Laskey v *The United Kingdom*: Learning The Limits of Privacy

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R v *Brown and others*[1] is a House of Lords decision that has been surrounded by considerable controversy.[2] In that case a three to two majority confirmed that consensual relations concerned with giving and receiving pain for purposes of sexual pleasure were unlawful under sections 20 and 47 of the Offences Against the Person Act 1861.[3] On 19 February 1997 a new dimension was added to the controversy; the European Court of Human Rights pronounced judgment in the case of *Laskey, Jaggard and Brown* v *The United Kingdom*[4] which had been brought before the Strasbourg court by three of the defendants in *Brown*.

The terms of the legal controversy that surrounded the original House of Lords majority decision in *Brown* were given voice in the various commentaries and articles that followed in its wake. Some welcomed the decision on the basis that it marked a shift in judicial attitudes to protect vulnerable people, particularly women, from violence.[5] Others attacked the majority decisions on the basis that they: complicated the burden of proof;[6] were based on inconclusive authorities and arbitrary distinctions; provided no clear guidance either to judges or citizens about

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1 [1994] 1 AC 212.

2 See for example, B. Thompson, *Sadomasochism* (London: Cassell, 1994); cf C. Stychin, *Law's Desire* (London: Routledge, 1995) ch 7; C.C. Stanley, 'Sins and Passions' (1993) 4(2) *Law and Critique* 207; S. Duncan, 'Law's Sexual Discipline: Visibility, Violence, and Consent' (1995) 22(3) *Journal of Law and Society* 326; L. Bibbings and P. Alldridge, 'Sexual Expression, Body Alteration, and the Defence of Consent' (1993) 20(3) *Journal of Law and Society* 356; L.J. Moran 'Violence and the Law: the Case of Sado-Masochism' (1995) 4(2) *Social and Legal Studies* 225. Nor has critical commentary been confined to scholarship in the UK for example in Australia the decision has been subject to critical commentary in the 'Model Criminal Code: Division 31 — Defences' (1996) Model Criminal Code Officers Committee of the Standing Committee of the Attorney General. See also A. Howe, 'Fictioning Consent in (Sexual) Assault Cases' *Critical InQueeries* (1996) volume 1(3) 35.

3 The defendants were originally convicted and sentenced to imprisonment in December 1990. Laskey was sentenced to imprisonment for a total of four years and six months. This included a concurrent sentence of twelve months' imprisonment in respect of various counts of assault occasioning actual bodily harm and aiding and abetting assault occasioning actual bodily harm under section 47. Jaggard was sentenced to imprisonment for three years. He received two years' imprisonment for aiding and abetting unlawful wounding — contrary to section 20 and a further twelve months' imprisonment for assault occasioning actual bodily harm, aiding and abetting the same offence, and unlawful wounding. Brown was sentenced to imprisonment for two years and nine months. He received twelve months' imprisonment for aiding and abetting assault occasioning actual bodily harm, a further nine months' imprisonment for assault occasioning actual bodily harm, and a further twelve months' imprisonment for further assaults occasioning actual bodily harm. On 19 February 1992, the Court of Appeal, Criminal Division, dismissed the appeals against conviction. Reduced sentences ranging from three to six months were imposed.

4 [1997] 2 EHRR 39. Other reports are to be found in *The Times* 20 February 1997 and *The Independent* 25 February 1997.

5 S. Edwards, 'No defence for sado-masochistic libido' NLJ (1993) 143, 406 and S. Edwards, *Sex and Gender in the Legal Process* (London: Blackstone, 1996). ch 2; J. Bradwell 'Consent to assault and the dangers to women' NLJ (1996) 146 1682; W. Wilson, 'Is Hurting People Wrong?' *Journal of Social Welfare Law* 388.

6 M. Giles, '*R* v *Brown*: Consensual Harm and the Public Interest' (1994) 57 MLR 101, 105.

the law;[7] appeared to be little more than a policy decision writ large as paternalistic concerns of a remote elite lacking rigour; were little more than *ex post facto* rationalisations;[8] were based upon an 'undesirable misconception', mistaking a sexual practice for one of violence;[9] and were (retroactive[10]) judicial law-making at its most confused.[11]

Another line of criticism focused upon the majority's rejection of the appellants' arguments based upon Articles 7 and 8 of the European Convention on Human Rights.[12] Particular criticism focused upon the 'glaring insensitivity to the matter of privacy'[13] evidenced in the majority decisions. Lord Templeman[14] who provided the most extensive review of the human rights issues for the majority dealt with these arguments in the following manner. He concluded that the argument based upon Article 7, that the actions under the Offences Against the Person Act 1861 amounted to retrospective law-making, was ingenious but had no foundation. With regard to Article 8, he commented that even if the activities of the appellants were an exercise of rights in respect of private and family life, which he doubted, the Article did not invalidate a law which prohibited violence that was intentionally harmful to body and mind. Reflecting upon the majority's rejection of the human rights' arguments another commentator concluded that in *Brown*:

> ... human rights receive the suspicion accorded to any novel development. Europhobia, which like Europhilia looks too hard at where rules come from and not enough at whether they are sensible, has led the Lords to read the European Convention on Human Rights with the pedantry they should reserve for regulations on the production and packaging of light bulbs. Human rights treaties interpreted in that spirit give rights to no-one.[15]

In general the failure of the majority to respect the privacy of the applicants was presented as a major weakness of the *Brown* decision.[16] In turn, resort to the European Convention on Human Rights was offered as a strong basis for a different outcome. In the wake of all these criticisms a decision on the issues raised

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7 B. Bix, 'Assault, Sado-Masochism and Consent' (1993) 109 LQR 540, 541. This particular criticism has also been developed in the context of the first reported decision that directly considers the scope of the *Brown* decision, *R* v *Wilson* [1996] 2 WLR 125 and see P. Roberts, 'Consent to Injury: How far can you go?' (1996) 113 LQR 27.

8 R. Mullender, 'Sado-Masochism, Criminal Law and Adjudicative Method: *R* v *Brown* in the House of Lords' (1993) 44 NILQ 380.

9 N. Bamforth, 'Sado-Masochism and Consent' [1994] Crim LR 661, 664.

10 S. Hedley, 'Sado-Masochism, Human Rights and the House of Lords' [1993] CLJ 194, 196.

11 M. Giles, '*R* v *Brown*: Consensual Harm and the Public Interest' (1994) 57 MLR 101, 110.

12 Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) so far as material provides that:

> 1. No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

Article 8 provides that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

13 Mullender, n 8 above, 381.

14 [1994] 1 AC 212, 237. The other majority judges gave similar reasons. See also Lord Jauncey of Tullichettle (247) and Lord Lowry (246).

15 S. Hedley, 'Sado-Masochism, Human Rights and the House of Lords' [1993] CLJ 194, 194–195.

16 Mullender, n 8 above; Giles, n 11 above.

in the *Brown* case by the European Court of Human Rights has been eagerly awaited.

The Strasbourg proceedings

Laskey, Jaggard, Brown v *The United Kingdom* began as an application based upon Articles 7 and 8 of the Convention. With respect to the former the applicants complained that their convictions were the result of an unforeseeable application of a provision of the criminal law. Under Article 8 they argued that the application of sections 20 and 47 of the Offences Against the Person Act 1861 in this instance amounted to an unlawful and unjustifiable interference with their right to respect for their private life. In January 1995, the Commission rejected the argument based upon Article 7 and declared admissible a complaint under Article 8. In its report of 26 October 1995 it expressed the opinion, by eleven votes to seven, that there had been no violation of Article 8.[17]

In February 1997 the applicants' final submission to the Court based upon a violation of their right to respect for their private lives through the expression of their sexual personality, as guaranteed by Article 8 was rejected by a unanimous Court. The Court concluded that the national authorities were entitled to consider that the prosecution and conviction of the applicants were necessary in a democratic society for the protection of health[18] within the meaning of Article 8 paragraph 2 of the Convention.

'necessary in a democratic society'

In the final instance the argument before the Court focused upon the meaning of the phrase 'necessary in a democratic society' found in the second paragraph of Article 8.[19] In considering the meaning of this phrase the Court concluded[20] that in order to fall within the parameters of 'necessity' various criteria had to be satisfied. First, the interference must correspond to a pressing social need. Second, the response must be proportionate to the legitimate aim pursued. Finally, in determining whether an interference is 'necessary in a democratic society', the Court would take into account a margin of appreciation left to the national authorities whose decision remains subject to review by the Court for conformity with the requirements of the Convention. The Court concluded that in this case the State met all of these requirements.

17 Extracts from the Commission's decision are reproduced in the report of the Court's decision (1997) 24 EHRR 39, 47–52.

18 The Court, like the Commission, did not make a finding as to whether the interference with the applicants' right to respect for private life could also be justified on the ground of the protection of morals. However they added that this should not be understood as calling into question the prerogative of the State on moral grounds to seek to deter acts of the kind in question. (1997) EHRR 39, at 60, para 51.

19 The proceedings focused upon this particular phrase in paragraph 2 of Article 8 as all parties agreed that the criminal proceedings against the applicants which resulted in their conviction constituted an 'interference by a public authority' with the applicants' right to respect for their private life 'in accordance with the law' in pursuit of the legitimate aim of the 'protection of health or morals', within the meaning of the second paragraph of Article 8.

20 The court referred to *Olsson* v *Sweden* (*no 1*) judgment of 24 March 1988, Series A no. 130, pp 31–32, para 67; (1989) 11 EHRR 259.

Pressing social need

In determining that there was adequate evidence of pressing social need the Court accepted[21] that one of the roles which the State is entitled to undertake is the regulation, by way of the criminal law, of activities which involve the infliction of physical harm, whether the activities in question occur in the course of sexual conduct or otherwise.[22] In the first instance, the Court concluded, a determination of the level of harm that should be tolerated by the law in situations where the victim consents is a matter for the State concerned. These situations call for a balance between, on the one band, public health considerations and the general deterrent effect of the criminal law, and, on the other, respect for the personal autonomy of the individual.[23]

The judgment leaves the reader in little doubt that the Court interpreted the applicants' actions as acts of extreme violence describing them in terms of (genital) 'torture'[24] and drawing analogies between the applicants' acts and acts of rape and sexual abuse.[25] As such the Strasbourg Court concluded that the acts complained of could not be characterised as trifling or transient.

Furthermore the State authorities were entitled to have regard not only to the actual seriousness of the harm caused, but also the potential for harm inherent in the acts in question. The fact that no medical treatment had been required was said to be irrelevant.

The present and potential perceived gravity of the acts was sufficient, the Court concluded, to distinguish the present case from the earlier decisions concerning consensual homosexual behaviour in private between adults.[26]

The Court also rejected the applicants' contention that they had, during the course of the investigation or the subsequent proceedings, been singled out partly because of the authorities' bias against homosexuals. In support of this specific argument reference was made to the recent judgment in the *Wilson* case.[27] The Court of Appeal concluded that consensual acts of branding by a heterosexual couple were outside the parameters of the *Brown* decision. In dismissing the argument that the *Wilson* case was evidence of bias, the European Court, like the

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21 (1997) 24 EHRR 39, 58, para 43.

22 In his concurring opinion Judge Pettiti went further arguing that 'pressing social need' could legitimate the regulation and punishment of all sexual practices which were demeaning even if they did not involve the infliction of physical harm. He explained his conclusions in the following terms:

> The dangers of unrestrained permissiveness, which can lead to debauchery, paedophilia or the torture of others, were highlighted at the Stockholm World Conference ... The protection of private life means the protection of a person's intimacy and dignity, not the protection of his baseness or the promotion of criminal immoralism. (1997) 24 EHRR 39, 61

23 (1997) 24 EHRR 39, 58–59, para 44.

24 See paras 9, 40 and the concurring opinion of Judge Pettiti.

25 See the concurring opinion of Judge Pettiti, (1997) 24 EHRR 39, 60–61.

26 *Dudgeon* v *the United Kingdom* judgment of 22 October 1981, Series A no 45, (1982) 4 EHRR 149; *Norris* v *Ireland* judgment of 26 October 1988, Series A no 142, (1991) 13 EHRR 186; and the *Modinos* v *Cyprus* judgment of 22 April 1993, Series A no 259 (1993) 16 EHRR 485. The Court also cast doubt upon the 'privacy' of the acts (para 36). They suggested that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8. While sexual orientation and activity concern an intimate aspect of private life in this instance the privacy of these activities was in doubt for various reasons. First, the acts involved a considerable number of people. Second, the activities also included the recruitment of new 'members'. Third, the activities used several specially-equipped 'chambers'. Fourth, many video-tapes were distributed among the 'members'. These factors suggested to the Court that it was open to question whether the sexual activities of the applicants fell entirely within the notion of 'private life.'

27 [1996] 3 WLR 125.

Court of Appeal, did not consider that the facts in the *Wilson* case were at all comparable in seriousness to those in the applicants' case.

Proportionate to the legitimate aim

In addressing the question of proportionality the Court concluded that the measures taken against the applicants could not be regarded as disproportionate. Neither the number of charges originally brought against the applicants, nor the distance between the act and the charge, in some instances up to ten years, nor the severity of the original sentences of imprisonment were considered as disproportionate.[28] The State's response, the Court concluded, was proportionate to the nature of the acts complained of and the degree of organisation involved in the offences.

Margin of appreciation

In general the Court concluded that the margin of appreciation ought to be wide in this context. Various reasons were offered in support of this proposition. First, the Court argued that this was a necessity having regard to the great complexity of the role of consent in the criminal law. Second, Judge Pettiti, in his concurring judgment, suggested that the margin is wide in relation to questions of morals or problems of civil society and above all where the concern of the State was to afford better protection to others.[29] Finally, while a State's decision would still remain subject to review by the Court any review by the Court would take account of the fact that the scope of this margin of appreciation need not be identical in each case. It might vary according to the context. Relevant factors would include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned.[30]

Brown after *Laskey*

The *Laskey* decision offers considerable support to the majority decision in *Brown*. It affirms the majority's determination not only to represent the actions of the accused as acts of violence, but as forms of violence that are to be understood as acts so evil that they are not only a threat to the individual but a threat to civilised society.[31] This gives rise to a generous basis for criminalisation; not only actual harm but speculation about future harm will legitimate intervention. By way of its generous approach to the 'margin of appreciation' *Laskey* reduces the viability of any challenge to the State's determination of the nature of particular acts. Furthermore it adds a gloss of legitimacy to inconclusive, arbitrary, and ex post facto rationalisations that are the judicial reasoning of the majority in *Brown*. Finally, the *Laskey* decision supports the majority decision in the House of Lords that the criminalisation of consensual acts of giving and receiving of pain for sexual pleasure is not a matter of privacy in particular or in general a violation of human rights of all of the parties to those acts.

28 (1997) 24 EHRR 39, 61, para 49.
29 *Müller and Others* v *Switzerland* (1991) 13 EHRR 212.
30 *Buckley* v *the United Kingdom* (1996) 23 EHRR 101 para. 74.
31 See Lord Templeman [1994] 1 AC 212, 237.

As for the *Laskey* decision itself, in many respects the judgment of the Strasbourg Court suffers from several of the weaknesses found in the House of Lords decision. In the final instance the Strasbourg decision is based upon an 'undesirable misconception', mistaking a sexual practice for one of violence. With the discretion offered by way of the margin of appreciation the judgment offers little clear guidance either to judges or citizens about the limits of privacy under the European Convention on Human Rights either within the UK or in different countries who are signatories to the treaty. In the final instance the decision appears to suggest that in matters of particular complexity specifically when concerned with morality or presented in terms of the protection of the vulnerable, the Strasbourg Court will be reluctant to intervene, thereby giving a State's paternalistic policy decisions considerable latitude and the gloss of legitimacy associated with human rights.

Privacy after *Laskey*: salutary lessons

The *Laskey* decision is a salutary lesson for those critics of *Brown* who projected their hopes and aspirations for a different outcome onto human rights in general and the principle of privacy under the European Convention on Human Rights in particular. Even though there is a substantial body of work which draws attention to the need for considerable scepticism in this respect[32] a naive optimism was characteristic of those who offered a human rights solution to the defendants in *Brown*. In the wake of the *Laskey* decision Lord Mustill's reflections on the European Convention on Human Rights found in his dissenting judgment in *Brown* have a prophetic ring to them:

> The sonorous norms of the Convention, valuable as they unquestionably are in recalling errant states to their basic obligations of decency towards those in their power, are often at the same time too general and too particular to permit a reasoned analysis of new and difficult problems. Article 8 provides a good example. The jurisprudence with which this article, in common with other terms of the Convention, is rapidly becoming encrusted shows that in order to condemn acts which appear worthy of censure they have had to be forced into the mould of article 8, and referred to the concept of privacy, for want of any other provision which will serve. I do not deny that the privacy of the conduct was an important element in the present case, but I cannot accept that this fact on its own can yield an answer.[33]

While the *Laskey* decision suggests that Lord Mustill's final conclusion that privacy on its own cannot yield an answer is problematic, the decision of the Strasbourg Court does draw attention to another important aspect of Lord Mustill's reflection. Privacy is a set of juridical terms and conditions according to which human relations and disputes about those relations are given particular juridical form. While the form itself gives those human relations particular meaning and shape it does not necessarily produce either a single or an inevitable outcome. The juridical terms and conditions give voice to a range of other factors and at the same time mediate them.

The Strasbourg decision points to the limits of privacy in a particular context and

32 In the specific context of human rights issues and sexuality see D. Herman, *Rights of Passage* (Toronto: University of Toronto Press, 1994); and L.J. Moran, 'The Homosexualisation of Human Rights' in C. Gearty and A. Tomkins (eds), *Understanding Human Rights* (London: Mansell, 1995) 313–335.

33 [1994] 1 AC 212, 272.

more generally the limits of human rights. It demands that we recognise that human rights are not necessarily about inclusion and recognition of difference. Human rights may also be about the violence of exclusion and the denial of human rights.[34] In that process human rights is about ontological categorisation: is the humanity of those who derive pleasure from the consensual giving and receiving of pain worthy of recognition? In this instance the Court has denied the humanity of those who so act. Judge Pettiti provides perhaps the clearest representation of the terms of that denial, in his suggestion that: 'The protection of private life means the protection of a person's intimacy and dignity, not the protection of his baseness or the promotion of criminal immoralism'.[35] Here, privacy in particular and human rights more generally are taken to be concerned with the institutionalisation of an ontological order as a moral order based upon a violent hierarchy of sex, sexuality and gender. These ontological and hierarchical matters are given another form by way of the medicalisation of the actors and the acts they perform. While resort to 'public health' may sanitise the politics of exclusion and the normalising assumptions at work in that process it fails to erase them.

Protection for the vulnerable?

Nor, I would argue, does the *Laskey* decision call for further celebration on the part of those who welcomed the *Brown* decision as a recognition of the rights of the victims of violence, in particular women. First, the suggestion that *Brown* and now *Laskey* would protect women who might be the (potential) victims of violence is naive in many respects. It ignores the reality of policing connected with the *Brown* proceedings and in its wake, which suggests that the police viewed (gay) men as a source of criminal activity rather than as individuals or a group in need of police services.[36] It also ignores the reality of the law of consent both with respect to sexual relations and also in those relations of violence which are capable of being consensual.[37] One effect of the decisions in both the House of Lords and the European Court of Human Rights is that the decision to accept the criminal nature of the acts before the court precluded any consideration of the nature of consent, which feminists have quite rightly pointed to as being profoundly problematic and in need of urgent review.[38] The Strasbourg Court's apparent endorsement of the Court of Appeal in *R* v *Wilson*,[39] is another cause for concern in this respect. In *Wilson* the Court of Appeal found that the branding of initials by one person on the buttocks of another person was not an offence under section 47 of the Offences Against the Person Act 1861. Here the husband's act against his wife (with her consent) was described by the court not as an act of violence akin to sexual abuse but analogous to a tattoo and as 'a desirable piece of personal adornment'.[40] What

34 Moran, n 32 above.
35 [1997] 2 EHRR 39, 61.
36 C. Stychin, n 2 above, ch 7; Moran, n 2 above.
37 On rape see S. Duncan, 'Law's Sexual Discipline: Visibility, Violence, and Consent' (1995) 22(3) *Journal of Law and Society* 326 and Howe, n 2 above. Lord Mustill provides a good exposition of those instances where the law allows an individual to consent to acts of violence otherwise unlawful. See also Moran, n 2 above.
38 See for example S. Edwards, n 5 above, ch 2; N. Naffine, *Feminism and Criminology* (Cambridge: Polity, 1987) ch 4; C. Smart, 'Law, Feminism and Sexuality: from Essence to Ethics?' (1994) 9 *Canadian Journal of Law and Society* 16.
39 [1996] 3 WLR 125.
40 [1996] 3 WLR 125, 127.

in a 'homosexual context'[41] was read as a sign of unruly violence and a form of cruelty that threatened civilisation itself, in the context of a heterosexual relationship and in this particular instance, marital relations, was a:

> Consensual activity between husband and wife, in the privacy of their own home [and] is not, in our judgment normally a proper matter for criminal investigation, let alone criminal prosecution.[42]

Wilson draws attention to the vulnerability of women as victims of violence under the *Brown* decision when they come to the law. In a heterosexual marital context *Wilson* draws attention to the fact that it will be no easier to categorise acts against a person as acts of violence under *Brown*. A more pessimistic reading of *Wilson* might suggest that it will be more difficult to define an act between the parties as an act of violence. The decision in *Wilson* perhaps offers a more disturbing reading of the legal response to violence against women in the marital context; the criminal law has little place in the regulation of such relationships. This would seem to be the very antithesis of a growing recognition of the need to take the protection of the women as victims of violence seriously. The endorsement of the *Wilson* decision by the Strasbourg Court and that Court's inability to read the distinctions drawn between the actions in *Brown* and those in *Wilson* as distinctions tinged with value assumptions about the worthiness of heterosexual marital relations in contrast to the questionable value of 'homosexual' relations ought to be a salutary warning to anyone who might look to the Strasbourg Court to address matters of discrimination in general and of violence against women in particular.

The conclusion that the margin of appreciation will be wide because questions of consent raise particularly complex questions is another disturbing sign. It suggests that the Court will be most reluctant to intervene in those very areas which demand intervention.

Far from being a cause for celebration, the *Laskey* decision ought to be a cause for concern by all those who seek to protect those who are exposed to the threat of gendered and sexualised violence. In short *Laskey, Jaggard and Brown* v *The United Kingdom* makes disturbing reading. It is a chilling lesson to find the Court of the European Convention on Human Rights interpreting the treaty in a way that 'give[s] rights to no-one'.[43]

41 I have criticised the use of 'homosexual' in the context of the *Brown* proceedings elsewhere: Moran, n 2 above.

42 [1996] 3 WLR 125, 128.

43 Hedley, n 10 above, 194–195.