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Democratic dialogue, multiculturalism and "public wrongs"*

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ABSTRACT

In this work, I challenge some of the ideas presented by Antony Duff's in his book *The Realm of Criminal Law* and, more particularly, his approach to the idea of "public wrongs." I claim that his views on the subject unjustifiably put into question some shared ideas about what it means to live in a democratic and multicultural society. More particularly, I maintain that, in multicultural societies, we define the basic elements of our identities in dialogue with different and "significant others," which –I submit- makes it difficult to identify public wrongs that are –in his words- "clearly inconsistent with… any remotely plausible conception of civil order". In my opinion, many of the problems that I find in his views originate in Duff's implausible understanding of democracy: the "voice of the community" –I claim- can and should only be expressed by the community itself, through an ongoing and unending collective conversation.

Keywords: democracy, "public wrongs", mululticulturalism, liberalism, communitarianism

> The Ulama was a popular ballgame with ritual associations played since 1400 BC by the pre-Columbian people of Ancient Mesoamerica. Among the Mayans, the game was known as Pok a Tok, while the Aztec called it Tlachtli. The game, which is still played in a few places by the indigenous population, constituted a central part of the indigenous American culture. The ballcourts were the size of a modern day football field. The game was played on a rectangular court with slanted side-walls against which the ball could bounce. Usually, those walls were decorated with the images serpents and jaguars and also with images of human sacrifice. The rules of the game are unknown, but –according to the images and sculptures that were found in the courts- it was like the racquetball, where the players struck a ball, made of rubber, with their

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hips. In some late developments of the Ulama, which seemingly took place during the Classic era, the game was combined with religious human sacrifices. In these occasions, one of the teams was offered as a sacrifice after the end of the game. Remarkably, it seems that the winning squad or its captain –rather than the defeated team or some of its individual members- were the ones to be decapitated after the game.[1]

1. INTRODUCTION AND ILLUSTRATIONS

In what follows, I want to critically examine some aspects of Antony Duff's book The Realm of Critical Law (Duff 2019).[2] In particular, I want to call the attention about some problems related to the notion of "public wrongs", which plays a central role in this and some other recent works of his (Duff 2009, 141; Marshall and Duff 1998). In this paper, I shall mainly discuss four of those problems: i) the difficulty of maintaining a notion of "public wrongs" such as the one that Duff wants to maintain, in the context of (radically) plural societies; ii) the confusions created by Duff's oscillations between liberal and communitarian positions; iii) the institutional difficulties implied by Duff's views on the matter; iv) the tensions that may emerge between "the voice of the community" and democracy.

As a general, introductory point, I would claim that Duff defines public wrongs in ways that –I submit- conflict with the demands of our multicultural societies, and also with some of our most basic assumptions about democracy. By the end of the paper, I will briefly sketch an alternative approach –related to the notion of deliberative democracy- which I think could better accommodate those serious demands.

Before presenting some of my criticisms to Duff's views, let me quickly offer a few examples related to the challenges that multiculturalism poses to our traditional Western or liberal approaches to the law in general, and to the Criminal Law in particular.

In recent years, the Colombian Constitutional Court recognized as legitimate certain forms of indigenous justice that many still consider as examples of "torture." For instance, in a 1996 (*Tutela* 349/1996, p. 10), and following a claim brought by an Embera-Chamí Indian, the Colombian Court defended the institution of the *cepo*, which was a a kind of corporal

1 The content and details of these events are still unconfirmed, but the story, which has been told once and again, belongs to our shared knowledge -and beliefs- about the life of aboriginal groups before colonization. In the end, the story simply offers an extreme illustration of cultural diversity and its implications.

2 From here on, I shall only quote the pages of the book when I refer to *The Realm of Criminal Law.*

punishment common among certain indigenous communities, which was imported from Spanish colonial law (Van Cott 2000, 218). Similarly, on 15 October 1997 (T-523/1997, in the "*Jambalá* decision"), and in the name of protecting the community's customary law, the Court upheld a form of indigenous punishment that included whipping, and which Amnesty Law considered at that time an expression of torture (ibid., 221).[3]

Other "hard cases" may be those involving minors living in indigenous communities. For example, in the province of Salta, Argentina, there was recently a case related to a Wichí girl victim of alleged sexual abuse by her stepfather (the case is from 2005).[4] In that opportunity, members of the Wichí community maintained that the alleged abuse represented, in fact, a common practice that belonged to the group's traditional culture. Another difficult and paradigmatic case was that of the U'wa twins in Colombia, where an aboriginal couple refused to raise the twins out of the traditional belief that giving birth to twins could create misfortunes for the community. In Santa Cruz del Quiché, Guatemala, a local indigenous leader "punished" with a spanking a 12-year-old child, accused of theft, which generated complains from the Human Rights Ombudsman, who accused the community's leader of "child abuse"[5] (Ramírez 2017, 16). All these cases offer us extreme examples, difficult to accept or tolerate for most of us, individuals who have grown up in social contexts defined by the Western culture and a liberal philosophy.

2. RADICAL PLURALISM AND THE DIFFICULTY OF DEFINING "PUBLIC WRONGS". DIALOGIC IDENTITIES

The examples of radical pluralism that I have presented in the previous section call our attention about the existence of a plurality of world-views, which may include substantially different understandings of how to live a good life, but also radically different approaches to the notions of "right",

3 According to ex-Magistrate Ciro Angarita, the Court's decision reflected a division within the Court, between those who "absolutely reject the possibility that indigenous 'usos y costumbres' can be considered sources of law… [and] another, which accepts, on the contrary, that respect for this alternative source of law – to the extent that it is not contrary to the Constitution and the law – constitutes an expression of the ethnic and cultural diversity of the Colombian Nation and, as such, has a firm but conditional pretext in our [normative] system" (ibid.). See also Bonilla (2003).

4 The case was the object of a judicial process in "Ruiz, José Fabián. Abuso sexual con acceso carnal calificado". Expte 3399/5.

5 See the newspaper "Prensa Libre", 13th October 2017.

"wrong," and the like.[6] The mere existence of these radical differences has interesting implications for a theory of Criminal Law like the one that Antony Duff has been building up in recent years. In the first place, I shall maintain, those examples cast doubts about the author's approach to the concepts of *public wrongs, mala in se* and *mala prohibita*, in particular.[7]

If we take into consideration Duff's strongest definition of the concept of "public wrong", the challenge posed by our examples seems more serious. For instance, in different parts of his work, and thinking mostly about extreme cases like those of murder and rape, Duff defined *public wrongs* as faults that "are clearly inconsistent with, manifest violations of, any remotely plausible conception of civil order –any conception, that is, of how the members of a polity can live together as citizens" (300; and also Duff 2009, 141; Marshall and Duff 1998). Similarly, Duff defined *mala in se* as "crimes consisting in conduct that is (uncontroversially) wrongful independently of its criminalization" (20; also Duff 2001, 23-4; Duff 2013, 181). When we define public wrongs (and like concepts, such as *mala in se*), in this strong form, we leave little room for radical pluralism. To put it differently, in this way we show having little respect to alternative cultures.[8]

It should be clear, in fact, that different cultures may value different things for different reasons, at different times of their own history: why is it that a culture different from ours could not treat "our most cherished values" in a completely different way than we do, and still be a decent community, worth of respect?[9] Why could not they understand the right to private property, or even the right to life or the right to sexual integrity in ways that radically –and reasonably- challenged our own approaches to

6 The idea of radical pluralism is fundamentally related to John Rawls' notion about "the fact of reasonable pluralism" (Rawls 1991). However, with this alternative concept I also want to encompass world-views that in principle may sound unreasonable –while (I would suggest) in the end they should not be considered as such. The same Rawls makes an effort to consider such rather extreme views, for example, in Rawls 2002. Thus, for instance, in his references to "hierarchical" and "nonliberal" peoples (ibid., Part II).

7 Duff –I shall suggest- defines these concepts differently in different parts of the book, but none of his definitions seem to deal properly with radical pluralism.

8 As Duncan Ivison put it: "Do 'we' share, as a social, political, and legal community, a form of life within which diverse and overlapping sub-communities can find their place? Or are 'we' instead merely a diverse collection of incompletely articulated communities, between whom communication –when it occurs- is erratic, superficial and at worst, hostile?" (Ivison 1999, 89-90).

9 Note that I am making reference, most of all, to different communities sharing the same geographical space, this is to say, being part of the same multicultural society (Duff recognizes, of course, that different –even repugnant- civil orders may exist. See, for instance, Duff 2016)

those matters?[10] In the context of democratic and multicultural societies, I believe, we should be able to accept the "fact of disagreement," and learn to live with it (Waldron 1999, Bracaccini 2018).

Of course, to state this –to recognize that other cultures may have a completely different approach to our most cherished values- does not imply endorsing cultural relativism. What I am trying to say, instead, is that we have reasons to be more attentive to and respectful of other cultures, particularly in the face of established practices of cultural imperialism and social imposition. More significantly, to accept the fact that other cultures may repudiate or radically challenge our most cherished values, does not necessarily imply saying something in favor of those alternative values or cultural practices: those shared practices, shared values and shared understanding may result valuable -or not at all- from a critical perspective. We may have reasons, or not, to accept, support or enforce those alternative shared understandings. But these are things to be discussed apart, with independence of the point I am making here. The point is: we need to recognize that different cultures may resist, repudiate or dismiss, rather than endorse or share, what we consider to be our "shared values".

Moreover, one may consistently recognize the importance of cultural differences and be at the same critical in relation to all established cultural practices –even, or more particularly, concerning long-standing shared practices. Usually –one could claim- those shared practices tend to be the result of cultural constructions, and as such the product of a complex and problematical history –a history that may combine deep convictions and shared commitments, together with profound injustices, unjustified inequalities, exploitation and domination. The history of private property may be a good example of this combination of noble reasons and obscure impositions. In sum, we could both challenge Duff's approach to the concept of public wrongs (public wrongs as wrongs that are "clearly inconsistent with…any remotely plausible conception of civil order") and be critical about cultural relativism.

In other passages of the book, Duff seems to define the concept of public wrongs in a slightly different way. He thus refers to public wrongs as

10 Let me suggest this: perhaps, at the deepest level, all of us, as human beings, share certain attitudes of disgust or profound discomfort with regard to certain human conducts. For instance, some could claim that is "intrinsic" to our human nature the tendency to react against unfair behavior. This may be true, but then our reaction against murder, for example, would be derivative from that "intrinsic" rejection towards unfairness. As a consequence, too, "murder" would not be "intrinsically" wrong. What would be wrong, instead, would be the act of unfairly depriving someone of his life. In addition, the fact that we had these reactions or feelings of disgust would not give us reasons, per se, against those actions capable of triggering such feelings on us.

conducts that are “intrinsically, rather than consequentially, inconsistent with civil order [because] they violate it in themselves, since they are utterly inconsistent with the terms on which citizens could live together” (300). This different definition seems also odd, particularly in the work of an author who has consistently show to have clear communitarian sensibilities (more about this below). Given those sensibilities, how could he then refer to conducts that are “intrinsically…inconsistent with the terms on which citizens could live together”? How to maintain such an approach, in the face of societies that are in a continuous process of cultural development? What would be “utterly inconsistent…”, etc., in societies that are in a permanent process of learning and changing? Think, for example, about the Me Too movement, its meaning and implications: if the *me Too* movement taught us something, this was that what seemed to be “natural” a few years ago –say, a certain distribution of work and social roles between men and women- may result “outrageous” nowadays. The point is: we “construct” the notions of “appropriateness”; “outrageous”, “immoral”; etc., in an ongoing process of “dialogue” with others. Within this alternative picture, there seems to be little room for “public wrongs” understood as wrongs that are “intrinsically…inconsistent with civil order”. As Nicola Lacey put it (in a review of Antony Duff’s most recent work), there is “no space outside culture: no ‘view from nowhere’ from which to appropriate criteria for the relevance of evidence, or reasonableness, or indeed the definition of criminal wrongs can be determined” (Lacey 2011, 307).

The communitarian author Charles Taylor presented a similar point a few years ago, with singular clarity. For him, “the crucial feature of human life is its fundamentally *dialogical* character” (Taylor 1992, 32). Following George Herbert Mead and his idea of “significant others” he adds that “the genesis of the human mind is…not monological, not something each person accomplishes on his or her own, but dialogical” (ibid.). For Taylor, “we define our identity always in dialogue with sometimes in struggle against, the things our significant others want to see in us” (ibid., 32-33). Taking into account these perspectives, Duff’s claim about public wrongs sounds problematic. In what concerns our shared values, there is nothing that stands “out there,” nothing to be “discovered” or “declared” as a pre-legal or pre-existing public wrong. Rather -I would suggest, following Taylor- we craft those shared values in a continuous interaction with our “significant others”. As a result of these interactions, we may finally decide, through more or less formal procedures, to encourage, discourage, and even punish, certain kinds of behaviors. But all of this would then be the product of a collective, human creation, rather than something to be discovered in the “intrinsic nature” of things, or “declared”, as pre-existing or pre-legal wrongs (more about this below).

3. THE DIFFICULTY OF BEING LIBERAL AND COMMUNITATARIAN AT THE SAME TIME

Let me now consider a different definition of "public wrongs", which can also be found in Antony Duff's recent publications. The alternative definition that I am now considering seems to be more sensitive to context, and therefore more dependent on considerations of "time" and "place". For instance, in certain occasions, Duff defines public wrongs as wrongs that are of concern to citizens as participants in the political community, where citizens are "engaged in a distinctive enterprise of living together, structured by a set of values that help to define that enterprise" (Duff 2010, 5; Edwards & Simister 2017, 110). For this view, what counts as the polity's business "depends on an account of the defining aims and values of such a polity", where those "aims and values" –it is here assumed- can "change over time" (Duff 2007, 142; Edwards & Simister 2017, 110). Similarly, in certain parts of his new book, Duff defines public wrongs as wrongs "directed against or impacting on some aspect of the polity's collective life…which concerns all citizens as citizens, and to which they must therefore respond collectively" (299). What all these views have in common, I believe, is a certain communitarian flavor: public wrongs are not seen here as permanent or unchangeable features of our life in common.

Now, and taking into account this new approach to the notion of public wrongs: Why would we have reasons to provide especial protections to those "aspect[s] of the polity's collective life…which concern[] all citizens as citizens"? Or, more specifically: What reasons would we have to define as public wrongs all those conducts that seriously challenged "significant aspects of the polity´s collective life"? Consider this example: knowing of the profound love we have for our community in Catalunya, someone may choose to defy our national feelings, make fun of our ancient communal traditions, and even insult us for belonging to this "land of nationalists". The vast majority of us could take such conducts as directed against us, and contrary to what define us as citizens of this community. Someone could seriously claim, in Catalunya, that those insults "deny or negate the conditions under which we can live as citizens who share a civic life" (300). In fact, if we define our civic identity in terms of a shared language and same shared traditions, then to launch an attack precisely against those shared values (those values that define us as Catalans), would imply to attack the same social bonds that keep us together and define who we are. In sum, someone could claim that the challenge posed by those anti-nationalists aggressions seriously and negatively impacts "on some aspect of the polity´s collective life," in ways that concern all us as citizens of this

country. But the question is: do we really have reasons to consider such wrongs (those insults, that mockery) as public wrongs? Do we really have reasons to take those anti-nationalist outbreaks so seriously (this is to say, in ways that could even require the use of our coercive powers)? Could we really say, in those circumstances, and following Duff, that those offenders are required to "answer to [their fellow citizens] for wrongs that are their business", because they have violated the values that help to define what the polity is? (Duff 2007, 142; Edwards & Simister 2017, 110).

Probably, Duff would object to that example. And he would (now) do so in the name (not of shared, localized, communal values, but rather) of more universal values. This answer, however, would be unattractive, and its unattractiveness would be originated in Duff's unjustified oscillation between the universal and the communal; the general and the particular; the critical view about the structures in which we live, and the attachment to the communities where we live. Typically, Duff claims: "we must begin with individuals in community: with individuals who already recognize themselves as living in community with others" (191) and also that we see our "good as partly bound up with the collective good of my fellow citizens" (190), *but also*, and at the same time, that "we should look critically at the structures and practices of our polities: they are not given, as the unchangeable framework of our civic life" (ibid.). These quotes, which appear almost in the same page, represent –as I shall illustrate- just one example of Duff's persistent attempt to reaffirm and resist liberal and communitarian values.

Duff, it seems to me, wants to vindicate both things at the same time (say, universal and local values), which may sound attractive in principle, but results untenable in the end: one cannot consistently defend both things as part of the same theoretical framework. Unfortunately, the fact is that Duff endorses a peculiar political philosophy, which at the same time wants to be republican, liberal and communitarian (186, 189). To reclaim, at the same time, all these different philosophical commitments, sounds strange within the context of contemporary political philosophy. In the end, what explains the existence of these diverse philosophical approaches is the fact that they offer different, and sometimes even opposite answers, to similar questions. Then, one may choose to declare his adhesion to different political philosophies at the same time but, in the face of the difficult questions –in those situations where having one or another political philosophy really matters- one needs to choose, and declare where he stands. At that point, it results simply unreasonable to continue advocating for opposing political philosophies at the same time.

What are we supposed to do, for instance, when the so-called "shared values" of our communities appear not to be shared by one –say, the dissident, the anarchist or the anti-conformist? Are we supposed to enforce the values of our community, so as to ensure that the basic cultural structure of our society is not undermined, or should we rather protect the individual rights of the dissident, no matter the impact of his challenge on the bonds that held us together? What should we do in the face of conducts that profoundly offend our shared understandings? What are we supposed to do with the anti-nationalist that mocks the symbols that –we assume- define us as "Catalans" –the symbols that structure our common identity?[11]

In sum, it is in the face of these difficult cases that we are required to define whether we are primarily liberals or communitarians. It is precisely in these cases when we cannot just claim to be, at the same time, liberals, communitarians, republicans and deliberative democrats. Unfortunately or not, we are required to take sides.

4. THE INSTITUTIONAL IMPLICATIONS OF "DECLARING PUBLIC WRONGS": A PATCHWORK OF VIEWS

Having reached this point, I shall now focus on another aspect of Duff's approach to the notion of "public wrongs", which I also find problematic. I am referring to the question about how to reach public decisions about "public wrongs," through the institutional system.

In a crucial section of his book, which appears under the title "The Law's Voice", Professor Duff refers to the way in which public wrongs are "declared" as such. He states: "The criminal law…,should be seen as a communicative enterprise: in its substantive dimension, it declares certain

11 Note that the reasoning behind this example –where we consider the anti-nationalist attack as an attack against "us"- does not significantly differ from the one that Marshall and Duff offer, for example, in order to justify the treatment of "rape" as a shared wrong. They claim that women may consider rape "as a collective, not merely an individual, wrong (as an attack on them), insofar as they associate and identify themselves with the individual victim. For they define themselves as a group, in terms of a certain shared identity, shared values, mutual concern –and shared dangers which threaten them: an attack on a member of the group is thus an attack on the group…the attack in this individual victim is itself also an attack on us –on her as a member of the group and on us fellow members" (Marshall & Duff 1998, 19-20). The question is then: Why should the attack against one women be considered an "attack on the group" (given our "shared identity, shared values, mutual concern," etc.), but not so the attack against the one who sings our national anthem? Finally, I want to note that, for reasons of space, I am not making reference, here, about another significant in Duff's view of the subject, which concerns the cases in which victims (i.e., victims of domestic violence) refuse to share their wrongs with the community. In this respect, see, for example, Dempsey (2011).

kinds of conduct to constitute public wrongs—to be wrongs that merit a formal public response; in its procedural dimension, it provides the process through which those accused of committing such wrongs are called to formal public account" (109; Duff 2001).

The fact that certain wrongs are "declared" to be public wrongs is particularly important for our approach to the matter, because it implies denying that those wrongs are, in one or another way, created, or collectively defined as such. Duff claims, for instance, that "the law that defines such *mala in se* as criminal does not create their wrongfulness: rather, its point is to declare that these (pre-existing, pre-legal) wrongs are, when committed within the polity's jurisdiction, wrongs for which their perpetrators are liable to be called to answer by the polity through its criminal courts" (123). Moreover, for him, "[t]o say [that substantive criminal law[declares these norms is to deny, implicitly, that this is a matter of norm-*creation*; although it involves a process of developing precise determinations of norms that are extra-legally somewhat vague or indeterminate" (207).[12]

We have already challenged Duff's claims about intrinsic wrongs, and suggested instead that people –and communities- constitute themselves through dialogic, creative processes. Now, we are going to express our reservations concerning Duff's idea about public wrongs as wrongs to be "declared," rather than created or collectively defined (collectively defined, for instance, through an ongoing and unending process of public conversations).

There are numerous things to be said concerning Duff's view about "declaring public wrongs", but here I just want to concentrate on one particular aspect of the matter. The problem I am thinking about relates to the *institutional mediations* required by these "declarations". The problem originates here: according to Duff's approach, some of the most crucial

12 Notably, in this book, more than in any other of his works, Duff acknowledges the "fact of disagreement", and the importance of public deliberation in the area of Criminal Law. In the conclusions of his work he for instance refers that he tried to argue for a "thin, formal principle [of criminalization, related to public wrongs], which leaves most of the substantive work to be done through what should be a process of public deliberation about the construction of the polity's civil order, about what kinds of conduct should be counted as public wrongs within that order, and about appropriate ways of responding to such wrongs" (332-3). These kinds of statements represent an interesting and novel development in his theory, given the way in which they recognize both the existence of disagreements and the importance of deliberation. However, they also show the persistent ambiguities we find in his views, between universalism and localism; liberalism and communitarism; legal moralism and subjectivism; etc. Duff needs to still clarify, for instance, how those views fit with the ideas of mala in se; or the pre-legal, pre-existing, non-created and declared public wrongs: What, then, is going to be discussed in those deliberations? The substance of the Criminal Law? Its content? Its details?.

decisions about our life together would be adopted "for the people," "in the name of the people," but finally "by a few people," and without communicating or discussing with the rest of them.[13] The fact that someone is going to "declare" what wrongs are to be considered "public wrongs", and do it in our name, but without talking to us, creates serious difficulties of "mediation", and serious risks of "distortions": who is going to do decide such important matters for us? Who and for what reasons could be authorized to speak in our name? How is this person or group going to know what matters to us, without talking to us first? Note, again, that we are dealing with very risky material here: we do not want to commit mistakes in this regard (say, regarding what to define as public wrongs), because our life and liberty may result thus compromised.

Now, those "declared" public wrongs have to go through a complex institutional process before they can become an integral part of our Criminal Law. A legislature may include those public wrongs as part of our Criminal Code; an administrative agency –the police- may detain someone in the name of a Criminal Law that criminalizes those public wrongs; a judge may be required to decide a conflict related to the application of the Criminal Law; etc. All those institutional mediations complicate things further, in a serious way.[14]

In fact, for the Criminal Law to be able to "declare" certain pre-existing wrongs as public wrongs, a complex institutional system needs to be in place. When the "declarative" process becomes in this way institutionalized– say, through the intervention of legislative, administrative and judicial agencies- some serious risks immediately appear. For instance, through that process, the voice of the law may come to distort, rather than express in any meaningful way, the voice of the community. I mean: in those conditions it is highly probable that the voice of the law (say, the voice of the law declaring certain wrongs as public wrongs) will have little connection with what the community itself would have said, had it been consulted about those matters. Predictably, at each stage of the process, interest groups, pressure groups, private interests, bureaucratic interests, etc., will come into play, adding new "distortions" or "noise" into our

13 That the decisions at stake are crucial for our life in common should be clear from the start: we are talking about issues related to our most cherished values, and also about questions that may require the use the coercive state apparatus, in its most extreme forms. This is why we need to be especially careful regarding how we define and act upon those public wrongs.

14 Note, however, that Duff refers to a criminal law system that first, "declare[s] and define[s] wrongs", and second "provide a process through which those accused of committing such wrongs can be called to formal account" (214). The "process" seems to be provided for the second task, and not for the first one.

decision-making (or, for this matter, "declarative") process.

In sum, after the intervention of so many different public agents with very different democratic credentials, different legitimacy, and different interests, elected in different times and through different processes, what we most probably obtain is a *patchwork of views* rather than decisions that express the community's voice. As Carlos Nino put it:

> "there is no guarantee whatsoever that the result of this awkward mix of different decisions, which can ultimately respond to a combination of findings from different debates, carried out by different groups of people at different times, have some resemblance to the majority consensus that obtained after an open and free debate" (Nino 1991, 578).

Duff's theory, which aims to be able to make sense for actual societies, would need to address these risks more seriously. In the end, and given the institutional framework that we have in place, in what sense could we expect that the Criminal Law became "our" Criminal Law? Under those institutional conditions, what reason could we have for maintaining that the voice of the law expresses the voice of the people? How could someone reasonably claim that the Criminal Law speaks with the community's language?

5. THE TENSIONS BETWEEN "THE VOICE OF THE COMMUNITY" AND DEMOCRACY. A MILLEAN APPROACH

Let me now explore a little bit more Duff's statements about the law as an expression of "the community's voice". What Duff says in this respect is enormously relevant for those of us interested in establishing stronger connections between the Criminal Law and democracy.

In one of the many paragraphs he wrote in this respect, Duff stated: "when the substantive criminal law defines certain kinds of wrong as public wrongs, it must speak, or claim to speak, in the voice of a linguistic and normative community whose law it is, and whose values it thus declares; and it must speak to an audience who can be expected to understand those declarations as grounded in what could be reasons for action—reasons for them to act. In defining theft, for instance, as a crime, the law defines it as a wrong—something that its addressees have normally conclusive reason not to do, for which they will be liable to be called to public account if they do it; but they can have such reasons only if they can

understand the (supposed) wrongness of theft, and the law that declares its wrongness" (110). This view, I want to emphasize, has always been present and has always played a central role in Duff's approach to the subject.[15]

Now, I find numerous problems in this view, which begin with Duff's suggestion about a law that "must speak or claim to speak" the voice of the community. Obviously, it is one thing to "speak" the voice of the community, and another very different one to "claim to speak" its voice. Anyone can claim to speak for the community, but only the same community –I shall maintain- can speak for itself, with its own voice.

The idea that only the same community can speak for itself relates to the particular conception of democracy that I endorse, namely a deliberative conception of democracy, and its Millean foundations. My point of departure is, in fact, John Stuart Mill's claim, according to which each person is to be considered the best judge of his own interests. For Mill, in fact, each person has something personal and non-transferable to say about him or herself and how the external world affects his or her own interests. In his famous book *On Liberty*, and trying to provide support to his proposed "harm principle", Mill introduced his view on the matter. He claimed:

> "That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise.

15 In other crucial writing on the same topic, Duff maintained: "my understanding of what is said to me, and of the possibility of saying it for myself, depends not merely on the content of what is said, but on the voice in which it is said –on who speaks to me, and in what accident; indeed, the content of what is said, what It means to the hearer, cannot be entirely divorced from the voice in which it is said…we must… wonder whether it is a voice which all citizens could hear as their –or as a voice which could be theirs" (Duff 1998, 204). In another piece of his work, he claimed: "If there are individuals or groups within the society who are (in effect, even if not by design) persistently and systematically excluded from participation in its political life and in its material goods, who are normatively excluded in that their treatment at the hands of the society's governing laws and institutions does not display any genuine regard for them as sharing in the community's values and who are linguistically excluded in that the voice of the law (through which the community speaks to its members in the language of their shared values) sounds to them as an alien voice that is not and could not be theirs, then the claim that they are, as citizens, bound by the laws and answerable to the community becomes a hollow one" (Duff 2001, 195-6).

> To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else" (Mill 2003, 18).

In support of his view, Mill resorted to at least two additional reasons, which we could call the *motivational argument* and (following Cass Sunstein) the *epistemic argument* (Thaler and Sunstein 2009, Sunstein 2014). The motivational argument says that each individual "is the person most interested in his own well-being". The interest that each person has in his or her own interest, contrasts with the interest that others may have in one's well-being. For Mill, the interest that any other person could have in one's well-being was "trifling, compared with that which he himself has"; while the interest that society could have in one's situation was "fractional, and altogether indirect." Individual self-government would thus be valuable not only in itself, as an expression of basic individual freedom and choice, but also because its connection with each person's well-being.

Together with the motivational argument, Mill made reference to the epistemic argument, which is still more interesting for our present purposes. This argument was based on an empirical assumption according to which, concerning his own sentiments and circumstances, "the most ordinary man or woman…has means of knowledge immeasurably surpassing those that can be possessed by anyone else" (see also Sunstein 2014, introduction). Let me quote –again, at some length- Mill's view on the topic, which is very rich:

> "neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it. He is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling, compared with that which he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional, and altogether indirect: while, with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else. The interference of society to overrule his judgment and purposes in what only regards himself, must be grounded on general presumptions; which may be altogether wrong, and even if right, are as likely as not to be misapplied to individual cases, by persons no better acquainted with the circumstances of such cases than those are who look at them merely from without...he

> himself is the final judge. All errors which he is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain him to what they deem his good" (ibid., 64, emphasis added).

To summarize: for Mill, all attempts by society to decide in the name of a particular individual, thus overruling his or her own will, would be based on "general presumptions, which may be altogether wrong" or "misapplied to individual cases". This is why –Mill assumed- each person had to be taken as "the final judge" in what regards his or her own interests.

Based on these Millean assumptions, and in agreement with other theorists of democracy, I would suggest that no one, but the same community, should be considered authorized to speak in the name of the community's interests (see, for example, Nino 1991). To state it differently: in the same way that each individual should be considered to be "the final judge" of his or her own interests, every community should be taken to be "sovereign" in what concerns its own affairs.

Now, in order to know what the community actually says about its own interests, what it thinks, what it considers to be good or bad, what it takes to be right or wrong –I submit- we have only one reasonable possibility: we need to launch a public, collective conversation, where each person participates as an equal together with all the others. Every voice has then to be listened, every viewpoint has to be considered, every interest has to be taken into account, so as to make it possible that the "voice of the law" expresses the "voice of community". If we did not allow this process to take place, the impartial character of our decision-making process would become compromised –the possibility of properly balancing the demands of all would result seriously affected.[16] Think, for instance, about what Duncan Ivison reported, concerning the situation of aboriginal people in Australia, Canada and the United States. He stated: "It is striking that, historically…many Aboriginal people have come to see the criminal law as simply a means to impose an alien and hostile conception of community over them, justified usually in terms of being for their own good. The fact that indigenous people in Australia, Canada, and the USA are amongst the most arrested and jailed people *in the world*, lends (depressingly) ample support to the acuity of such a perception" (Ivison 1999, 94).[17]

16 In previous work, I distinguished between this "deliberative" approach and both elitist and populist understandings of the Criminal Law. See, for example, Gargarella 2017.

17 And he adds: "How can we speak of the offender violating our common norms and values. Whose norms? Which values?" (ibid., 92).

In sum, either we allow someone to speak in the name of the community -with all the risks of “distortions” here involved- or we design an institutional -deliberative- process aimed at listening and balancing the voice of “all those potentially affected”, which would maximize our chances of deciding in ways that are respectful to the demands of all.[18]

6. CONCLUSIONS

In this work, I have challenged some of the ideas presented by Antony Duff’s in his book *The Realm of Criminal Law* and, more particularly, I questioned his approach to the idea of “public wrongs.” I claimed that his views on the subject unjustifiably put into question some shared ideas about what it means to live in a democratic and multicultural society. More particularly, I maintained that, in multicultural societies, we define the basic elements of our identities in dialogue with different and “significant others,” which –I submit- makes it difficult to identify public wrongs that are –in his words- “clearly inconsistent with… any remotely plausible conception of civil order”. Our views on the subject –I claimed- tend to be different in different times and places, which does not necessarily mean to say something in favor of these changing cultural values. In addition, I suggested that Duff’s approach to this and similar subjects failed as a consequence of his unjustified theoretical oscillations between a liberal and a communitarian political philosophy. Moreover, I objected to Duff’s opinions about how public wrongs are “declared”, by making reference to the problems that unavoidably emerge when we situate the task of “declaring public wrongs” in the context of an institutionalized democratic system. Finally, I maintained that many of the problems that I find in his views originate in Duff’s implausible understanding of democracy: the “voice of the community” –I claimed- can and should only be expressed by the community itself, through an ongoing and unending collective conversation.

18 One of the referees who evaluated this article asked me to clarify how my approach could endorse, at the same time, something like the “harm principle” and the claim that the community should always have the final word concerning how to deal with its own public affairs: it may well happen that the community’s deliberative decision may work “against the requirements of the harm principle.” I understand the point, but I don’t see it as really problematic, as a result of reasons that I cannot fully address within the scope of this article. Summarily speaking, however, I would suggest the following: i) first, I see the “harm principle” as directly related to the principle of “equal moral dignity”, which I take to constitute the fundamental presupposition of a deliberative democracy: in a society where that principle is severely violated, democracy (any version of it) could not work; ii) assuming a Jeffersonian view, I would suggest that societies would tend not destroy themselves, if they had fair, proper chances to deliberate about their own future.

their allegiance, nevertheless most members of a polity do not join it voluntarily and, typically, their polity cannot revoke their membership.

Codes of professional ethics are a seemingly useful analogue for the criminal law because they are codified. They have the same 'look' as the formal part of the criminal law. But, their use in an analogy comes at a high price and may heighten, rather than lessen, critics' skepticism about Duff's account of public wrongs and our standing to hold each other to account.

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