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Public Wrongs and Power Relations in Non-Democratic & Illiberal Polities

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Abstract

One of the influential contributions to criminalisation theories is Duff's work on public wrongs, which offers a thin master principle of criminalisation, proposing that we have a reason to criminalise a type of conduct if it constitutes a public wrong; one that violates a polity's civil order and forms part of that polity's proper business. The nature of the civil order, the scope of its proper business, and the distinction between the public and private realms of wrongs are context-relative to each polity, structured by their legal, institutional, and informal values and ways of life. Such a context-relative view led to problematic criminalisation examples raised by Duff and his critics. This article engages more fully with the relativism of the civil order and public wrongs in non-democratic and illiberal contexts. It draws on examples such as Saudi Arabi and Iran, and Beetham's work on the legitimation of power to argue that conceptualising the civil order as an undifferentiated whole that represents a polity's chosen way of life overlooks the ways in which the civil order's values and practices are shaped by relations of power and exclusion rules and processes. This, in turn, exposes the theory to the risk of mirroring and legitimising unequal relations of power and impeding efforts to change them. This is also due to the theory's lack of proper normative guidance on the legitimacy of criminalisation. The potential commitment to – instead of a preference for – democracy and guarantees of equality and freedoms might help strengthen the theory normatively, but it is insufficient to guard against the raised problems.

Keywords Criminalisation · Public Wrongs · Duff · Civil order · Non-democratic regimes

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Criminal law philosophy has seen rising scholarly interest in theories of criminalisation, fuelled for many by the need to address problems of over-criminalisation.[1] One of the influential works in this regard is Duff's theory of public wrongs, which offers a thin master principle of criminalisation, proposing that we have a reason to criminalise a type of conduct if it constitutes a public wrong; one that violates a polity's civil order and forms part of that polity's proper business.[2] The nature of the civil order, the scope of its proper business, and the distinction between the public and the private realms of wrongs are context-relative to each polity, structured by their legal, institutional, and informal values and ways of life.[3] Duff expressed a normative preference for democratic, republican, and liberal conceptions of the public order while advancing that these are not necessary pre-conditions. This led him to engage with how his theory might apply in other contexts by drawing on examples such as Iran and Indonesia.[4]

This invites a discussion to explore more fully how public wrongs and the context-relative civil order might operate in non-democratic and illiberal contexts.[5] Such discussion is particularly important because one of the principal ways of engaging with a criminalisation theory is to ask how well it guards against a state's potential

[1] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2007); R. A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, Victor Tadros (eds), *The Boundaries of the Criminal Law* (Oxford: Oxford University Press, 2010); R. A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, Victor Tadros (eds), *The Structures of the Criminal Law* (Oxford: Oxford University Press, 2011); Andrew Simester and Andreas Von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Oxford: Hart Publishing, 2011); R. A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, Victor Tadros (eds), *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013); R. A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, Victor Tadros (eds) *Criminalization: the Political Morality of the Criminal Law* (Oxford: Oxford University Press, 2014); F. Meyer, "Towards a Modest Legal Moralism: Concept, Open Questions, and Potential Extension", *Criminal Law and Philosophy* 8 (2014): pp. 237–244; A. Y. K. Lee, "Public Wrongs and the Criminal Law", *Criminal Law and Philosophy* 9 (2015): pp. 155–170; T. Hörnle, "Theories of Criminalization", *Criminal Law and Philosophy* 10 (2016): pp. 301–314; Lindsay Farmer, Making the Modern Criminal Law (Oxford: Oxford University Press, 2016); Andrew Cornford, "Rethinking the Wrongness Constraint on Criminalisation", *Law and Philosophy* 36 (2017): pp. 615–649; Victor Tadros, *Wrongs and Crimes* (Oxford: Oxford University Press, 2017); R A Duff, *The Realm of Criminal Law* (Oxford: Oxford University Press, 2018); Adam R. Pearce, "Evaluating Wrongness Constraints on Criminalisation", *Criminal Law and Philosophy* 16 (2022): pp. 57–76; Y Lee, "*Mala Prohibita*, the Wrongfulness Constraint, and the Problem of Overcriminalization", *Law and Philosophy* 41 (2022): pp. 375–396.

[2] R A Duff, *The Realm of Criminal Law* (Oxford: Oxford University Press, 2018). For detailed engagement with various aspects of Duff's theory of public wrongs see, "Duff Symposium", *Jerusalem Review of Legal Studies* 18(1) (2018); "Symposium on Anthony Duff's The Realm of Criminal Law", *Law, Ethics and Philosophy* 7 (2019); "Special Issue on Antony Duff's The Realm of Criminal Law", *Criminal Law and Philosophy* 14(3) (2020).

[3] Duff, *The Realm of Criminal Law* (n 2), p. 83.

[4] ibid. p. 156, 174; R. A. Duff, "Criminal Law and Criminalization: A Response to Crisis", *Jerusalem Review of Legal Studies* 18 (2018): pp. 62-87, p. 75; R. A. Duff, "Criminal Law, Civil Order and Public Wrongs", *Law, Ethics and Philosophy* 7 (2019), pp. 233-270, p. 249-250.

[5] I am concerned here with liberalism in a similar meaning to what Zaibert identifies as narrow liberalism, "which concerns itself specifically with the criminal law", and builds on Feinberg's view of "liberalism in a narrow sense", arguing that when one describes a criminal law as illiberal, one usually refers to criminal laws which unduly punish citizens for how they choose to lead their lives, and in this sense, narrow liberalism's goal is "to curb the State's punitive powers and to protect citizens' freedoms". Leo Zaibert, *Punishment and Retribution* (Aldershot: Ashgate, 2006), p. 158-161.

oppressiveness and intrusiveness over citizens' lives and freedoms. The answer to this question will not be complete if a theory is only assessed in ideal conditions. Rather, a more robust test would be how it functions in non-ideal conditions, such as in illiberal and non-democratic regimes, especially since we should aim to think about criminalisation in a way that responds to the experiences of polities that form over half of the world population who – still – live in non-democratic contexts.[6] Further, it is essential to engage with the worries of relativism that emanate from the context-dependent view of the civil order, which raise over and under-criminalisation problems as highlighted by Tadros, Tomlin, Chiao and others.[7]

In approaching this discussion and thinking about criminalisation, Duff invites us to start with the public realm instead of the wrongs; "we should begin, that is, by thinking not about wrongs, but about the public realm— the realm in which public wrongs are identified".[8] In taking this invitation seriously, the article focuses on the public realm and the conceptualisation of the civil order in the public wrongs theory. It draws, in *the first section*, on Beetham's work on the legitimation of power,[9] arguing that conceptualising the civil order as an undifferentiated whole, which represents a polity's chosen way of life, overlooks the ways in which the civil order's values and practices are shaped by relations of power and exclusion rules and processes. This, in turn, exposes the theory to the risk of mirroring and legitimising unequal relations of power and impeding efforts to change them. The *second section* expands Beetham's ideas on the self-confirmatory circle, which refers to how power relations produce the conditions of their own legitimation and their resistance to change, to show why the role of dissent and criticism in the public wrongs theory falls short of guarding against the raised worries. Finally, the *third section* argues that these problems are due to the theory's lack of proper normative guidance on the legitimacy of criminalisation beyond reproducing societies' internal logic. The potential commitment to – instead of a preference for – democracy and guarantees of equality and freedoms might help strengthen the theory normatively, but it is insufficient to guard against the raised problems. The modest relativism, adopted by Duff, thus leaves the theory without normative force to exclude intrusive and oppressive criminalisation practices.

[6] The Economist Intelligence Unit, *Democracy Index 2020*, (The Economist Intelligence Unit Limited, 2021), p. 3.

[7] Victor Tadros, *Wrongs and Crimes* (Oxford Scholarship Online, 2017); Patrick Tomlin, "Duffing Up the Criminal Law?" *Criminal Law and Philosophy* 14 (2020): pp. 319–333; Vincent Chiao, "Reflections on Themes from The Realm of Criminal Law", *Jerusalem Review of Legal Studies* 18 (2018): pp. 38-49; Kimberley Brownlee, "Professional Ethics and Criminal Law", *Law, Ethics and Philosophy* 7 (2019): pp. 173-189. For Duff's responses see: R. A. Duff, "Criminal Law and Criminalization: A Response to Crisis", *Jerusalem Review of Legal Studies* 18 (2018): pp. 62-87; R. A. Duff, "Criminal Law, Civil Order and Public Wrongs", *Law, Ethics and Philosophy* 7 (2019): pp. 233-270; R. A. Duff, "Defending the Realm of Criminal Law", *Criminal Law, Philosophy* 14 (2020): pp. 465–500.

[8] Duff, *The Realm of Criminal Law* (n 2), p. 79.

[9] David Beetham, *The Legitimation of Power* (London: Bloomsbury Publishing 2013).

1 The Public Realm and Power Relations

Duff's theory of public wrongs is part of his broader criminal and penal philosophy, which connects three dimensions of the criminal justice system; the substantive criminal law, the criminal trial, and punishment. The substantive criminal law expresses the values which bind the community together by declaring a set of moral wrongs that fall within the public's proper business. When a citizen commits a crime and violates the moral prohibitions set by the law, they have not only wronged their victims, but they have also violated "the central values of the political community, as expressed in its criminal law; the crime thus damages or threatens the offender's normative relationships […] with her fellow citizens".[10] To rectify this damaged relationship, citizens call the defendant to account in the criminal trial and hold her responsible for her moral wrongdoing. If declared guilty, the offender is punished, censured, and blamed for wronging the victim and violating the community's values, aiming eventually to induce secular penance.[11]

Thus, the criminal law's expression of the moral values which bind the community together is essential not only for the justification and legitimacy of the criminal law, but also for legitimately calling the defendant to account and punishing her to induce a return to the shared values. The question then is how, or rather where, to find these shared values to guide the criminalisation process and justify the entire criminal justice system. Duff invites us to start from the public realm of a polity, and "[t]he public realm is the realm in which we live and act as members of the polity—the realm of our civic activity, as distinct from our private activities within those other practices and practice-based communities in which we also live and act".[12] The moral wrongs that fall within the private realm where we engage in private activities and relationships are outside the scope of the criminal law's concern. Only those wrongs which take place in the public realm are – in principle – candidates for criminalisation and appropriate for being called to account for their violations.

Within the public realm, we should aim to identify further and, more specifically, a core order of values, practices, and ends that shape the community's life, constituting its civil order. The civil order, then, defines the shared values and public wrongs that the criminal law should reflect, culminating in a master principle of criminalisation where

A. We have reason to criminalize a type of conduct if, and only if, it constitutes a public wrong.

B. A type of conduct constitutes a public wrong if, and only if, it violates the polity's civil order.[13]

The civil order is "partly an institutional and legal order: it is structured by the polity's public institutions (of governance, of education, of health and welfare, of

[10] R. A. Duff, "Penance, Punishment and the Limits of Community", *Punishment & Society* 5(3) (2003): pp. 295–312, p. 300.

[11] R. A. Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2011).

[12] R. A. Duff and S. E. Marshall, "Crimes, Public Wrongs, and Civil Order", *Criminal Law and Philosophy* 13 (2019): pp. 27-48, p. 34.

[13] Duff, *The Realm of Criminal Law* (n 2), p. 232.

national defence, of culture, and so on), and by the laws that its legislatures enact and under which its officials act".[14] It also "encompasses the informal, extra-legal practices and expectations by which our social lives as citizens are structured".[15] The public wrongs stem from the practices of the community in how members of the polity live with each other and the values with which they define their community.[16] The legislator's task becomes that of giving a "more adequate and practicable expression to the values that already structure the community's life and understanding".[17]

Therefore, marking the boundaries of the public realm and the civil order that structure the community's life, as opposed to the private realm, which concerns citizens' private lives, is paramount in guiding criminalisation and legitimating the criminal law. However, Duff offered little normative substance on how to draw these boundaries and what guides the distinction between the public and private realms. He opted instead for a "context-dependent" view where "the scope of its [a polity] legitimate interests, depend on the practice or form of life in which the distinction is being drawn".[18] Thus, embracing what he called "a modest pluralism", [19] and "a modest kind of relativism",[20] which is

> one that allows, or requires, us to recognize that we should not criticize some polities whose civil orders are structured by values and goals rather different from our own, and whose criminal laws have a rather different scope, but should rather accept that they have, *quite properly*, *found their own path*.[21]

This context-dependent view of the civil order raised worries of over and under-criminalisation problems. Tadros argued that, on Duff's theory, if a polity fails to adopt certain important values as part of its public realm, then the criminal law may legitimately ignore very serious wrongs, such as "wrongs against women in very sexist societies: the wrongs of domestic abuse, female genital mutilation, sexual harassment, exploitation, and rape".[22] Further, the absence of any limits on what a polity can include as its proper business opens the door for over-criminalisation, where despite the disagreement with Moore, Duff's theory is closer to criminalising every moral wrong, "for any wrongdoing could become the state's business by the public binding itself together by the values that underpin the wrong".[23] Similarly, Chiao argued that "Duff's approach to criminalization boils down to: public wrongs, and

[14] Duff and Marshall, "Crimes, Public Wrongs, and Civil Order" (n 12), p. 34.

[15] Duff, *The Realm of Criminal Law* (n 2), p. 159.

[16] R A Duff, "Responsibility, Citizenship, and Criminal Law" in R. A. Duff and Stuart P. Green (eds.), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 125–148, p. 128.

[17] Duff, *Punishment, Communication and Community* (n 11), p. 59.

[18] ibid.

[19] R. A. Duff, "Criminal Law and Criminalization: A Response to Crisis", *Jerusalem Review of Legal Studies* 18 (2018): pp. 62-87, p. 75.

[20] Duff and Marshall, "Crimes, Public Wrongs, and Civil Order" (n 12), p. 48.

[21] Duff, "Criminal Law and Criminalization: A Response to Crisis" (n19), p. 75 (emphasis added).

[22] Victor Tadros, *Wrongs and Crimes* (Oxford Scholarship Online, 2017), p. 127.

[23] ibid., p. 126.

hence crimes, are whatever enough people (or the right people) in some society think is their business to define as crime […] relativizing the definition of crime to shared traditions seems problematic".[24] Tomlin also worried that "[a]t the scary end, 'public wrongs' seems so permissive as to provide hardly any brakes on the criminalization process at all—if we think something is 'our' business, we can criminalize it. This hardly offers us the principled bulwark against overcriminalization that we seek".[25]

I agree with Tadros, Chiao, and Tomlin; however, the over and under-criminalisation problems that they identify are manifestations of a more fundamental issue that concerns how the public realm and the civil order are conceptualised. Duff assumes that the values and ends which inform the civil order are formed by the collective equal contribution of all polity members who have found their own path. However, the public realm and the civil order are usually shaped by internal and external power relations and processes of exclusion, reflecting the ends and values advocated by dominant groups. The path is structured more than chosen. Beetham's work on the legitimation of power is helpful here in unpacking this argument.

Beetham reminds us that "[t]o treat any collective as an undifferentiated whole, as a single entity with definable purposes and interests, *is to overlook the way these purposes and interests are both constructed by and mediated through its internal relations of power*".[26] These relations of power usually revolve around processes of exclusion from key resources, spheres of activity, and positions of authority. They emanate from and are maintained by formal and informal exclusion rules that act as "basic 'keep out' signs which exclude the majority, and determine their relative powerlessness".[27] To demonstrate how power relations contribute to structuring a polity's purposes and values, let's reflect on the example of criminalising driving by women as a public wrong.

Let's imagine a polity like Saudi Arabia – in the not-so-distant past[28] – where the public realm and the civil order are shaped by the categorisation of women as "culture bearers" who represent the polity's morality and whose access to public spaces is curtailed by notions of segregation.[29] The institutions of health and education are segregated according to gender, so women have their own hospitals, can only be seen by women doctors, and mostly attend all-female schools and universities. There are formal legal rules which impose male guardianship on women, necessitating male

[24] Vincent Chiao, "Reflections on Themes from The Realm of Criminal Law", *Jerusalem Review of Legal Studies* 18 (2018): pp. 38-49, p. 41.

[25] Patrick Tomlin, "Duffing Up the Criminal Law?" *Criminal Law and Philosophy* 14 (2020): pp. 319–333, p. 319-320.

[26] Beetham, *The Legitimation of Power* (n 9), p. 47 (emphasis added).

[27] ibid., p. 51.

[28] I say in the not so distant past to acknowledge the recent rapid changes that have been sweeping the country with regard to women's rights; however, various forms of discrimination remain part of the legal and extra-legal practices. *See*, Aliki Kosyfologou, "The Status of Women in Saudi Arabia: Transition, tradition, controversies, and political oppression" *Rosa Luxemburg Stiftung – Gender Relations – Middle East* (11 May 2021), available at https://www.rosalux.de/en/news/id/45,316/the-status-of-women-in-saudi-arabia.

[29] Annemarie van Geel, "Separate or together? Women-only public spaces and participation of Saudi women in the public domain in Saudi Arabia" *Cont Islam* 10 (2016): pp. 357–378, p. 362.

approval before granting women a passport, a right to travel or to marry. There are also informal social rules, which exclude women from access to key resources and social activities, shaped by expectations regarding women's behaviour, dress code and the sort of jobs compatible with their domestic responsibilities. In this context, driving by women is seen as a public matter that risks the decay of morality in society if permitted; therefore, guided by their civil order, driving by women is criminalised.

This civil order is shaped by the legal and extra-legal rules which excluded women since the late 1970s.[30] The rules of exclusion themselves have been shaped by internal pressures from dominant groups seeking more conservative policies and external pressures from international players calling for reforms.[31] In this context, conceptualising the civil order as the product of how members of the polity chose to shape their life together conceals the reality of how internal and external power relations shaped the values and ends of the polity in the way that they are currently represented. The notion of a collective civil order offers a cloak of invisibility to the inherent inequalities and exclusion of women from shaping the public realm by portraying the current social arrangement as the natural development of the polity's chosen path. The public wrongs principle directs our attention to simply ask *what is the civil order of this polity* to identify the kind of wrongs that should be criminalised when there is a preliminary important question of *how this civil order was structured and maintained in the first place*.

This example is not unique in demonstrating how power relations and processes of exclusions shape the civil orders of polities. Let's consider another example Duff used concerning the criminalisation of contraception – among other things – when such criminalisation genuinely reflects the values and ends of a polity which considers "the proper role of sex" to be part of its civil order.[32] The conceptualisation of such civil order as a polity's chosen way of life is what leads Duff to advance that, in a limited sense, "we (whether 'we' are unhappy members of it, or critical observers of it) must agree that in one way it [the polity] acts quite legitimately in criminalising these kinds of conduct" because they reflect what they indeed count as public wrongs.[33]

However, the limited legitimacy derived from grounding such a criminalisation decision in a genuine civil order is only possible by painting over the unequal relations of power that shape the role of sex in the polity and referring to the polity as an undifferentiated whole. Marriage, sex, and reproductive health, including the use of contraception, are traditional spheres in which women suffer from continuous exclusion and power imbalance. The UN Women's Report in 2011 indicates that one of the critical areas in which.

> women's rights are least protected, where the rule of law is weakest and men's privilege is often most entrenched, are first, women's rights in the private and

[30] ibid.

[31] ibid., p. 360-364.

[32] Duff and Marshall, "Crimes, Public Wrongs, and Civil Order" (n 12), p. 37.

[33] ibid.

> domestic sphere, including their rights to live free from violence and to make decisions about their sexuality, on marriage, divorce and reproductive health.[34]

Further, the UNFPA report in 2021, which covers "about one in four of the world's countries", reported that "only 55 per cent of girls and women are able to make their own decisions in all three dimensions of bodily autonomy", with some countries scoring a staggering less than 10%.[35] The three dimensions are the power to say no to sex, the power to decide on contraception, and the power to decide on health care, including reproductive health.

In this context, when a polity decides that the use of contraception is a public matter and should be criminalised, it would be unrealistic to describe this civil order as the product of equal collective contribution from members of the polity. The current social arrangement is inevitably shaped by the exclusion of a considerable percentage of women from the power to shape the role of sex, not only in the use of contraception, but also more broadly by formal and informal exclusion rules and processes which limit their equality in marriage, their power to say yes and no to sex, and restrict their autonomy in reproductive health.

Therefore, when the criminal law uncritically reflects the civil order's values and practices, it mirrors the structured social organisation of power in the society. It becomes a genuine reflection of the prohibitions which feed the exclusion rules and processes. It legitimises calling citizens to account for defying the existing order, which excludes and disempowers them. It punishes individuals to censure their defiance and induce penance from their beliefs in equal relations, right to bodily autonomy, or right to move freely in the public realm, aiming to induce them to return to the shared values which support the existing relations of power.

Moreover, the risk of guiding criminalisation decisions by the civil order is not only that it will uncritically reflect the existing relations of power, but it will also strengthen and legitimise them. This, in turn, will place obstacles on the road towards political change for more equal relations. To explore this further, we must turn to a problematic feature of power relations, that they tend to produce the conditions of their own legitimation in a self-confirmatory circle. This will enable us to engage more fully with Duff's theory concerning the role of dissent and criticism within a polity as a guard against problematic criminalisation decisions.

2 Power Relations and Dissent

Nothing so far suggests that the public realm and the civil order are exclusively shaped by power. There are always processes of socialisation, agreements, and arrangements which take place in a polity and contribute to its collective purposes and values. However, as Beetham points out, "power relations constitute a crucial element in this process, both in themselves, and as an underpinning to the other means of

[34] UN Women, *2011-2012 Progress of the World's Women: In Pursuit of Justice* (UN Women 2011), p. 11.

[35] UNFPA, *My Body is My Own: Claiming the Right to Autonomy and Self-Determination* (State of World Population 2021), p. 19-20.

coordination".[36] On the one hand, power relations are crucial in themselves because they "structure the condition of relative powerlessness, disadvantage or dependency that gives people the incentive to make agreements of subordination which in turn confirm the existing rules of power".[37] When women are excluded from the power to move freely within the public sphere or to take decisions regarding their bodily autonomy, they are forced to negotiate their rights within the existing power arrangements. However, every time they negotiate and accept the imposed conditions, they inevitably contribute to the continuous legitimation of the current arrangement. As Beetham puts it more generally,

> Is there any doubt that, when regularly in a society, women agree to obey their husbands in marriage, or workers their employers, or citizens their government, they thereby confirm the relations of dominance and subordination in general, of which their agreement is a part? We thus see once more the self-confirmatory circle at work between rules of power and the process of their legitimation.[38]

On the other hand, relations of power underpin the social arrangements by contributing to forming the beliefs that support the current arrangement. The dominant parties typically have power to shape the public discourse and direct the ideas circulated in the public sphere. Although such powers can never truly control people's beliefs which remain formulated by a variety of personal and social factors, nonetheless, they are impactful, as "[there] is simply no regular process of belief-formation or consent-giving within historically placed societies that exists independently of their power structures, or that can therefore remain uninfluenced by them".[39]

Thus, power relations have a self-confirmatory circle where they produce the conditions for their own legitimation. The dominants structure the public realm in a way that restricts the choices of the subordinates, forcing them to negotiate from within the existing structure. Such negotiation and any following acceptance in itself contribute to legitimating the current arrangement. Further, the dominants impact the formation of the beliefs and ideas circulated in the society, which support the current power arrangement. Thereby, contributing to the continuity of the values which legitimise the differentiation between the dominants and the subordinates and the former's privileges. This self-confirmatory circle is why it is very difficult to break power relations. Those who dissent and seek change for better equal relations face continuous obstacles in the structure and the culture, and.

> Throughout history, in fact, the limitations on power which the subordinate have been able to secure, and which they understand as constituting rights for themselves […] are typically the product of historical struggles between domi-

[36] Beetham, *The Legitimation of Power* (n 9), p. 46.

[37] ibid., p. 97.

[38] ibid.

[39] ibid., p. 104.

> nant and subordinate, and represent the crystallisation of a particular balance of forces at a given moment of time.[40]

In this context, when the criminal law, guided by the civil order, uncritically reflects the existing relations of power in a polity, three effects follow. First, the criminal law becomes part of the formal exclusion rules, which act as "basic 'keep out' signs"[41] to exclude disadvantaged individuals and groups further from spheres of activities and key resources. The structure of the power relations becomes stronger due to the threat of punishment to those who dare defy the existing order. Second, the criminal law contributes to the self-confirmatory circle by providing a normative legitimising force that cements the place of the values in the civil order. As Beetham puts it

> The basic point about social rules, whether conventional or legal, is that they have a normative force, not only in prohibiting us from certain actions, but in defining our duties and obligations towards others, and in conferring rights and entitlements that we can require others to respect in turn. In as much as power is itself constituted by rules of exclusion, therefore, it is also legitimated by them, since they confer the right on the powerful to require others to respect the exclusiveness which is the basis of their power.[42]

Third, for those disadvantaged by the existing relations of power, the criminal law becomes one of the main obstacles against change for better equal relations. Dissenters would have to overcome not only the structure and the culture towards better equal relations, but they must also endure the pain of punishment and acquire enough power to decriminalise the prohibition that has become part of the power relations. To overcome these obstacles, decades of resistance and activism are required. Saudi women faced numerous burdens and punishment in their calls to lift the driving ban,[43] and there is no more evident example than the hardships born by Iranian women in their fight to decriminalise the imposition of the veil. Let's consider this last example in more detail to trace how the three effects can manifest.

In 1983, wearing the veil became mandatory in Iran, and "[c]riminal punishment for those violating the law was introduced in the 1990s and ranged from imprisonment to fines".[44] The first effect is that the criminal law became part of the exclusion rules and processes which excluded women from further spheres of activity. According to Maranlou, the impact of the mandatory hijab law extends to "every aspect of

[40] ibid., p. 66-67.

[41] ibid., p. 51.

[42] ibid., p. 56.

[43] Megan Specia, "Saudi Arabia Granted Women the Right to Drive. A Year on, It's Still Complicated", *The New York Times* (24 June 2019), available at https://www.nytimes.com/2019/06/24/world/middleeast/saudi-driving-ban-anniversary.html; Manal al-Sharif, "We Finally Won the Right to Drive in Saudi Arabia. But the Kingdom's War on Women Is Only Getting Worse", *Time* (10 April 2019), available at https://time.com/5,567,330/saudi-arabia-women-rights-drive/.

[44] Sahar Maranlou, "Hijab law in Iran over the decades: the continuing battle for reform", *Essex Blogs University of Essex* (12 October 2022), available at https://www.essex.ac.uk/blog/posts/2022/10/12/hijab-law-in-iran-over-the-decades-the-continuing-battle-for-reform.

everyday life in Iran. For example, it forces the segregation of the sexes and promotes censorship (women are not allowed to appear without hijab on TV or in movies)".[45] More recently, "official and unofficial reports and images have emerged showing women without hijab being deprived of services in the subway and banks".[46]

Second, the criminal law contributes to the self-confirmatory circle by offering a normative legitimising force that justifies and confers an entitlement on the powerful to expect and demand compliance with the imposed prohibition. The commander of Iran's police force justified the pursuit of women who refuse to wear the veil by claiming that they "offend citizens in various ways" and that "improper hijab harms moral security, undermines internal security and disrupts societal relationships".[47] Claims which ground themselves in public morality and seem to gain force from a similar logic to that of damaging the offender's normative relationship with the polity and violating a civil order that governs citizens' life together and expectations towards each other. The place of the prohibition in the public realm became stable to the extent that even when the 2009 reformist movement "called for a gradual opening-up of Iranian society. […] none of Iran's political parties — even the most progressive, reformist-led ones — supported abolishing the compulsory veil".[48]

Third, for the women who dissent and disagree with the criminalisation, the criminal law became one of the main obstacles against change towards equal relations and power over their bodily autonomy. Maranlou summarises the impact of the law on dissenters that.

> During the last few decades, Iranian women's groups have fought to change this law. Every day, they have fought the state's notion of "proper dress" by choosing what they wear, their fashion, their make-up, the way they walk out of their houses. In every step they take in public, they have challenged the discriminatory law that can stop and tell them that their personal choices are "improper". In doing so, they put themselves at risk of criminal punishment ranging from imprisonment to fines.[49]

Not to mention the hardships of the recent wave of protests calling for the abolition of the law following the death of Mahsa Amini in custody after she was arrested by the morality police, the protests have seen the death of 13 individuals and "more than 1,400 demonstrators arrested".[50] Despite all these efforts and decades of dissent, the imposition of the veil is still not decriminalised.

[45] ibid.

[46] Parvaneh Massoumi, "Repeating History: Iran's Police Chief to Intensify Crackdown on "Bad Hijab"", *Iran Wire* (10 April 2023), available at https://iranwire.com/en/politics/115,385-repeating-history-irans-police-chief-to-intensify-crackdown-on-bad-hijab/.

[47] ibid.

[48] Associated Press, "Iran's Anti-Veil Protests Draw on Long History of Resistance", *VOA News* (28 September 2022), available at https://www.voanews.com/a/iran-s-anti-veil-protests-draw-on-long-history-of-resistance/6,766,714.html.

[49] Maranlou (n 44).

[50] Associated Press (n 48).

We can see now more clearly why the role played by dissent in Duff's theory falls short of responding to the raised concerns. Duff proposes that in the face of "cultural differences and deep normative disagreements within contemporary polities; we agree that such problems must be addressed within the polities themselves, through a democratic deliberation in which every citizen has an equal voice".[51] However, putting aside for a moment the democratic requirement, which is not a necessary condition in Duff's theory, and which will be discussed more fully in the next section, the assumption that every citizen has an equal voice in the debate is unrealistic.

The dissenters already stand on unequal grounds in the structure and the culture of this assumed debate, and it is very difficult to imagine that a public debate preceding the criminalisation process would likely impact the direction of the debate. As elaborated above, decades of work and activism are required to change relations of power which shape and underpin the civil order, and rights acquired by disadvantaged individuals and groups are usually affected by "the crystallisation of a particular balance of forces at a given moment of time".[52] Further, once a criminalisation decision is passed, the dissenters will not only face the structured relations of power which already excluded them for years, but the criminal law will become the main tool to enforce the power imbalance and oppress the debate. In fact, we can see in the example of the Iranian mandatory veil law that the dissenters were able to overcome the structure and the culture with a recent survey in 2020, showing a shift of 72% of the population expressing opposition to the imposition of the veil.[53] However, the criminalisation decision, which potentially once reflected the polity's prevalent values, has now become the main obstacle against change.

Duff might argue that in light of the recent shift in public values, the imposition of the veil and the criminalisation of non-compliance is no longer appropriate, given it no longer reflects the civil order of the polity. However, this argument overlooks how the problem was caused by the interference of the criminal law in imposing public morality in the first place. It minimises the impact such a criminalisation has had on the lives of generations of women throughout the past decades who suffered the threat and punishment of the criminal law until they achieved this shift.

So far, it seems that without proper normative limits on what can be considered a public wrong, a context-relative civil order will enforce the existing relations of power and offer little protection against the infringement of individual liberties, and as Meyer reminds us,

> We ought to bear in mind that (de)limiting the scope of the criminal law is very much about the protection of minority rights and spheres of individual liberty against the majority will. We cannot simply rely on majoritarian decision-mak-

[51] R. A. Duff, "Criminal Law, Civil Order and Public Wrongs", *Law, Ethics and Philosophy* 7 (2019): pp. 233-270, p. 258.

[52] Beetham, *The Legitimation of Power* (n 9), p. 66-67.

[53] Pooyan Tamimi Arab and Ammar Maleki, "Iran protests: majority of people reject compulsory hijab and an Islamic regime, surveys find", *The Conversation* (28 September 2022), available at https://theconversation.com/iran-protests-majority-of-people-reject-compulsory-hijab-and-an-islamic-regime-surveys-find-191,448.

> ing processes. Criminal law principles have always been anti-majoritarian and not principles of majoritarian self-empowerment.[54]

Such lack of protection is due to a further fundamental problem: the public wrongs theory falls short of guiding us as to when the criminal law or a criminalisation decision is normatively illegitimate. The next and final section explores the normative guidance on legitimacy in the public wrongs theory and whether the presence of democracy and guarantees of equality and freedoms as necessary conditions can guard against the problems raised in this article.

3 Legitimacy and the Public Wrongs Theory

The public wrongs theory offers a two-tier system of legitimacy. The first tier is entirely internal and dependent on asking whether members of a polity are being true to how their life together is organised. If the criminal law genuinely reflects the civil order of the polity and the values with which citizens live with each other, then the criminal law is legitimate, at least "in one sense".[55] The second tier of legitimacy concerns the legitimacy or validity of the civil order itself and whether it is acceptable. Following Duff's approach, I will call the first tier the analytical lens and the second the normative lens. Both lenses, however, fall short of guiding us as to when the criminal law or a criminalisation decision is normatively illegitimate. Let's consider each in more detail.

The analytical lens, as discussed throughout the paper, risks uncritically mirroring the existing relations of power. The relativism of what differentiates the public and private realms of wrongs undermines the theory's ability to exclude objectional criminalisation decisions, other than on grounds of lack of genuine reflection of the civil order. The reason for this lies in the reliance of this lens on a purely internal view, which seems to offer a sociological, rather than a philosophical, understanding of legitimacy. Beetham is again helpful in the distinction he draws between philosophical and sociological approaches to legitimacy.

A sociological approach to legitimacy is concerned with the internal view within a society to explore what kinds of beliefs and values are prevalent and whether the practice of power is congruent with such values and beliefs to be held legitimate; "he or she is, as it were, reproducing the reasoning of people within that society, and reconstructing the logic of their own judgements".[56] This allows the social scientist to understand a given historical context, explain the behaviour of those subject to power, the degree and quality of their cooperation and when and why legitimacy might break down. The advantage of the internal view appears when one focuses empirically on particular polities, with an awareness of their historical contexts, internal dynamics and external pressures. It has an explanatory value that enables us

[54] F. Meyer, "Towards a Modest Legal Moralism: Concept, Open Questions, and Potential Extension", *Criminal Law and Philosophy* 8 (2014): pp. 237–244, p. 240.

[55] Duff, *The Realm of Criminal Law* (n 2), p. 166.

[56] Beetham, *The Legitimation of Power* (n 9), p. 100.

to understand why a given system of power has endured and why people are obeying it. However, it does not offer a normative assessment of whether the form and use of power are just and justified.

Duff, in reflecting on objectional criminalisation decisions in non-democratic and illiberal polities, without awareness of the socio-political realities of the polities from which he drew examples, has attracted the problems of the internal view and lost its value. He lost the explanatory value because he is not thoroughly engaging, and it is not his purpose to engage with particular polities empirically in depth. However, he attracted the problems of the internal view, which is to reproduce the internal logic without a philosophical input on what makes that logic acceptable or not and by which criteria. In contrast, a philosophical approach to legitimacy would have been concerned with crafting external "moral or political principles that are rationally defensible",[57] to judge whether the internal view is just and justified and why.

Duff is aware of this problem and has told his audience that disappointment awaits those who expect the public wrongs principle to do this kind of substantive normative work.[58] This work is left to the second tier, which is the normative lens that assesses the validity and legitimacy of the civil order itself. Duff argues, in response to objectionable criminalisation decisions such as that of criminalising driving by women or the use of contraception, that this "is not to say that we cannot, as normative theorists or participants in political debate, criticize other polities on the grounds that their conceptions of civil order are misguided or unacceptable: we can engage in vigorous normative debate both within and between polities".[59]

However, as Tomlin has rightly responded, "Duff makes it clear that we can object to a civil order, but it isn't clear what (valid) objections of this sort amount to: do they render the laws unjust, illegitimate, unenforceable, or what?".[60] More importantly, it is not clear what are the grounds for such objections; what sort of moral or political principles are offered to assess the legitimacy and validity of a civil order? Democracy, for one, is not a necessary condition for the legitimacy of a civil order. Duff argues that in understanding "the kind of process through which a polity's (self) constitution, its conception of its civil order, and its criminal law are to be constructed. We cannot say, a priori, that those processes must be in any way democratic", although decent polities should be democratic.[61] Democratic representation is not a necessary condition for the legitimacy of criminalisation. The public wrongs are not created by the public will as democratically represented in the legislative body; rather, they are pre-legal moral wrongs as they stem from the practices of the community in how members of the polity should treat each other and the values with which they define their community. Thus, a hand-picked, security-approved member of parliament who reads well the social practices of the public and honestly reflects on the values with

[57] ibid., p. 4.

[58] R. A. Duff, "Defending the Realm of Criminal Law", *Criminal Law, Philosophy* 14 (2020): pp. 465–500, p. 466.

[59] Duff, "Criminal Law and Criminalization: A Response to Crisis" (n 19), p. 75.

[60] Tomlin, "Duffing Up the Criminal Law?" (n 25), p. 330.

[61] Duff, "Criminal Law, Civil Order and Public Wrongs" (n 51), p. 250.

which the polity regulates its public life, and criminalises only those wrongs which are the proper business of the public enacts a legitimate criminal law.

Liberal and communitarian conceptions of the civil order are also absent as necessary principles for the validity of a civil order. This has been highlighted by Tomlin arguing that "the liberal republic polity is described, not argued for, and it is made clear that it is but one form of civil order we might favour",[62] and Chiao expressing scepticism that the political principles discussed by Duff play any serious role in supporting his theory.[63] Duff has also expressed that his book does not engage seriously enough with the "substantive normative arguments about the content of civil order", although he offers a sketch of a preferable democratic and liberal communitarian polity.[64]

Now, it seems we are left in a place where the analytical lens, although at the heart of the theory, does not offer normative guidance to assess the legitimacy and illegitimacy of criminalisation, other than through genuine reflection of the civil order. Most of the normative work is carried out by the second tier. But, when we reach the second tier, we are left with a sketch of preferences that do not offer any normative commitments to assess which civil orders are legitimate and justified and why. This inevitably leaves us in a place where the public wrongs theory lacks proper normative guidance and constraints on the legitimacy of criminalisation.

The question now is whether filling this normative void with commitments to, rather than preferences for, democracy and at least guarantees of equality and freedoms would better place the theory normatively to overcome the problems raised so far. The answer is not necessarily. These commitments would help in offering a principled way to assess the legitimacy of civil orders and contribute to the presence of conditions that discourage the self-confirmatory circle of power relations. However, they would still not overcome the risk of mirroring existing power relations in the criminal law, because the theory's working heart is still the analytical lens which adopts a purely internal view that re-produces societies' internal power structure.

To clarify this further, let's consider first why these commitments would be helpful. I start by joining Beetham in disagreeing with "the standpoint of the knowledgeable sceptic, who, from a position above all power relations, sees how they reproduce the conditions for their own legitimation, and concludes that the subordinate can never break out of this self-confirming cycle of power".[65] Structured relations of power exist in democratic and non-democratic societies; they are more blatant and easily identifiable in non-democratic and illiberal polities, while they hide better in complex processes in democratic and liberal polities. However, despite all the limitations and shortcomings of democratic systems, they offer better conditions against the exclusion rules and processes than other systems.

Democracy assumes equal citizenship and free and fair contestation and access to positions and means of power. A democratic system ideally opposes the exclusion rules, processes, and beliefs which seek to establish a differentiation between the

[62] Tomlin, "Duffing Up the Criminal Law?" (n 25), p. 332.

[63] Chiao, "Reflections on Themes from The Realm of Criminal Law" (n 24), p. 44.

[64] Duff, "Criminal Law, Civil Order and Public Wrongs" (n 51), p. 251.

[65] Beetham, *The Legitimation of Power* (n 9), p. 111.

dominants and subordinates on bases other than equality. Instead, "it postulates the ideal that people's qualities, attributes, capacities and opportunities should precisely not be defined or limited in advance because of some determinate role they are bound or expected by birth to occupy".[66] Further, it also aims to open the public sphere for free circulation of ideas, including the freedom to dissent and criticise those in power. It supports the beliefs that "all power rules are open to revision by public debate and decision between equal citizens".[67]

Thus, ideally, democratic governance aims to discourage the self-confirmatory circle of unequal relations of power by opening the structure and the culture to free and fair contestation of power. It also discourages the exclusion of individuals and groups from the public sphere. However, unfortunately, the extent to which such ideals are realised in practice is limited; of the 45% of the world population who live in some form of democratic governance, only about 6% live in full democracies.[68] The assumptions and guarantees of democratic governance, thus, operate less than one hopes across the world.

Further, even when these ideals are as close to application as possible; democracy and guarantees of equality and freedoms do not – in themselves – eliminate unequal relations of power across gender, race, or class. They simply support a system in which the self-confirmatory circle is less closed than in others by offering a better chance for deconstructing the power imbalance and for dissenters to seek change without fear of repercussions from the authority. Therefore, even when the analytical lens operates within a normatively legitimate civil order – on these conditions – it would still risk mirroring the existing power relations. The criminal law, if guided by the civil order, would still reflect the structure and culture preferred by dominant groups as they emanate from the social practices, history, internal dynamics, and external pressures that have been shaping the polity for decades. In other words, while these political principles might discourage the self-confirmatory circle, it is doubtful whether the public wrongs principle would operate in the same direction.

To demonstrate this, let's consider liberal democratic polities where inequalities across gender, race, and class persist. Disadvantaged groups and individuals are supported by principles of democratic governance to fight against the existing structure and culture and to overcome the inherent inequalities and exclusions without fear of repercussion. The self-confirmatory circle of unequal relations is, thus, less closed. The public wrongs principle, in this context, calls for guiding criminal prohibitions by the existing civil order, which typically reflects the still-not-changed unequal relations of power. Dissent and public debate, although guaranteed as mechanisms, are not guaranteed to change the direction of the debate by themselves. Not only are decades of work and activism required, but the success of mobilisation against inequalities requires the crystallisation of a balance of forces supporting the disadvantaged. If the criminalisation decision is passed, the self-confirmatory circle becomes more closed. The prevalent values which inform the civil order and their underlying relations of power gain additional legitimacy and support. The pain of punishment opens dis-

[66] ibid., p. 113.

[67] ibid.

[68] The Economist Intelligence Unit, *Democracy Index 2020* (n 6), p. 4.

senters to repercussions from the authority if they defy the existing order. Thereby, depriving them of the freedom supposedly guaranteed by the democratic system to dissent without threats and fear. Therefore, while the political principles work in the direction of helping the self-confirmatory circle become less closed, the public wrongs principle risks working in the other direction because the working heart of the theory is still the analytical lens and its entire dependability on the internal view within the polity.

The dependability on the internal view in the analytical lens and the presence of the normative constraints only at the level of the justifiability of the civil order itself also leads to another problem. In non-democratic polities and those which fail to guarantee equality and freedoms, the absence of these political principles in the second tier results in invalidating the civil order itself as illegitimate. This would lead to de-legitimising the whole criminal law of the polity as it emanates from an invalid civil order instead of targeting the objectional criminalisation decisions. This is because most of the targeted work of the theory is undertaken by the analytical lens, which is purely internal. Hence, until the analytical lens transforms into a normative lens by differentiating between the public and private realms of wrongs on the basis of rationally defensible principles instead of a context-dependent view of the civil order, the theory will continue to run the risk of uncritically mirroring and legitimising unequal relations of power.

4 Conclusion

The civil order of a polity is underpinned by a social organisation of power that remains unequal and unjust in many societies. The inequalities that thrive in the absence of democracy and guarantees of equality and freedoms are clearer and more challenging to change. However, unequal relations of power remain persistent in democratic and liberal systems as "the structures of gender and class power are themselves reproduced within the political domain, and the political domain is itself structured, in a manner that is weighted against such change".[69] Mirroring the civil order of a polity in the criminal law, without normative limits that differentiate the public and private realms of wrongs, risks legitimising the existing relations of power and creating painful obstacles against their change.

Further, suggesting that dissent and public debate can act as antidots to these risks is an oversimplification that overlooks the self-confirmatory circle of power relations and the difficulty of breaking them in the structure and culture of a polity. Adding the coercive power of the criminal law to these dynamics contributes to strengthening the self-confirmatory circle and impedes the potential development of a polity towards more equal relations. This article is an invitation to question whether the criminal law's heavy hand should play any part in imposing public morality. This is not to deny that the criminal law, in fact, expresses values and contributes to shaping relations of power continuously in all polities. Rather, this is to question whether

[69] Beetham, *The Legitimation of Power* (n 9), p. 97.

upholding values should be the defining purpose of the criminal law or a risk from which we should guard.

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