Safe, Sane and Consensual but potentially Breaking the Law; BDSM in the United Kingdom.

Dr John Bahadur Lamb

The characters Christian Grey and Anastasia Steele capitulated a form of sexuality which is often maligned and misunderstood back into public consciousness; BDSM. Standing for Bondage and Discipline, Domination and Submission, Sadism and Masochism, BDSM covers a range of differing sexual practices which all share the common element of consensual pain being inflicted, in order to create mutual sexual and psychological gratification. This leads these acts to fall into a legal grey area as the participants in such ‘kinky’ sex are consenting to bodily harm. Consent is the cornerstone of these activities with many BDSM practitioners using coded safe words to stop activities if true distress is caused and even drawing up contracts which specify what acts are consented to and what acts are not. In the views of one scholar on the subject BDSM is “Safe, Sane and Consensual” (Barker 2013).

However, in the United Kingdom, an individual can only consent to bodily harm in very specific circumstances where the harm has been legally judged to be in the public interest. As such, surgery, piercings, tattoos and sport are legally permissible because they are deemed as being in the public interest to allow. Despite these exceptions and the *Sexual Offences Act 2003* defining a person as consenting if they “agree by choice and have the freedom and the capacity to make that choice” BDSM activities are all considered chargeable criminal offences under the *Offences Against the Person Act 1861* and the *Sexual Offences Act 2003*.Given that we, in the UK, can legally and publicly beat a consenting opponent senseless inside a boxing ring it seems odd that the use of handcuffs and a spanking paddle in the bedroom should result in criminal charges.

So why does the Government via the law and judiciary feel it has the right to legislate against the sexual practices of consenting adults? The answers are bound up within a now infamous case known as the Spanner Trials. A police raid in 1987 found a video tape which showed a group of men engaged in heavy sadomasochist activities including genital abrading, bodily beatings and lacerations. Indeed, so serious did the physical harm appear that Greater Manchester Police actively pursued the case under the belief that at least one of the participants who took part in its making must have died from the injuries sustained. Upon investigation the police discovered that not a single one of the sixteen men involved in the video had any long term injuries from their participation and no one died. Despite this revelation and the genuine belief of all involved that they were consenting adults engaged in legal behaviour at trial the court handed down sentences ranging from fines to four and a half years in prison in 1990. These draconian sentence were given on the basis that consent offers no defence as BDSM activities can never be in the public interest as they pose both a public health and a moral threat to society.

As such, it would appear that if you engage in BDSM activities, which result in marks or injuries which are more than transitory or trifling, in the UK you are committing a sexual crime and a crime against the person and should face criminal sanction. It is this line of thought which sees this case continue to set the benchmark for what is considered legally acceptable sexual behaviour between adults due to the failure of appeals against it at the House of Lords (1992) and the European Court of Human Rights (1997). Yet, the ideas that BDSM is a public health and a moral threat to society does not stand up to scrutiny and there also seems to be an element of discrimination against LGBT BDSM practitioners. For example, in another case, *R v. Wilson*, the courts decided that the branding of a partner using a heated knife was not grounds for criminal prosecution. The only difference between this case and the Spanner case is that the defendants in Wilson where a married husband and wife instead of a group of single, gay men.

It would appear, then, that the law around BDSM is applied inconsistently and this is backed up by conviction rates with gay BDSM practitioners more likely to be arrested, tried and convicted of both crimes against the person and sexual crimes than their heterosexual counterparts. This leads us back to the core of the matter that BDSM is ruled against by the courts largely on moral grounds. It is only through a moral lens that we can understand how a heterosexual married couple engaged in fairly heavy BDSM involving branding can avoid prosecution. This is arguably because marriage between a man and woman is still considered the ‘correct’ form of a relationship and thus martial bed is deemed a private sphere and the consensual activities which take place between husband and wife are no concern of the state. Whereas, the engagement in BDSM by single, homosexual individuals represents a moral threat to this accepted and idealised form of relationship.

This muddled and confused legal and moral framework has become even more difficult to navigate thanks to the introduction of yet another piece of legislation which criminalises those individuals who enjoy watching BDSM pornography but have never engaged in such acts. The *Criminal Justice and Immigration Act 2008* outlawed the possession, distribution or consumption of pornography which depicts any acts which threaten a person’s life, will result in serious injury to breasts, anus or genitals and other acts. Whilst this sounds perfectly reasonable convictions have been handed down by the courts for pornography containing the wearing of gas masks; vaginal fisting and the use of unusual objects for penetration. A further piece of legislation, the *Criminal Justice and Courts Act 2015*, outlaws pornography which depicts simulated rape, rough sex or sex with individuals who are bound. Effectively, these laws ban all BDSM pornography as it is up to the court to interpret what acts would cause harm or threaten life.

Thus we can conclude by paraphrasing Lord Templeman during the Spanner Trials appeal, that the legality of BDSM has little to do with harm and more to do with the belief that pleasure derived from pain is an evil thing so long as sexual gratification and not body modification or sport is the driver behind it.

**References**

Barker, M. (2013), “Consent is a grey area? A comparison of understandings of consent in fifty shades of grey and on the BDSM blogosphere” in *Sexualities*, (**16**):3, 896-914.

HM Government, *Offences against the Person Act 1861*, HMSO: London

HM Government, *Sexual Offences Act 2003*, HMSO: London

HM Government, *Criminal Justice and Immigration Act 2008*, HMSO: London

HM Government, *Criminal Justice and Courts Act 2015*, HMSO: London