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DISCUSSION

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BDSM, body modification, transhumanism, and the limits of liberalism

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1 | INTRODUCTION

Autonomy over your own body and the right to act as you please so long as your actions do not cause harm to another person are two fundamental principles of liberalism. Although these principles have not always been applied to all people in the same way throughout history, they are now, in Western democracies at least, applied to people regardless of their race, religion, gender, or sexuality.

However, what happens when there is an apparent conflict between these two principles? This article considers how the liberal principles of individual liberty and not causing harm to others play out when it comes to the law relating to the infliction of violence and damage to the body.

I explore the limits of these principles. The article outlines the law relating to actual bodily harm, grievous bodily harm, and the role of consent. It examines how the law has developed in this area and the impact that this has had on the concept of individual freedom and on minority groups.

Rather than focusing on any specific jurisdiction, the article limits itself to a discussion of general principles. It does so through examining two areas where the law appears to be in conflict with personal autonomy, namely BDSM[1] and body modification.

Laws relating to the prohibition of violence committed by one person against another date back to ancient Greece (Cohen, 1991). These laws have developed over the centuries and now practically every jurisdiction[2] has such provision. This allows the state to honour its obligation of defending its citizens from harm. The legislation in the majority of jurisdictions recognises instances when a person can be said to have consented to harm inflicted upon them and so the actions of those involved will not attract criminal liability. The circumstances in which the consent of an adult 'victim' can provide a defence varies between jurisdictions. However, the vast majority of legal systems recognise activities such as surgery (nowadays including gender reassignment surgery), sporting activities, tattooing and body piercing, and male ritual circumcision (Farrugia, 1997).

There are, however, instances in which the consent of the victim cannot be said to constitute a valid defence. This is the case even when the defendant has provided evidence to the authorities that their alleged victims consented to the harm inflicted upon them.

The two most controversial of these are BDSM and body modification. Again, there are slight differences in the approaches taken by different jurisdictions. What is more, it is an area of the law which has developed in such a way that there are conflicting legal authorities, which means there is a great deal of ambiguity about the legality of such actions. Nevertheless, adults who have freely consented to take part in these activities are at risk of finding themselves facing prosecution as a result.

2 | THE LAW AND BDSM

The academic Monica Pa (2001, p. 51) has set out five features which are generally present in sadomasochistic encounters:

> *Dominance and submission – the appearance of control of one partner over the other*;
> *Role-playing – the participants assume roles that they recognise are not reality*;
> *Consensuality – a voluntary agreement to enter into sado-masochistic activity and to respect certain limits*;
> *Sexual context – the presumption that the activities have a sexual or erotic meaning*;
> *Mutual definition – participants must agree on the parameters of what they are doing.*

In the landmark case of *R v. Brown* (1994), the Appellate Committee of the House of Lords heard an appeal from several men who were convicted of offences under sections 20 and 47 of the Offences Against the Person Act. The case involved a group of men who engaged in consensual sadomasochistic activities which caused injuries. The injuries were said to provide sexual pleasure both for those inflicting the pain and for those receiving it. The Appellate Committee dismissed the appeal by a majority of 3 to 2.

In *R v. Brown*, their Lordships held that the law had developed a list of circumstances in which the consent of the victim would be a valid defence where the injuries involved serious assault. The majority stated that this list could be extended, but only if it was in the public interest. The majority in *R v. Brown* held that sadomasochism should not be added to the list of exceptions because not only was it not beneficial to society, it was harmful.

This decision has been the subject of a great deal of academic debate. There are arguments on both sides as to whether or not the Appellate Committee reached the correct decision in their judgment (Duff, 2001; Hanna, 2001). However, there is more consensus on the troubling way in which their Lordships allowed their own views on sexual relationships and the activities of the appellants to shape their decision.

It could be argued that some of the language used was homophobic; for example, the repeated references to the sexuality of the appellants. One commentator (Stychin, 1995, p. 526) argued that it pathologises gay male sexuality. This was the case not just in the House of Lords but also in the Court of Appeal, where one of the justices remarked: "It is some comfort at least to be told, as we were, that 'K' has now it seems settled into a normal heterosexual relationship"

(Stychin, 1994, p. 527). This is not to suggest that their Lordships were deliberately homophobic in their judgment, but rather that their discomfort with the practices and sexuality of the appellants had an impact on their reasoning (Tasmania Law Review Institute, 2017). At the very least, it would appear that the decision of the majority was based on a heteronormative understanding of gender and sexuality. The references to 'manly pursuits' and their unwillingness to accept homosexual sadomasochism as a valid form of sexual expression serves to highlight this point.

Furthermore, it has been argued that the views of the majority in *R v. Brown* relating to the concepts of pain and pleasure played an important role in their judgment. For example, Weait (1996) has argued that the law views pain as a punishment. Therefore, in situations where pain is actually pleasurable, then, in the minds of their Lordships, a fundamental basis of the law is potentially undermined.

This is important as, although it was an English legal judgment, it has been cited approvingly by courts in other jurisdictions. Therefore, it could be argued that a legal authority based on prejudice has been established not just in England but also in other jurisdictions.

This argument is strengthened by the fact that in the case of *R v. Wilson* (1996) a man used a hot knife to brand his initials on his wife's buttocks. The Court of Appeal held that this fell within the category of a 'lawful infliction of actual bodily harm' because it was in the confines of a marital relationship. As such, the courts have held that injuries caused in the context of a heterosexual marriage were not illegal, but they were illegal in a case involving homosexual men.

However, in the case of *R v. Emmett* (1999), the dangerous sexual activities of a heterosexual couple did lead to a conviction under section 47 of the Offences Against the Person Act.

Irrespective of the sexuality of those involved, it would appear that sadomasochism falls outside the accepted norms of sexual activity. It has been relegated to the outer limits of social acceptability, alongside sex work. It falls outside the charmed circle of sexual values (Rubin 1984). Understandings of sadomasochism, in a similar manner to sex work and homosexuality, have historically been shaped by discourses of criminal law and psychology; this, therefore, goes some way to explaining the treatment of the activity by the law (Morris, 2018). Moreover, the law in this area in various jurisdictions is ambiguous. This is because the courts have reached different decisions in various cases despite the facts often being similar (Arnold, 2015).

It should be noted that certain jurisdictions have attempted to bring some clarity to the issue by issuing guidelines. However, as these often do not consist of a complete list of actions that would or would not be criminalised, the ambiguity remains.

3 | THE LAW AND BODY MODIFICATION

In *R v. BM* (2018), the appellant was charged with three counts of actual bodily harm for performing the following procedures: removal of a customer's ear; removal of a customer's nipple; and splitting a customer's tongue to resemble that of a reptile (Beetham, 2018). While it was accepted that all the customers had consented to these acts, the court held that consent could not amount to a valid defence to these injuries. Accordingly, the appellant's appeal was dismissed.

BM had argued that his procedures were a natural extension of piercings and tattoos which do not attract criminal liability. As such, body modifications should be allowed in the public interest, as this preserved the personal autonomy of his customers. The court rejected this

argument. It held that body modifications constituted "medical procedures performed for no medical reason and with none of the protections provided to patients by medical practitioners ... the personal autonomy of the appellant's customers did not justify removing body modification from the ambit of the law of assault" (Beetham, 2018, p. 206).

Again, the argument here would appear to be that it is not in the public interest to allow body modification because of the harm that could befall individuals as a result. However, very many activities pose a danger to participants, but those activities are not criminalised (Baker 2008). Furthermore, it could be argued that there is no real difference between getting a tattoo or a piercing and some forms of body modification.[3] So why are piercings and tattoos legal and socially acceptable whereas some forms of modification amount to assault?

Most people view body modification with disgust and cannot understand why a person would choose to have those things done to their bodies (Egan, 2007). What is more, many people who undergo body modification are members of a subculture which the majority of the population does not understand (D. Roberts, 2015). It could be argued that this is why body modification is not treated in the same way as tattoos or piercings, even though they both involve the changing and adornment of one's body.

As a result of the law relating to assault, members of a subculture are not able to exercise autonomy over their own bodies. Moreover, as with the law concerning sadomasochism, the law relating to body modification is ambiguous. For, while the court found that the specific acts conducted by body modification practitioners amounted to assault, there is a wide spectrum of procedures in body modification which may or may not be deemed illegal. As a result, body modification practitioners and their customers are left in a legal limbo (Keenan, 2018).

4 | THE CASE FOR REFORM

It is a core principle of liberalism that individuals should have autonomy over their own bodies. As Robert Nozick (1974, p. ix) put it: "Individuals have rights, and there are things no person or group may do to them (without violating their rights)."

If people choose to engage in consensual sadomasochistic encounters, or to have their bodies modified in some way, then it should not be the role of the state or society to stop them. What is more, such a restriction should not be enforced by the criminal law, which is the "State's most coercive form of social control" (P. Roberts, 1997, p. 389).

As such, the law as it currently stands represents an assault on individual freedoms. It prevents people from doing as they please with their bodies. What is more, the law has had an unacceptably disproportionate impact on marginalised groups in society. It also interferes in one of the most intimate parts of life, one that is central to a person's identity, namely sexuality. Many countries have prosecuted men and women for homosexuality, and some still do. As a result, many have gone to prison and had their lives destroyed. Many others have lived under the constant threat of exposure or blackmail – all because their sexuality deviates from what is deemed 'normal behaviour' by society and the state (Dryden, n.d.)

It could be argued that the situation is similar for practitioners of sadomasochism. For many of them it is an important part of their identity. What is more, other practices cannot satisfy their sexual desires in the same way (Martinez, 2011). They should not face prosecution because of their sexual identity if their practices are with other adults and are consensual.

There is also an argument based on harm reduction. This is most obvious in terms of body modification. For example, if procedures are unregulated and there is a degree of uncertainty

about which procedures are legal and which are not, then the chances of going wrong are increased, whereas if it were legal but regulated, and practitioners were not in fear of being prosecuted, then procedures could be carried out in a much safer way.

This is also true of sadomasochistic activity. If a person were to sustain an injury which required medical treatment, they might be reluctant to seek medical assistance. This is because they might be worried about the legal implications for themselves or their partner. Moreover, given the stigma attached to criminal activities, there might again be a reluctance on the part of patients to be open with their doctor about the nature of their injuries.

Moreover, the principle that laws should be easily understood and applied to everyone equally is a fundamental tenet of the rule of law (Bingham, 2011). However, as I have argued in this article, this is not the case with the law relating to assault. With sadomasochism and body modification, there is a great deal of ambiguity. There is also the troubling risk of some minority groups being more likely than others to be prosecuted and convicted.

A further reason for reform relates to the ways in which the law could impact individuals in the future as society changes and new technologies develop. Taking a more liberal approach to consent would pave the way for increased technological and developmental augmentation of the human body, which could tap into the potential for considerable improvements to health and well-being and, ultimately, allow humanity to flourish, now and far into the future.

5 | TRANSHUMANISM

Transhumanism, a relatively modern philosophical movement, suggests that humanity can enhance itself through the use of science and technology. Although transhumanism is too broad a topic to address fully here, it merits a concise discussion in this context. Previously the preserve of the ideological fringes, transhumanism as a philosophy has gradually moved into the mainstream of academic scrutiny in recent decades (More, 2013; Le Dévédec, 2018). It is a loosely defined movement that has developed over the past half-century. The philosopher Max More (2013, p. 3) defines it as follows:

> *Transhumanism is a class of philosophies of life that seek the continuation and acceleration of the evolution of intelligent life beyond its currently human form and human limitations by means of science and technology, guided by life-promoting principles and values.*

A longer definition is also provided by More (2013, pp. 8–9):

> 1. *The intellectual and cultural movement that affirms the possibility and desirability of fundamentally improving the human condition through applied reason, especially by developing and making widely available technologies to eliminate aging and to greatly enhance human intellectual, physical, and psychological capacities.*
>
> 2. *The study of the ramifications, promises, and potential dangers of technologies that will enable us to overcome fundamental human limitations, and the related study of the ethical matters involved in developing and using such technologies.*

As such, transhumanism is a movement that seeks to improve human abilities and capabilities through the use of science and technology, beyond the presumed limits imposed by nature.

This has the potential to bring about immeasurable benefits. For example, human enhancement could lead to improvements in human cognition, granting humanity a deeper understanding of its existence and surroundings and leading to scientific and technological breakthroughs (Schneider, 2008). It could help to eliminate disease and tackle the effects of ageing, allowing humans to live longer, healthier, and happier lives (McConnel & Turner, 2005; Dvorsky, 2008). Tasks could be undertaken with greater efficiency and accuracy, thereby boosting productivity and delivering high levels of economic growth, leading in turn to previously unimaginable improvements in living standards (Academy of Medical Sciences, 2012).

The technological research sector therefore urgently needs a regulatory framework that is flexible enough to remain perpetually abreast of any and all scientific and technological progress in order to foster innovation with maximum efficiency and effectiveness. Many of these innovations will not be realised for decades or even centuries to come.

It is essential that legal foundations are laid down now so that the law can develop alongside scientific and technological innovation, at a sufficient pace so as not to constrain innovation.

6 | CONCLUSION

There are numerous situations in which legal systems recognise that a person has the right to consent to being harmed. However, there are certain situations in which this is not the case. These are often activities which are outside the bounds of what society considers mainstream or acceptable behaviour. As a result, many people find themselves facing prosecution for engaging in activities to which everyone involved has consented. The people most likely to be impacted are those from minority groups.

The law as it stands in most jurisdictions means that people risk being prosecuted for engaging in consensual acts and choosing to live their lives as they see fit. Moreover, due to the ambiguity of the law, many people who attempt to abide by it still risk facing prosecution. Moreover, the fact that these acts are criminalised and not regulated increases the risks of serious injury or death for those engaging in them. It also has the potential to hold back human progress both now and in the future.

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NOTES

[1] 'BDSM' is a portmanteau term covering a variety of erotic practices and role play. It is a combination of the abbreviations B/D (bondage and discipline), D/S (dominance and submission), and S/M (sadism and masochism).

[2] In the United States and Australia this is determined at the state level, whereas in many other countries, such as the United Kingdom, Canada, Ireland, and India, it is a national prerogative.

[3] Or, more seriously, gender reassignment surgery, which in some cases the state will fund.

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