Tripkovic

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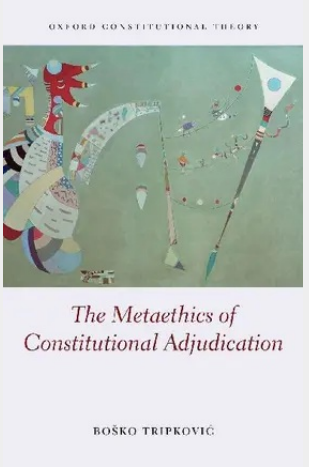

In this book Bosko Tripkovic develops a theory of value-based arguments in constitutional adjudication. In contrast to the standard question of constitutional theory that asks whether the courts get moral answers wrong, it asks a more fundamental question of whether the courts get the morality itself wrong. Tripkovic argues for an antirealist conception of value -one that does not presuppose the existence of mind-independent moral truths- and accounts for the effect this ought to have on existing value-based arguments made by constitutional courts. The book identifies three dominant types of value-based arguments in comparative constitutional practice: arguments from constitutional identity, common sentiment, and universal reason, and explains why they fail as self-standing approaches to moral judgment. It then suggests that the appropriate moral judgments emerge from the dynamics between practical confidence, which denotes the inescapability of the self and the evaluative attitudes it entails, and reflection, which denotes the process of challenging and questioning these attitudes. The book applies the notions of confidence and reflection to constitutional reasoning and maintains that the moral inquiry of the constitutional court ought to depart from the emotive intuitions of the constitutional community and then challenge these intuitions through reflective exposure to different perspectives in order to better understand and develop the underlying constitutional identity. The book casts new light on common constitutional dilemmas and allows us to envisage new ways of resolving them.

Analysis of case law from the US, Germany, South Africa, Canada, Israel, and the ECtHR forms the basis of Tripkovic's exploration of constitutional adjudication from an antirealist standpoint. This highly original work identifies the salient value-based arguments in constitutional practice and exposes the implicit assumptions that lie therein.

140,60 €
140,60 € (zzgl. MwSt.)

Lieferfrist: bis zu 10 Tage

Artikelnummer: 9780198808084
Medium: Buch
ISBN: 978-0-19-880808-4
Verlag: ACADEMIC
Erscheinungstermin: 21.12.2017
Sprache(n): Englisch
Auflage: Erscheinungsjahr 2017
Produktform: Gebunden
Gewicht: 508 g
Seiten: 260
Format (B x H): 161 x 240 mm

Kundenservice Verlag Dr. Otto Schmidt KG
Neumannstraße 10, 40235 Düsseldorf | kundenservice@otto-schmidt.de | 0221-93738-997 (Inland)