlikely to be satisfied by the moral view that babies should not be tortured merely because the appraiser believes this is so. Our moral conviction on this point tends to understand this norm as self-evident and hence to take it to be independent both of the view of the majority (agent relativism) *and* of the view of the appraiser on this question (appraiser relativism). Furthermore, the relativist component has trouble accounting for common features of our moral experience: reflection and reasoning play an important role in moral argument as we experience it, and this apparently contradicts the argument from common sentiment (according to which the mere sentiment of a community could ground a theory of value). Here, we see the tension with rationalism reappear once more. The author's findings therefore suggest that the argument from common sentiment leaves insufficient space for reason to offer a plausible account of our moral experiences.

Finally, whether considered from the angle of the emotivist or relativist component, the argument from common sentiment has trouble explaining why we ought to abide by its normative conclusions. '[H]ow do the descriptive facts about our contingent moral attitudes gain any normative traction' (p. 95)? Ultimately, Tripković argues, the argument from common sentiment is undermined by the *is/ought* problem. In general, the *is/ought* problem suggests that claims about facts in the world ('*is*') do not allow us to draw conclusions about how that world ought to be. The fact that abortion *is* practised in contemporary Europe does not imply that abortion *ought* to be practised or legally protected. The argument from common sentiment does not explain why and how we attribute normative weight to descriptive facts about our moral attitudes. This leads the examination once more in the direction of the argument from universal reason.

UNIVERSAL REASON

The argument from constitutional identity and common sentiment thereby culminate in a third plausible candidate for a source of moral value: universal reason. For judges, the idea that the source of value is simultaneously universal and based in reason has important implications: it suggests that they might not be alone in the face of ethical dilemmas. Indeed, chances are that foreign judges have confronted similar dilemmas in the past. According to the argument from universal reason, they could find moral guidance in universal reason as it is reflected in foreign legal materials, such as precedents from foreign jurisdictions. Tripković hence examines the well-known comparative constitutional literature analysing the use of foreign legal sources in the constitutional reasoning of numerous courts.

Tripković distinguishes two different approaches of the argument from universal reason: the deductive and the reflective view. Both views are problematic in his eyes.

According to the deductive view, foreign precedents give us direct access to moral answers (p. 120). International agreement on specific constitutional questions is assumed to reflect an objective moral truth. The difficulties with this view are numerous. For one, it is not self-evident that international consensus on certain moral issues (such as torture, for instance) is due to the discovery of an objective moral truth rather than simply the contingent circumstance that certain views have come to be shared by an overwhelming majority of people. (To explain consensus on torture by virtue of the deductive view, for instance, reeks of *ex post facto* rationalisation according to the author.) More importantly, it is likely to be associated with moral realism: the view that there exist objective, timeless moral answers that do not depend on our subjective preferences. The author is reluctant to endorse this view and its problematic presuppositions. Yet moral theory has attempted to respond to this challenge. The Kantian tradition, for instance, can be understood as offering a response (p. 128): it attempts to avoid the pitfalls of moral realism by postulating that we can derive moral truths thanks to our own individual capacity of practical reason. Yet, according to Tripković, this view is problematic in our context: if a central dogma of the Kantian tradition is the recognition of our capacity to reason and reflect, why should judges yield to the moral authority of foreign law at all – instead of reasoning and reaching the conclusion that reason dictates under the circumstances for themselves? Worse still, shouldn't we critically assess the assumption of the deductive view that people who reason about their moral commitments will converge on moral truth, to the extent that there are examples of moral consensus which we find unacceptable (such as the concurrent opinion of Justice Daniel in *Dred Scott*, a decision which held that the practice of slavery was not contrary to the U.S. Constitution) (p. 129)? Hence, the author remains ultimately unpersuaded that the difficulties associated with the deductive view can be overcome.

According to the second approach, the reflective view, foreign law merely *mediates* our access to moral knowledge (p. 120). It is 'the preferred position in both comparative practice and academic commentary' (p. 130). While foreign precedents may not give us immediate access to moral truth, it allows us to transcend the particularity of our moral circumstance and to detach ourselves from our concrete interests, thereby giving us a better chance at uncovering moral truth. Although it 'falls short' of revealing 'objective normative reason' (p. 132), the virtues associated with the reflective view are countless: among others, it allows us to make better informed and more mature judgments, it encourages us to be more open towards alternative moral conceptions, it stimulates our imagination, etc. Crucially, the reflective view manages to avoid collapse into the deductive view: the process of 'accepting someone as an epistemic authority' (p. 138) depends on our own moral judgment. It is most difficult to distinguish the reflective from the deductive view when we are confronted with a global consensus on a specific issue. Yet they are crucially different. According to the author, from the perspective of the reflective view consensus is best explained by 'contingent

circumstances' producing similar value systems from which judges deduce similar normative judgments. Here, and by contrast with the deductive view, consensus has 'normative pull [...] without renouncing our moral agency' (p. 138).

Tripković ends his analysis of the reflective view on a positive note by underlining its advantages in light of the general inquiry of the book. None of the theoretical approaches described – the argument from constitutional reason, the argument from common sentiment, the argument from universal reason, in its deductive element – could live up to the numerous challenges Tripković set out in the first half of the book. The reflective take on the argument from universal reason, however, provides, on the one hand, a plausible foundation to account for the uses of foreign law we observe in judicial practice, and second, it provides a holistic theory of constitutional ethics that is capable of unifying the three arguments (the argument from constitutional reason, from common sentiment, and from universal reason) set out in the book (p. 140).

TAKING STOCK

Mid-way through the book, the idea that the reflective view could be a model for how to think about ethical questions in constitutional reasoning nevertheless confronts us with a great ethical dilemma: either there are 'absolute and mind-independent truths', and the path of the reflective view is an *Irrweg* because it doesn't have the ambition of offering us access to those objective moral truths, or there are no such truths, and the enterprise of the reflective view appears meaningless, because there is no point in engaging in that reflection anyway. We are thus left with a critical question: 'Why *ought* we reflect on our contingent moral attitudes' when we know that 'this procedure fails to lead us to universal and timeless moral truths?' (p. 140).

Given that the author believes the literature offers no convincing response to this question, he argues that 'constitutional ethics is metaethically unstable'. In plain English: none of the proposed conceptions of value (the arguments from constitutional identity, from common sentiment and from universal reason) offer a solid grounding for moral reasoning in constitutional adjudication. To overcome this instability, constitutional ethics needs to confront the is/ought distinction: 'it needs to explain what makes the sociological fact about contingent intuitions morally relevant, and where the value of reasoning and reflection comes from' (p. 142). This will lead Tripković, in the second part of the book, to set forth his own theory of value.

This first part of the book is densely written, the pace is quick and the arguments are not always clearly structured. At times, one wonders for whom this book was written: lawyers unfamiliar with metaethics might not make it past the first part of the book, as it is unforgiving for the uninitiated. Philosophers interested in law might find the analysis in the first part overly hasty. At times, the book suffers from this lack of clarity about its intended audience.

Substantively, Tripković dismisses major contributions to the field of metaethics with a few strokes of the pen. For this reason, it sometimes appears vulnerable to objections. But this is unsurprising to the extent that, as the author himself recognises, he relies in the first part of the book 'on arguments that presupposed specific views about value' (i.e. his own views about value which he develops in the second part of the book) (p. 143). The first part of the book is therefore best understood as a ground-clearing operation, making room for the articulation of the author's own theory of value that follows in the second part.

TOWARDS A DIFFERENT THEORY OF VALUE

Whereas the first part of the book is arid at times, the author's argument really comes into its own in the second part. Tripković own theory of value is centred around a dialectic between confidence and reflection. On the one hand, we should dare to be confident in the moral values which we hold today. In the absence of absolute moral truths, they are our primary source of moral guidance. On the other hand, we should be aware of the contingency of our moral judgments and therefore reflect upon them, in an effort to improve them. This 'process of interaction between confidence and reflection, immersion and detachment, action from and deliberation upon our own values' should yield a 'thoughtful, self-aware and flexible approach to practical questions' (p. 174). Whereas some might doubt whether Tripković's proverbial 'philosophical spade' has thereby reached the 'bedrock' that is the 'non-question-begging justification of our values' he had hoped to reach at the start of his inquiry (p. 3), it is beyond question an important contribution to the literature of comparative constitutional law and legal theory.

The author deems his own take on 'a plausible and coherent constitutional ethics' to be 'disenchanted' (p. 192, 180). Among his major references are Rorty, Nietzsche and Williams. Given that we are 'uncertain about the existence of timeless and universal moral values and about the judicial ability to recognize them', Tripković proposes a conception that is 'cautious about presupposing mind-independently true moral answers, and even more cautious about developing a theory of constitutional interpretation from that metaethical premise' (p. 7). At heart, our moral judgments are and can only be 'our deep intuitions about how to live' (p. 180), and it is 'doubtful' whether we will ever have 'a clear-cut measurement for the trustworthiness of intuitions' (p. 183). The 'modest idea of practical reasoning' set forth 'is not merely the second-best, but the only one we could possibly hope to have' (p. 142).

While 'the prospects of overcoming our contingent intuitions and emotional reactions is illusory', 'this realization need not lead to a bottomless moral scepticism which renders us unable to make moral judgments at all' (p. 142). The proposed dialectic is meant to help us find a way out of the dilemma. The author's starting point is the predicament of our moral finitude: we must make value-judgments based on the

contingent set of values which we happen to hold dear. From this predicament Tripković draws two conclusions. One is 'liberating and reassuring: instead of hopelessly trying to reach the values that are completely beyond us, we need *confidence* in our existing values'. Given that we do not have access to absolute moral truths, 'the only path we have is to stop worrying about absolute moral truths and reaffirm our practical identity that includes a set of contingent evaluative attitudes' (p. 173). The confrontation with the imagined figure of the amoralist ultimately leads us to an encounter with ourselves that allows us to steer clear of nihilism. Appealing to Williams, Tripković steers us towards a question of our own identity: '[t]he problem is who *we* are' (p. 178). This teaches us two things: first, even the choice to abandon our values, as the amoralist does, remains an 'ethical choice' (p. 177). When we are all inescapably confronted with this choice, we discover that 'we have no reason to prefer the seemingly valueless perspective to our own moral attitudes'. Second, these are also '*our* own contingent set of values' (p. 177) and this is also why we ought to care about them. For Tripković, the source of confidence in our values is our identity. Confidence in our moral opinions therefore ultimately rests upon – disenchantment notwithstanding – a 'leap of faith' 'in humanity' (p. 180).

Tripković's dialectic is a virtuous circle: the contingency of our moral finitude should also encourage reflection, i.e. 'a thoughtful, self-aware and flexible approach to practical questions' (p. 173-174). Preaching introspection, reflection ought to nuance a 'disproportionate confidence' which might flow from a belief in absolute values. The author draws on Nietzsche's account of intellectual consciousness according to which awareness of the fragility of our moral confidence should 'destabilise' our moral views 'so they lose their authority over us' in the name of prudence rather than despair (p. 181). Because of 'our contingent set of evaluative beliefs that has lost the absolute confidence in its rightfulness' (p. 183), the reflective attitude implies a tolerance towards alternative perspectives. Yet the reflective attitude cannot ultimately overcome the problem of moral disagreement. Although reflection in moral judgment is thought to bring greater stability, it would be 'an illusion to think that a mere realization that absolute truths are beyond our reach will prevent radical conflicts of evaluative conflicts' (p. 188).

From the perspective of this theory of value, Tripković can offer a reconstruction of the arguments from constitutional identity, common sentiment and universal reason. The author argues that his theoretical perspective allows him to respond conclusively to the theoretical problems set out in the first part of the book. Indeed, the author's dialectic between confidence and reflection offers a space for each of the arguments he has discussed. The argument from common sentiment has its place, given that the moral values which a community intuitively holds dear are the starting point of that dialectic. Those very values can be understood as constituting the heart of our moral identity. The argument from universal reason is important because we are called upon to reflect upon those values

in order to improve them. In this process, our identity is gradually redefined – and hence, the argument from constitutional identity also plays a role. This reconstruction Tripković offers us also implies that the structure of the book is non-linear: in many ways, the first part anticipates the author's own perspective, while the second part of the book requires the reader retrospectively to project this perspective back onto previous arguments of the book. Arguably this doesn't simplify the reader's task.

INSTITUTIONAL IMPLICATIONS

In the final pages of the book, Tripković attempts to apply this general theory of value to the practice of ethical reasoning in the judicial setting. He claims 'constitutional ethics may emulate' this 'moral point of view by departing from contingent emotive intuitions and developing them through reflection, in order to gain confidence and further advance the underlying constitutional identity' (p. 192). A judge in a constitutional setting, although he cannot relinquish his own identity, ought to decide, in principle, in the name of the people.

If the theoretical endeavour of the book is highly innovative, it is less clear whether the implications for the institutional practice of moral reasoning in courts are genuinely innovative or disruptive.

Tripković's account of the modalities of judicial review is ultimately somewhat generic. Generally, judges should defer and be 'cautious in deciding against public opinion', though they may overrule public opinion 'when public emotions are insufficiently reflective and diverge from the profound moral values embedded in constitutional identity' (p. 194). 'The theory accommodates and vindicates democratic sensibilities but simultaneously accounts for the intuition that the majority ought not to prevail all the time'. In light of the dialectic between confidence and reflection, judicial review may be understood as legitimate to the extent courts operate as 'guardians of reflectiveness' (p. 194). The author proclaims 'democratic sensibilities' but recognises simultaneously that the democratic process may fail 'to be representative and reflective', and thereby vindicates 'the intuition that the majority ought not to prevail all the time' (p. 195, with reference to John Hart Ely). Whereas arguments from constitutional identity can justify the peculiar choices of particular communities at times – even in the face of a diverging global consensus – '[m]ost constitutional dilemmas cannot . . . be resolved by a straightforward inference from constitutional identity' (p. 200). Whereas a confrontation with other legal systems on the central questions of constitutionalism 'does not entail that there are right answers to these questions, a comparison can be useful' (p. 205). One would be hard-pressed to find a constitutional lawyer who is startled by these suggestions.

Because of his peculiar take on the nature of value, the author's treatment of the question of disagreement is perhaps more interesting. Disagreement in general is often

a problematic theme in legal theory, to the extent that it can suggest a threat to judicial legitimacy.⁵ The author's disenchanted attitude leads him to a frank recognition of the problem of moral disagreement in the setting of constitutional reasoning. By the author's own admission, '[a]ny mind-dependent conception of value must presuppose a certain amount of agreement, and could thus dissolve in the face of disagreement' (p. 188). The theory must, therefore, presuppose agreement – an assumption thought plausible in light of 'the shared circumstances of life that lead to a significant overlap between different moral codes'. These shared circumstances can also 'suppl[y] the framework in which disagreement can be resolved and managed', if necessary by resorting to the persuasion of others (p. 188). But what if these shared circumstances leave unspecified the answer to the most pressing constitutional problems of the day?

In the face of such a formidable challenge, Tripković reveals himself to be an incorrigible optimist.

When it comes to the evolution of morality in society, the author appears to overestimate the guidance his theory can offer to judges. When the moral judgments of a society progressively evolve, 'courts ought to give effect to deep and reflective transformations in moral attitudes that are not excessively confident' (p. 210). At times, courts will 'help us to overcome our illusions' thereby encouraging new moral attitudes, whereas at other times courts are thought to 'rush into inducing changes they believe are apposite' (p. 212). Citing *Roe v Wade*⁶ as an example, such rapid changes can lead to polarisation. Judges will have to make do with the warning that they should not be 'excessively confident' and be careful in walking on this 'thin line' (p. 212).

When it comes to the perhaps more challenging case of synchronic conflicts between moral judgments, Tripković recognises that that '[i]t is probably an illusion to think that conflicts can be completely avoided or that convergence can be fully rebuilt through reflection' (p. 214). Yet we are entitled not only to the 'hope that reflection will give us enough common ground to keep searching for appropriate solutions in an attempt to overcome the differences', but also to the belief that we have good 'reasons to trust that this hope is not idle' (p. 214). Because disagreement is 'an important part of establishing how we want to live together through engagement with each other's opinions', he insists that his framework offers reasons which allow us to understand 'why agreement matters and which qualities make it important', thereby allowing us to 'seek creative solutions to enable it' (p. 215).

Nevertheless, it is questionable whether Tripković manages to deal with situations of deep ideological conflict, in which multiple reasoned and considered moral positions clash. On the one hand, Tripković argues that in situations of intractable conflict courts will sometimes 'have to impose the prevailing view to the extent to which

⁵See generally e.g. J. Waldron, *Law and Disagreement* (Oxford University Press 1999); R. Bellamy, *Political Constitutionalism* (Cambridge University Press 2007).

⁶*Roe v Wade*, 410 US 113 (1973).

it is reflective and self-aware' (p. 214). The book offers little practical guidance, though, to determine which views will be most reflective and self-aware. Yet in situations of deep ideological conflict, multiple reflective and self-aware ethical views may well clash with one another. The book seems to respond that deference is the appropriate judicial stance: because courts ought to 'respect the will of the people to the extent that it can be ascribed to the reflective identity of the constitutional community', they 'should also respect the process of consensus-formation to the extent that it contributes to the realization of this goal' (p. 215).

There are two ways of engaging in philosophical reflection: one which calls into question the conceptions and beliefs we hold that legitimise the *status quo*, thereby challenging it, and another which seeks to uphold rather than challenge it. Tripković claims modest objectives for his work: it 'aims to illuminate the complex relationship between divergent sources of value in constitutional interpretation, provide the vocabulary to express different concerns that ought to bear on these problems, and – finally – organise some of the normative intuitions pertaining to complicated constitutional problems' (p. 208). This reviewer was under the impression that the author thereby mainly ends up underwriting the *status quo*, by justifying some instances of contemporary judicial practice, rather than questioning it. Take the issue of judicial review. The author is careful to distinguish the meta-ethical question of the book, and the argument from common sentiment in particular, from the debate surrounding popular constitutionalism. Despite this distinction, one could have expected that the author's thesis could have shed significant new light on this debate. Yet at the conclusion of his work, Tripković broadly subscribes to a fairly conventional, run-of-the-mill view supporting the legitimacy of judicial review (p. 196). Or take the many controversial ethical issues which the author touches upon throughout the book: abortion, same-sex marriage, etc. The development of a meta-ethical framework could have led to a theoretical argument supporting one or the other substantive position in these debates. Instead, the author chooses to stay away from controversy. The margin of appreciation doctrine of the European Court of Human Rights, for instance, is a relevant issue which could have an impact on these substantive questions, yet the author merely mobilises his theoretical framework to show why it 'could be justified' (p. 203). Despite Tripković's appeals to Socrates, one may doubt whether our contemporary establishment of constitutional lawyers will invite Tripković to drink the proverbial cup of hemlock.

