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# Values for a Valueless Society: Constitutional Morality After Collective Crime

# 1. Introduction: The Constitutional Interplay between Values and Coercion, Especially After the Regime Change

The constitution is a set of rules that defines the coercive order for a polity. Subjects of political communities are exposed to an ever-present threat of official repression. It is because of this threat that liberty is formalized in the constitutional institution of rights, and that political power is formalized in the constitutional institution of public, limited and accountable authority. The relationship between the two institutions is shaped by the claim of legitimacy. In terms of agency, legitimacy is a particular kind of relationship between individuals as rights holders and authoritative state bodies as coercion holders. While the object of the legitimacy question is the capacity of the public authority to require the surrender of private judgment, this question should always be approached from the perspective of individuals as the coercion addressees. As citizens of constitutional democracies, we have the right to ask under which conditions we owe loyalty to political authority. More precisely: in what kind of state do we live, what is the character of our relationship with political authority, does this relationship meet certain normative criteria, and why is it important that these criteria be met? Dealing with such questions should tell us whether those in authority rule rightfully, and consequently whether they can justifiably demand our loyalty to their supreme, coercionbacked commands.

A. Sajó & R. Uitz (Eds.), Constitutional Topography: Values and Constitutions, 123-140. © 2010 Eleven International Publishing. Printed in The Netherlands.

J. Kis, Political Neutrality 4 (1994).

Seen in this light, the constitution defines the community, authority, and human condition by translating into valid law: 1) abstract moral claims that citizens may legitimately impose on the state (to treat each person with equal respect and care; to uphold equal liberty of all by defining and effectively protecting basic rights; to provide liberty-based justification for each of its commands); 2) the price that citizens ought to pay if requirements of 1) are fulfilled, that is, if political authority meets legitimacy criteria. This price is political obligation, or the citizens' duty to be loyal to the legitimate state.

Summarized in this way, the concept of the "highest act" invites us to take a further step. The major theme of the constitution may indeed be coercive order, but this is so because of the values and principles those subjected to coercion (ought to) hold as most significant. However, constitutional values are not uncontroversial. Controversy exists at many levels, of which I will focus only on the level of the original constitutional choice made in the process of constitution-making following regime change. When a non-democratic regime falls, constitution-makers devoted to the democratic cause must provide an authoritative answer to this question: Why are we, who pledge our loyalty to universal morality, still bound by special ties to this particular polity? How to make sense of *our* life together? In other words, how to justify our loyalty to this particular coercive order?

If the regime change was revolutionary, that is if it annulled the old legal order, it appears that the constitution-makers' creative capacity is unconstrained. However, constraints do exist, and they come mostly from the past. Institutional and value patterns, actors and processes that shaped common life prior to the change, do not simply disappear with the breakdown of the old order. At least some of them are transformed into a certain kind of 'past present' or legacy. The old economic, political, legal, cultural, and ideological traits may have ceased to be determining features of the new polity; certain types of processes and events are unlikely to repeat themselves but they are still alive and powerful, all in particular ways. In such a constellation, the problem of old values deserves special attention. While the ambition to transform everything and build a new world ex nihilo amounts to dangerous utopianism, equally precarious is the position which holds that the inherited non-democratic values should not be dealt with at all. Constitution-makers need to reflect on the role contested values played in the recently delegitimized past, to grasp the exact manner and shape in which their legacies are present today, and to form a clear normative stance towards them.

The question becomes especially difficult if democracy is about to be established on the ruins of a regime distinguished by mass crimes. For instance, the Serbian regime under Milosevic caused violent deaths of tens of thousands of innocent people; this regime for a long time enjoyed the support of the majority of the Serbian population. Does such a legacy affect the approach to the question of the rightness of the constitutional order? Should constitution-

makers leave the past behind and focus on reaching forward? Or, should they acknowledge the sinister past as the constraint requiring the adjustment of the normative foundations and the institutional design of democracy? In this text I will defend three broad claims. First, such a regime has a moral and political duty to explicitly disassociate itself from the evil past. Second, this disassociation requires posing the question of moral responsibility. Third, mass crime committed in the name of the whole nation, with the support of the majority of the nation's members, demands *collective* moral responsibility – every person who belongs to the group in whose name mass crime was committed, has a duty to take a reflective attitude, and respond to the crime. I will argue that this duty to respond is best seen as a specific process founded on a proper constitutional definition and interpretation of new, post-criminal, identities and values.

This introduction is followed by three sections. The second section focuses on the identification and definition of "collective crime." I will argue that such crimes leave difficult moral traces on the post-criminal society and all its members, and that for this reason 'closing the books' on the past is neither a morally justifiable nor politically feasible alternative. The third section discusses collective moral responsibility. The main claim is that the nature of collective crime demands the conceptualization of collective responsibility beyond intention, causality, and blame. The fourth section offers a short analysis of constitutional patriotism. I defend the claim that the character of the moral predicament confronting a post-criminal society and all its members calls for a radical universalist re-thematization of both collective and individual identities.

### 2. Collective Crime and its Moral Legacies

#### 2.1. What is Collective Crime?

My focus is on societies whose pasts are distinguished by massive, cruel, regime-sponsored violations of the right to life and basic human dignity. Such acts of violence can be preliminarily termed "mass crimes." Their gravest typical element is mass murder. The targets are chosen by the official ideology identifying them as enemies and less worthy human beings. Mass murder is complemented by other forms of violence. Those who are not killed, or have not yet been killed, are denied the status of citizens and forced to live in a condition of humiliation and fear, deprived of elementary security. Provisions of legal, political and social protection the state normally guarantees to all of its citizens cease to apply to targeted people. The police do not protect them, and the judicial system does not recognize them as equals; their property is considered free to be taken or destroyed; they are denied freedom of

movement, access to education, proper social and health protection; they lose their jobs. Such people become outcasts, living or dying at the mercy of those who named them enemies.

Analytically, mass crime is distinguished by the following features: ideological justification, especially the way ideology defines and singles out the targets of hatred; the number of victims; the role of the regime; the number of perpetrators and collaborators; beliefs, attitudes and behavior of 'ordinary people.' An important inference of these features is the normalization of crime, which itself has two important aspects. The first consists in ideological, legal and political institutionalization of crime: the system of values, political arrangements and legal norms are all shaped in a manner that allows, justifies, and renders routine the killing of those under attack.<sup>2</sup> The second aspect of normalization is the majority support for the regime and its practices.

Using the criterion of normalization, it is possible to distinguish between two types of criminal regimes. The first will be provisionally called the 'repressive criminal regime.' It assumes the effective independence of the regime from its subjects. The regime does not count on the approval of the criminal ideology and practices by the subjects – in other words, the second aspect of normalization of crime is missing. Such a regime demands 'mere' obedience, which is secured by the wide-scale, arbitrary and unpredictable threat and use of force. The goal is to bring those subjects who are not direct targets of crime into a state of submission in order to prevent their resistance against criminal practices. An example is provided by the so-called 'dirty war' in Argentina during the reign of the military regime of 1976-1983.<sup>3</sup> Crimes committed by this type of the regime can be labeled 'regime crimes.'

My focus is on the second regime type, which could be called the 'populist criminal regime.' Unlike the previous type it relies on the support of its subjects, or more precisely on the support of those subjects who belong to the group in whose name the regime rules. The essential quality of this relationship is not repression, but rather populist integration, which includes a high level of ideological and practical agreement about crime. Nazi Germany and Serbia under Milosevic's rule are examples. Crimes committed by such a regime can be identified as 'collective crimes.' A collective crime is an act committed by a significant number of members of a group, in the name of all members of

<sup>&</sup>lt;sup>2</sup> This institutionalization is sometimes formal, as in the case of Nazi Germany, where legal system, government, and political organizations were established as instruments of the racist ideology. Alternatively, it can be informal, as in the case of the Serbian regime under Milosevic, where democratic institutions were created only to serve as a façade for criminal practices based on the ideology of extreme nationalism. For a distinction between formal and informal institutions, *see* P. Hall & R. Taylor, *Political Science and the Three New Institutionalisms*, 44 Pol. Stud. 936 (1996).

<sup>&</sup>lt;sup>3</sup> See, e.g., M. Feitlowitz, A Lexicon of Terror: Argentina and the Legacies of Torture (1998); C. S. Nino, Radical Evil on Trial (1996).

that group, with the support of the majority of group members, and against individuals targeted on the basis of their belonging to a different group.<sup>4</sup>

The following point to note in the analysis of collective crime is the simple fact that perpetrators, collaborators, and bystanders act not in their own name only, but in the name of the whole group. Causal agents' ascription to the criminal purpose, intention and action to all group members is the constitutive feature of such crime. Those who join for the criminal purpose, who formulate and spread criminal intention and who engage in criminal acts, will justify each of their steps by invoking the identity of the entire group and some alleged good of each of its members. Call the latter the ethics of evil: no collective crime has ever been committed without strong ethical justification. The regimes of Nazi Germany and of nationalist Serbia under Milosevic relied heavily on a certain concept of the good, the alleged embodiment of which was the chosen group ("Aryans" and Serbs). The ruling elite based its (auto)legitimation on the self-assumed role as 'sovereign representative' of both the group and the binding ultimate moral truth. The necessary feature of such an ethical attitude is the re-presentation of the targeted group in the same perverted ethical terms, as the embodiment of everything that is morally wrong. The circle is closed by the inference that the destruction of the enemy group is both necessary and good. Mass killing and other types of denial of basic human rights follow. Systematic criminal action against innocent human beings is justified by the claim that they are not simply inherently 'less worthy,' but indeed that they represent the threat to 'our good.' Consequently, killing is ethical.<sup>5</sup> The fact that there is a perverted 'ethics of evil' at work does not deprive this justification of importance – without its acceptance by the majority, collective crime would not be possible at all.

Thus a regime-sponsored atrocity becomes a collective crime, provided certain additional conditions exist. First, crime unfolds as the coordinated intentional action of a multitude of individuals. Second, crime is ideologically justified by reference to the group-specific ethics, which is in turn presented as being in accordance with 'universal truths.' Third, crime is ideologically,

L. Radzik, *Collective Responsibility and Duties to Respond*, 27 Soc. Theory & Prac. 456 (2001).

Most of you will know what it means when 100 bodies lie together, when there are 500, and when there are 1000. And to have seen this through, and – with the exception of human weaknesses – to have remained decent, has made us hard

exception of human weaknesses – to have remained decent, has made us hard and is a page of glory never mentioned and never to be mentioned [...]. We have the moral right, we had the duty to our people to do it, to kill this people who wanted to kill us [...]. Altogether we can say: We have carried out this most difficult task for the love of our people. And we have taken on no defect within us, in our soul, or in our character

H. Himmler, *Speech at Poznan, 4 October 1943*. Source: <a href="http://www.holocaust-history.org/himmler-poznan/">http://www.holocaust-history.org/himmler-poznan/</a>. For a detailed account of Himmler's efforts to justify the extermination of the Jews to the SS troops and to the regular police units under their command, *see* R. Breitman, *Himmler and the 'Terrible Secret' Among the Executioners*, 26 J. Contemp. Hist. 442 (1991).

legally and politically institutionalized and 'normalized:' the political arrangements, legal norms and the system of values, beliefs and attitudes, are all shaped in a manner that allows, justifies, and renders routine inflicting harms on those who are arbitrarily proclaimed as enemies. Fourth, the majority of the regime's subjects interiorize the perverted value system, and express their support for the regime, its ideology and its actions, including killing.<sup>6</sup>

The relevance of the last feature of collective crime cannot be exaggerated. The majority of the subjects accepted the institutionalized lie. The most drastic violations of human rights were made possible through broad endorsement of a perverted value system, and through the complicity, collaboration, or 'passive support' of many, ranging from those at the top of power to 'ordinary men.' Note that much is required from subjects: to become a supportive bystander of such crimes, a mentally and emotionally normal person must substantially change his or her view of the world. He or she should demonstrate a specific moral loyalty, manifested in belief that whatever the regime does, and whatever the subjects act as accomplices to, is politically justifiable and morally right.

#### 2.2. A View from the Ruins: Against the 'Policy of Forgetting'

Legacies of collective crime confront the post-criminal society with difficult questions. Let us assume (or reconstruct from historical experience) the following story: At one time we lived as decent citizens in a community that acknowledged the principle of moral equality, both in relationships among citizens, and in the way the state treated its citizens. Then things somehow changed: the majority of those who used to be decent people sided with a militant extreme nationalist group, gradually accepting the group's ideology as their own value system. The group came to power 'democratically' thanks to the support of the new majority, and it set out to carry out its ideology, again with majority support. Mass killing of innocent fellow citizens followed. After some years, the criminal regime collapsed, and the new regime initiated a process of democratic transition. The following predicament transpires: the same people who as subjects of the criminal regime used to support crime, or who at least used to refuse to comprehend evil, are now citizens of the newly

<sup>&</sup>lt;sup>6</sup> See, e.g., P. Longerich, 'Davon haben wir nichts gewusst!' – Die Deutschen und die Judenverfolgung 1933-1945 ['We knew nothing about this!' – Germans and the Holocaust 1933-1945] (2006); E. Johnson & K.-H. Reuband, What We Knew: Terror, Mass Murder, and Everyday Life in Nazi Germany (2005); N. Popov (Ed.), The Road to War in Serbia. Trauma and Catharsis (2000).

R. Teitel, Transitional Justice 81 (2000).

<sup>&</sup>lt;sup>8</sup> D. Dyzenhaus, *Justifying the Truth and Reconciliation Commission*, 8 J. Polit. Philos. 473 (2000).

emerging democratic regime. They return to civilized decency, as individuals who allegedly clearly understand and accept the moral standards of decent society as their own.

To regard such a chronology as morally harmful is neither comprehensible nor widely accepted. It is in fact sometimes justified by a combination of moral realism and political pragmatism. Take the following example:

Those who are really guilty for the crimes committed during the Nazi rule and in the war should be sternly punished. But we must not make distinction between two classes of population anymore, those who are politically objectionable and those who are not [...]. Hence, the Federal Government will have to address the question of amnesty, and to consider the proposal to submit a request to High Commissioners that the military tribunals of the Allies grant amnesty for the punishments imposed thus far. On the one hand, the Federal Government is determined to leave the past behind, because we are convinced that many were punished for the guilt that subjectively had not been that difficult at all; but, on the other hand, we are equally determined to draw from the past the lessons necessary for the right attitude towards all those who are today undermining the existence of our state, regardless of whether they are classified as the right or the left radicals.<sup>9</sup>

Adenauer's reasoning provides the paradigmatic justification for the strategy known as 'closing the books' on the past. In a nutshell, it argues that the demand for public – political, legal, and cultural – confrontation with the criminal legacies would only divert attention from really pivotal issues, opening up at the same time the Pandora's Box of painful questions to which there are no conclusive answers, and resulting in the further deepening of already thorny social, political, and ideological divisions. The positive argument is that the establishment and stabilization of democracy require investing trust in its institutional arrangements and the rules of game. If we – citizens and political elites – persist in acting within the democratic institutional framework, we will soon accept its underlying values and principles. In other words, by practicing democracy and by looking forward, we achieve two principal past-related goals. First, already by accepting the new institutional setup, we disassemble the structural legacies of the old regime. Second, the normative reflection on the past becomes obsolescent through the practice of democracy, because our autonomous and responsible acting within democratic constraints promotes new values, which we interiorize in the process. Shortly, even if in the past we used to be morally and politically co-responsible 'fellow travelers' of a wicked regime, its institutional and normative legacies will soon cease to be relevant for us.

This strategy is wrong on at least three important accounts. First, it does injustice to victims and their communities. There is something deeply troubling

<sup>&</sup>lt;sup>9</sup> Erste Regierungserklärung von Bundeskanzler Adenauer [First Governmental Declaration by Federal Chancellor Adenauer], 20 September 1949, Konrad-Adenauer-Stiftung, available at <www.kas.de/publikationen/2001/820\_dokument.html>.

and wrong in the indifference to the recent sinister past on the part of those individuals who share their group and communal identities with perpetrators of mass crimes. In words of Chadran Kukhatas, to argue that such a past does not matter amounts to arguing that grave injustices committed do not matter either <sup>10</sup>

Second, this strategy exculpates individuals who should not be exculpated. Regime change cannot possibly turn those who until yesterday voluntarily supported killing into decent persons. After the change, most bystanders remain caught in the same malady that defined them during the crime: call it the lost sense of justice. 11 This category refers to the widespread moral corruption which, during the lifespan of the regime, has stabilized into various patterns of moral indifference, tolerance and support for the crime; after the regime change it transforms into multi-layered strategies of denial. Some people will stick with the claim that the crime did not happen at all; others will argue that they did not and could not know what was happening; some, while admitting that many people were killed, will interpret these events not as crimes but as 'legitimate defense of national interests,' or even 'heroic deeds;' again others, while admitting that bad things indeed happened, will insist that those were regime crimes, which cannot be meaningfully linked with 'ordinary people.' The intellectual and political elite will also oscillate between literal and interpretative denial, a culture-specific reading of the inability thesis, and claims to the primary importance of normalization and stability. These strategies reveal that yesterday's 'ethics of evil' leaves as its most troublesome legacy a political culture in which too many people engage in self-deception. Such people do not merely refuse to acknowledge elementary facts about crimes – they do not comprehend or do not want to comprehend distinctions between right and wrong, just and unjust, good and bad.

Third, contrary to the claim of its supporters, the official policy of 'closing the books' cannot work as a pragmatic forward-oriented strategy. It rather comes down to a sort of 'negative idealism,' which assumes that the line between the past and the present can be drawn at will. This cannot be done. First, recent atrocities influence the way we live today. Their character, magnitude, and legacies are such that they *cannot* be willfully erased from collective memory, nor can they be disassociated from the present. Second, collective crimes *ought not to* be forgotten. The fact that it was possible for such things to happen outlines the range of necessary paths of dealing with the past. We have to reflect on past atrocities, and we have to condemn them. This is not some moralistic stance that would depart from a metaphysical perspective of an abstract moral truth only to end up posing impossible demands on ordinary

<sup>&</sup>lt;sup>10</sup> C. Kukathas, *Responsibility for Past Injustice: How to Shift the Burden?*, 2 Politics, Philosophy & Economics 172 (2003).

<sup>&</sup>lt;sup>11</sup> My use of this category is inspired by J. Allen, *Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. Toronto Law J. 337 (1999).

people. Rather, this is the minimum requirement of practical morality. Without meeting it, post-criminal society would remain caught in the past.

## 3. What is the Question: Collective Moral Responsibility

Here is the claim: the criminal past creates a duty to respond. As citizens of the state and members of the group which produced collective crime, we need to examine its legacies in unambiguously non-functionalist terms. Paraphrasing Habermas, instead of accepting the revisionist interpretation which tries to refurbish history by creating false continuities and fake traditions, we have to point out that after collective crime no continuity is morally acceptable, and that it is necessary to re-create both individual and communal identities.<sup>12</sup> This is the duty of all members of the group in whose name the crime was committed.

Why should we all take part in moral reflection? I have argued that collective crime is more than an aggregate of individual criminal intentions and actions. It follows that its evaluation is not reducible to the assessment of separate acts of discrete perpetrators, collaborators, and bystanders. Instead, reflection should be carried out in the first person plural, the "We-perspective" as defined by group membership. We need to ask what happened in our group, or what transformation did our identity undergo in the recent past that made it possible to kill on our behalf. We also need to ask about the character of our group identity today, after the crime. The goal of this reflective process would be that we who share group and communal identities with the perpetrators come to realize that 1) public acknowledgment of the crime is the duty we owe to victims and their communities, and that 2) our capacity to return to civilized normalcy depends on our readiness to learn from the humiliating past and to turn this knowledge into the building block of our new identity.

I wish to argue that such reflection requires accepting collective moral responsibility. This may be a vulnerable idea, not only in the perspective of methodological individualism. Some liberals who do not deny the relevance of groups, but insist on the conceptual primacy of individual autonomy, would come up with the following objection which is intuitively strong: how could someone who did not take part in wrongdoing, who did not support it, who did not share the values and beliefs of the criminal majority – i.e., someone who neither intended nor did anything legally punishable nor morally wrong – still be held morally responsible?<sup>13</sup>

J. Habermas, Die nachholende Revolution: Kleine Politische Schriften VII [The Rectifying Revolution: Short Political Writings Vol. 7.], 21 (1990).

<sup>&</sup>lt;sup>13</sup> For the most powerful exposition of such reasoning, *see* H. D. Lewis, *Collective Responsibility (A Critique)*, *in* L. May & S. Hoffman (Eds.), Collective Responsibility. Five Decades of Debate in Theoretical and Applied Ethics 23 (1991).

I hold that the nature of collective crime calls for a concept of responsibility adjusted to this specific context.<sup>14</sup> Its novelty would consist in responsibility being independent of intention, control and causality. I am suggesting an individualist approach to collective responsibility, where the group is not seen as a separate moral agent – the claim is that all group members share responsibility. 15 Thus concept raises many difficult questions, among which the distribution of accountability stands out. Roughly, it is useful to make a distinction among three subgroups in a post-criminal society. To the first belong those whose causal responsibility is determined by criminal law: perpetrators, collaborators, military commanders, and political leaders. Among group members who are not criminally responsible it is possible to distinguish those who are morally blameworthy and those who are not. To the former group belong bystanders, those group members who are not criminally or politically responsible, but who in various ways supported the regime. They deserve blame for their failure to observe the distinction between right and wrong – they chose to support wrong beliefs, attitudes and actions. To the latter group belong those who did not betray basic moral standards and thus are not blameworthy. However, they are not free of debt – their responsibility will be different, given that its source is simply group identity.

How to explain such a comprehensive accounting of responsibility? There can be situations in which each member of a collective should be held morally accountable, regardless of whether she contributed to an intentional action and its consequences, regardless of her attitude to that action, and regardless of whether he or she was able to influence the course of the action. Collective crime belongs to such situations: the ultimate reason for collective moral responsibility is the integration of collective crime into the identity of the whole group, and into individual identities of each group member. Take the example of a nation tainted by collective crime:

- 1) the crime was committed by some members of the nation, in the name of all;
- 2) it was justified by reference to the core of national identity the nation-specific values, customs, norms, traditions, and interests; and

<sup>&</sup>lt;sup>14</sup> Here I follow Christopher Kutz, who offers an interpretative theory of collective responsibility. This theory is "descriptive insofar as it tries to map the obscure territory of our actual responses to complicity, and normative insofar it suggests considerations that reasonably apply to these problems." C. Kutz, Complicity. Ethics and Law for a Collective Age 164-165 (2000). Notice that this approach does not imply moral relativism: moral evaluation of the specific post-criminal context is guided by universalist considerations.

<sup>&</sup>quot;This means that all members of a community must have the obligation specifically because of their belonging to the community. Morality remains a matter of individuality, even if the source of the moral obligation resides in community membership"—A. Sajó, *Affordable Shame*, in L. R. Dahrendorf, Y. Elkana & A. Neier (Eds.), The Paradoxes of Unintended Consequences 164 (2000).

3) such justification and criminal action, taken together, lead to the practical corruption of both individual and national identity.<sup>16</sup>

At stake is the fall below a certain civilizational minimum that had been known and accepted prior to the crime, i.e., which most of the group members had already interiorized by the time of the crime.

In such a situation, the baseline of one's responsibility becomes the identity one shares with the perpetrators. This is so because the group-specific fall below the civilizational minimum directly targets the moral integrity of each group member, independent of one's personal attitude towards the crime. It is only by coincidence that I am a member of this nation, but the crime was consciously and systematically committed in my name. The contingent nature of my national identity is revoked by the intention and action of those who proclaimed my ethnic identity as the reason for killing the people of different ethnic identity. The ideological foundation, character and scope of the crime penetrate my individual identity. The fact that my inclusion in the ideological pattern of the crime rested on ideological manipulation does not suffice to absolve me of responsibility. Once innocent people were killed, the lie expressed in my name ceased to be a mere lie: it has become a moral fact. This is why my group identity yields my duty to acknowledge the injustice done, as well as the victims' right to demand an unambiguous, public demonstration of disassociation from the crime from me.

# 4. Outlining an Answer: Self-referential Constitution as an Instrument of Transformative Justice

#### 4.1. What is Transformative Justice?

In the first section I argued that the constitution defines and authorizes the order of coercion, with the aim of protecting normative claims presumably shared by all citizens. Still, value consensus—real or presumed—is insufficient in itself. Values themselves have to meet an independent criterion: they should be just. More precisely, values should meet both moral and ethical criteria. In the moral perspective, values to which we pledge our loyalty should correspond to the universal moral standards of right. Ethically, we are loyal to the values that stand in the core of our group-specific good. But both moral and ethical standards are susceptible to corruption. Criminal regimes rest on an imposed ideological combination of a peculiar interpretation of universal morality on the one hand, and an appropriate version of the group-specific ethics on the other. Therefore one of the most important tasks of transition

<sup>&</sup>lt;sup>16</sup> D. Cooper, *Responsibility and the 'System,' in P. French (Ed.)*, Individual and Collective Responsibility: Massacre at My Lai 81, at 88-90 (1972).

from a criminal regime to democracy consists in redefining the relationship between universal and particular values. In this regard, the coordinates of the constitution-makers' task in the post-criminal context seem to be clear: constitutional democracy presumes the constitutional explication of liberal values. But this is where the problems only begin: to opt for democratic values while standing on the ruins of the shameful past, means to choose something merely desirable. Such a preference can be realized only if it somehow meets the challenge posed by the present condition. It is necessary to show that "the nature of existing problems functionally requires the political arrangement of constitutional democracy." <sup>17</sup>

Above I argued that the 'existing problem' after the regime change is moral in nature. Our group identity makes us all co-responsible. Here I understand responsibility etymologically, as the duty to respond. This duty has two aspects, or two addressees. First, members of the tainted group have the duty to address the victims and their community. In doing so we publicly acknowledge what we privately (ought to) know well: the killing of the innocent people took place, it was carried out in our name, and it cannot be justified. Victims and members of their community have the right to require this public utterance from all of us, and not only from those personally responsible for their suffering. This is so because the harm was inflicted up on them in the name of all of us. I may have distanced myself from crime, I may have resisted, but the members of the targeted group do not know this, nor do they have a duty to know. The plain fact of my group identity is a sufficient reason for victims to demand that I unambiguously and publicly disassociate myself from crime. My burden is neither individual guilt nor moral blame. My duty to respond is the consequence of the victims' 'reasonable fear:'

Even if I believe you did not kill with your own hands, I don't know how you feel about the people who did. I don't know if you encouraged or approved of them. I don't know whether you will act like they did in the future. So I am afraid of you. If you apologize, if you express regret, I will have less reason to be afraid, and maybe we can find a way to live in peace together.<sup>18</sup>

The second duty is that of self-reflection. After the atrocities committed in the name of false ethical claims, a transition into civilized democratic peace cannot be achieved solely by replacing the governing elites and setting up of a new institutional arrangement. The criminal past requires a clear, radically new moral foundation of the community – call it the requirement of *transformative justice*. <sup>19</sup> The object of transformation consists of patterns of beliefs, attitudes, and values that are shaped into a distinctively unjust culture of silence. Transformative justice concerns our internal group relationships, and it seeks to define the price we ought to pay, both individually and as a community, in

<sup>&</sup>lt;sup>17</sup> Z. Djindjic, Jugoslavija kao nedovrsena drzava [Yugoslavia as an unfinished state] 39 (1988).

L. Radzik, *supra* note 4, at 465.

Allen, *supra* note 11, at 335; Dyzenhaus, *supra* note 8, at 492.

order to regain the right to be perceived as decent human beings living in a decent society. We need to prove something that is not obvious at all: first, that we deserve to be treated as moral beings, i.e., as human beings capable of living in accordance with the standards of what is right and just; second, that our society deserves to be treated by others as a decent society. The principal task of transformative justice is to look back. As the moral duty that stems from the relationship between the crime and our group identity, it should remain independent of transition-specific political and social considerations. While it is true that we cannot reach democratic normalcy without transforming our values, the justification of transformative justice is not principally based on the prospect of a better – not even morally better – life for tomorrow. Rather, it is our *debt* to the past.

The two perspectives – individual and communal – cannot be separated. And the question is not simply what we as members of a post-criminal society have in common. The question reads: what *ought we* to have in common, or which values should we choose as legitimate communal ties? The question is unusual. Members of large involuntary groups are not typically in the position to select the moral coordinates of their communal identity. But the crime creates the predicament from which *the duty of choice* follows. Put bluntly, collective crime is first an act of self-exclusion from civilization; second, it is the act that destroys group-specific ethics. In consequence, after the change the crime and its legacies are the only remaining points of group identification. Group members are certainly still tied by common culture and national belonging. But the common culture, traditions, memories, and ethnic identity are now all tainted by the crime. Our group identity – indeed, our national identity – has become a crime-specific identity.

How do we proceed from here? The choices are limited. Either we identify ourselves with killers, or we identify ourselves as decent human beings. If the past is left unthematized, or if it is thematized through different strategies of denial, we are effectively choosing the former alternative, thus designating our community as a community of killers, and ourselves as morally blameworthy people. The choice is not a cultural affair. While I agree that moral reflection is not an exclusive matter of law and politics, I disagree with the claim that it should be an exclusively civic enterprise. It is illusory to expect that in a morally destroyed society those who hold right views will be able to convince the silent majority of the need for a proper response to the crime. Transformative justice requires an authoritative framework, 20 the main task of

<sup>&</sup>lt;sup>20</sup> Here I simply assume something that needs a separate analysis: a post-criminal society requires the authoritative truth about the past. This obviously raises many difficult issues, from the context-specific problem of 'victor's justice,' to the general problem of state neutrality. I have tried to address these questions in my article *Justice Beyond Blame. Moral Justification of (the Idea of) a Truth Commission*, 50 J. Conflict Resolut. 375 (2006).

which would be "to generate and consolidate new and distinctive conceptions of political morality that can henceforth inform the political culture." This is where the constitution enters.

#### 4.2. Constitutional Patriotism

Constitution-makers have two options. The first strategy attempts to 'normalize' the past by finding a usable version of it. In this approach, the constitutional formulation of the basic societal and political values is made with the intention of reestablishing the alleged fundamental continuity with the 'better past' and its 'genuine traditions and values.' Such a better past, as the repository of true answers to the 'Who are we' question, would appear in turn as the bridge between our group loyalties and democratic patterns. This is the path of the post-criminal nation-state. It departs from the rational-instrumental idea that "in a country without history the future belongs to those who determine the content of memory, who coin concepts and interpret the past."22 The message is clear: neither life together, nor political community, are possible without an unquestionable basis, which can be provided only by national identity or, more precisely, by a proper (i.e., affirmative) constitutional, political and cultural reading of the nation's history. The same author continues: "Confronted by an increasing lack of grounding, however, we must ask how long the petrified guest from the past should be permitted to veto civic virtue and love of the fatherland, both in the future and in the past?"<sup>23</sup> The 'petrified guest' is the Holocaust, a menace that has to be pacified, placed into the history textbooks and detached from the present, so that it does not prevent us anymore from living in accordance with our genuine values and attachments. Our 'guests' obviously do not belong to us, our virtues and objects of love obviously do.

This is a typical (albeit not very subtle) attempt to reinterpret a nation's moral fall. It aims at excluding a shameful time period from the legitimate body of collective memory. Everything is turned upside down in this reasoning: a very real event of extraordinary moral weight is seen as a mere – at best only historically relevant – episode from the past, while the morally corrupted national identity becomes a proper object of positive emotional attachment. However, as so many Germans – from Theodor Heuss to Jürgen Habermas – have convincingly demonstrated, it is wrong to assume that the identification

<sup>&</sup>lt;sup>21</sup> A. du Toit, *The Moral Foundations of the South African Truth and Reconciliation Commission: Truth as Acknowledgment and Justice as Recognition*, in R. Rotberg & D. Thompson (Eds.), Truth v. Justice: Morality of Truth Commissions 125 (2000).

<sup>&</sup>lt;sup>22</sup> M. Stürmer, *History in a Land without History, in* E. Piper (Ed.), Forever in the Shadow of Hitler? Original Documents of the *Historikerstreit*, The Controversy Concerning the Singularity of the Holocaust, (transl. J. Knowlton & T. Cates), 16 (1993).

M. Stürmer, in the Frankfurter Allgemeine Zeitung, 27 December 1993; quoted after J. Habermas, A Berlin Republic, Writings on Germany 5 (1998).

with killers can be overcome by preserving the reference to the 'valuable core' of national identity and by adding liberal values and arrangements, without looking back. Actually, it is the approach of the Federal Republic's Basic Law that provides a precious guideline for an alternative moral reading of the past. This constitution abandons the ideology of the nation-state. It provides for a fundamental break in the perception of individual and communal identities. Let us recall:

*Preamble.* Conscious of their responsibility before God and Men, animated by the resolve to serve world peace as an equal partner in a united Europe, the German people have adopted, by virtue of their constituent power, this Basic Law [...].

Article 1. The dignity of man is inviolable. To respect and protect it is the duty of all state authority.

Article 2. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world

The Basic Law does not make an explicit reference to the recent past. Still, the way assumptive responsibility of the nation is defined leaves little doubt about the context-specific source of the chosen moral universalism. First, Germans ought to base their future values, attitudes, goals and actions on the general moral duty to treat all persons in the world in accordance with the precepts of justice. Second, this responsibility serves a particular purpose as well: to demonstrate that Germans deserve to be treated as equals. Third, the basis of individual and group-specific assumptive responsibility is the moral principle of human dignity. Fourth, human rights, as the institutional formalization of human dignity, are the sole source of political legitimacy of (every) political community.

These provisions provide the normative basis of constitutional patriotism. In most general terms, constitutional patriotism elucidates the idea of the postnational ("post-conventional," to use Habermas' term) communal identity and of a legitimate political order beyond the nation-state.<sup>24</sup> It argues for a specific normative 'strategy of continuity.' Individual identity, group identity, and political legitimacy are all based on the same fundamental set of values. The constitution is the meeting place of morality, politics and legal validity, its binding procedures being derived from universal(izable) values.

I do not aim to provide a full theoretical account of this concept.<sup>25</sup> My analysis will focus on two standard objections. The first argues that the radically universalistic basis of constitutional patriotism is incapable of building individual and communal identities, since these are based not

<sup>&</sup>lt;sup>24</sup> J. Habermas, Moderne – ein unvollendetes Projekt [Modernity: An Unfinished Project, transl. N. Walker], 175 (1990).

The most comprehensive theoretical reconstruction of constitutional patriotism is provided in J.-W. Müller, Constitutional Patriotism 46-93 (2007).

only on moral legitimacy, but also (and primarily) on historical plausibility grounded in shared cultural identity. A legal and political regime resting only on universalist constitutional values would not be in touch with social and political realities created by the prevailing feelings of identity; such a constitution would probably remain a worthless piece of paper, deprived of the capacity to frame social and political processes and protect human freedoms. Second, following the insight that culture is an intergenerationally shaped construct, an empirical observation is raised against the feasibility of constitutional patriotism: culture cannot be re-constituted at will.

These are serious objections, which address the sensitive field of political culture. Their starting point is the assumption of group solidarity. Solidarity is typically understood as a stabilized cultural attitude of sentiment, a feeling of closeness to other group members, from which special, group-exclusive obligations follow, including care for the well-being of the significant others, and of the group as such. Let me first address the latter objection, which insists on the non-voluntary character of culture. The objection is misplaced, because constitutional patriotism after collective crime neither questions group solidarity, nor does it aim at a utopian creation of a 'new man.' At stake is not a cultural construction ex nihilo, but rather a culturally specific coming-to-terms with the recent horrifying abuse of the common culture. In the post-criminal context, the old question as to what constitutes polity – blood or contract – cannot be answered in any conciliatory way. Collective crime has destroyed the group's culture by abandoning basic norms of equal respect and equal care which had been valid until the establishment of the criminal regime. One major consequence is that the continuity of cultural identity cannot be simply resumed. After everything done in the name of the nation, it is simply no longer possible to create a civilized community on the background of a prepolitical unity.

The answer to the objection of the artificial character of constitutional identity follows. Constitutional patriotism tries to respond to the predicament of the loss of cultural orientation by providing for a context-specific reading of moral universals. It does not deny the relevance of group solidarity, but rather requires its re-conceptualization. In a decent society solidarity is based on a combination of moral and ethical commitments. It is important to emphasize that universal moral norms are not, or should not be, alien to groups: the presence of interiorized universal standards is the criterion of a group's decency. Group-specific values meet the ethical requirements of the good provided they remain within the normative framework shaped by moral universals. This is why solidarity is not reducible to an unquestionable positive emotional attitude to our co-members, based merely on shared belonging. Rather, solidarity is a normative feature of membership, which demands from each member critical reflection on the group's values and practices. <sup>26</sup> If, on

<sup>&</sup>lt;sup>26</sup> See, e.g., W. Rehg, Solidarity and the Common Good: An Analytical Framework, 38 J. Soc. Philos. 7 (2007).

reflection, we find that our recent practices cannot stand the test of universal morality, our solidarity will require that we disassociate ourselves from such practices.

Finally, the idea of a *self-referential* constitution for the post-criminal society proposes a specific understanding of the relationship between foundational moral values and democratic legitimacy. It assumes their hierarchical relationship, where democracy would be understood not as something valuable in itself, but rather as a rationally preferable instrument for the protection of principles that hold an independent value. Such an approach does not belittle the importance of democracy. It only argues that democracy is the best governmental form for us here and now – for our post-criminal society - because of the values we want to affirm and because of the specific legacies with which we are confronted. We opt for democratic government because we believe in its capacity to uphold principles of justice and civility where there were none yesterday, and because we find such principles extraordinarily vulnerable today. In other words: 1) we believe in democracy's capacity to act as an authoritative framework that will safeguard transformative process by controlling and preventing the reappearance of discredited political and normative patterns; 2) we believe that democracy can help bring to life basic moral values still alien to the majority of citizens after the crime, and of which the group identity remains deprived.

If this instrumental perception of democracy holds good, then the question of the origin of the constitution's legitimacy has to be carefully reexamined. The focal point of constitution-making and of the subsequent 'law in action' should not be democratic legitimacy. 'We the people' should not be conceptualized as a subjectivity whose will-power is the supreme source of creation and justification of constitutional authority. Neither the power to make a constitution, nor the right to rule should be derived from the principle of popular sovereignty. We who share identity with killers are not the sovereign people – we are the people in debt. Yesterday the basic moral principles were betrayed by the majority among us, in the name of all of us, and there is no guarantee whatsoever that tomorrow, if given freedom of choice, we would not do the same. For this reason the universalistic moral embeddeness of our individual identities, of our group identity, and of our statehood, should be made constitutionally explicit and placed beyond the reach of democratic decision-making.

The highest act is to be established as its own reference, and not as an epiphenomenon of the people, the nation, or the state. The claim is not that the citizens should not take part in constitutional design. But both citizens and bodies that act as constitution-makers would be denied freedom of deliberation about foundational principles of the new order. This follows from the requirement to establish the authoritative truth about the past. The task of the self-referential constitution would be to set up an official 'collective

liberal narrative.'<sup>27</sup> Its binding, non-democratic, universal principles would refer explicitly to our rights and duties in the present and in the future, but would derive their context-specific normative force and justification from the reflection on the recent past. Such a constitution would contain all the democratic principles and arrangements. Still, the legitimacy of the less-than-fully democratic character of constitution-making, of the constitutional content, and of the process of its implementation, would stem from the duty to respond to yesterday's atrocities and to establish conditions of civilized peace. The constitutional order would make and preserve legitimacy with reference to its own morality. The inner morality of the constitution is the composite of the liberal principles of freedom and the rule of law, understood as "values and principles that stand *before* all democratic disposal and [that] demand unlimited validity [...] the politics is assumed to have its democratic character guaranteed by a 'value order' which is kept outside the reach of the democratic process."<sup>28</sup>

In conclusion, I am aware of the vulnerabilities inherent to the concept of a constitution outlined here. Still, I have endeavored to argue that criticism which points to the motivational deficit of constitutional patriotism does not necessarily hold. It is true that the idea of constitutional patriotism does not rest on given identities or on democracy understood as the procedurally shaped majority rule. This disassociation from unreflected givens and from majoritarianism is not to deny that constitutional patriotism

must be enduringly linked with the motivations and convictions of the citizens, for without such a motivational anchoring [constitutional principles] could not become the driving force behind the dynamically conceived project of producing an association of individuals who are free and equal.<sup>29</sup>

In short, the importance of the motivation question is not overlooked, but an answer to it is to be searched for beyond our pre-stabilized intuitions about the meanings of particular identities and democracy. Identities are not cultural givens, while democracy is not a political superstructure that would rely on self-comprehensible collective ties. Rather, constitutional democracy is based on a rational agreement about the political conditions necessary for a morally justifiable life in community with others. In the wake of collective crime, constitutional morality should start from a reflection on criminal legacies. We ought to respond to yesterday's deeds in universalistic terms, because the moral equality of all human beings is the only realistic alternative to the tragically failed formative principles of community.

<sup>&</sup>lt;sup>27</sup> R. Teitel, *Transitional Justice as Liberal Narrative*, in A. Sajó (Ed.), Out of and Into Authoritarian Law 3, at 4 (2003).

O. Weaver, With Herder and Habermas: Europeanization in the Light of German Concepts of State and Nation, 16 Working Papers of the Center for Peace and Conflict Resolution 14 (1990).

<sup>(1990).

29</sup> J. Habermas, Struggles for Recognition in the Democratic Constitutional State, in A. Gutmann (Ed.), Multiculturalism and the Politics of Recognition 134 (1994).