Sadomasochism in Strasburg: A Pleasurable Danger?

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ABSTRACT

This paper presents an analysis of sadomasochistic practices from a gender perspective against which it compares and criticizes the European Court of Human Rights' (ECtHR) case law on sadomasochism. In sadomasochistic practices, domination and subordination are closely interdependent. The interplay of domination-subordination and pleasure-danger entails that these postures may be variously attached to either/both masculine and/or feminine roles and identities without pre-fixed meaning. What is the stance of human rights law on this type of practice? The ECtHR's case law is the only example of a supranational human rights court dealing with sadomasochism. To date, no cases related to sadomasochism have been brought forth in other regional courts' case law and in the jurisprudence of UN human rights treaty bodies. The study investigates, therefore, how the ECtHR has interpreted sadomasochism under Article 8 of the European Convention of Human Rights, considering the notions of private life, sexual acts, and violence in order to evaluate the legitimacy of the State's interference. This paper looks at the way in which the ECtHR interprets the conducts and roles within sadomasochism. The peculiarities of this sexual performance are hardly understood faithfully to their nature and purposes in the ECtHR's case law. Apart from rare shy exceptions, the mantra of domination=violence, dominator=perpetrator, and dominated=victim monopolizes the ECtHR's narrative on sadomasochism. From the sadomasochistic perspective, the subject described as a "victim" in the Court's decisions can well be an individual who has freely consented to receive pain as a source of their pleasure under certain conditions negotiated beforehand with the dominator. Where such conditions are respected, the latter's position should be considered much closer to a sexual contracting party rather than a perpetrator. The conclusion stresses that the ECtHR's reasoning does not grasp the sexual realities of gendered subjectivities, being based on oppositional and unnuanced conceptions of violence versus sex, domination versus subordination, and masculinity versus femininity.

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. . . Pleasure often comes from pain, power from prohibition, and domination often is impossibly mixed up in subordination.[1]

INTRODUCTION

Sadomasochism resides in the blurred land of domination-subordination producing a sense of pleasure-danger. It encompasses various types of sexual activities which share their consensual nature and their source of pleasure, ranging from control over or subjection to others to giving and receiving pain. In sadomasochistic practices, domination and subordination are closely linked. At the heart of subordination is the danger-pleasure of domination, unlike the oppositional conceptions of male domination *versus* female subordination underlying prevailing interpretations of international human rights law. But what happens when sadomasochism arrives before the European Court of Human Rights in Strasbourg? This paper analyses sadomasochistic practices from a gender perspective against which it compares how the European Court of Human Rights (ECtHR) interprets the conducts and roles within sadomasochism under Article 8 of the European Convention of Human Rights (ECHR), considering the notions of private life, sexual acts, and violence in order to evaluate the legitimacy of the State's interference. The ECtHR's case law is the only example of a supranational human rights court dealing with sadomasochism. To date, no cases related to sadomasochism have been brought forth in other regional courts' case law and in the jurisprudence of UN human rights treaty bodies.

Sadomasochism disrupts the traditional gendered dualism and asymmetry of the man-perpetrator dominating the woman-victim. The amalgam of domination and subordination unveils that the legal framework of 'victim' and 'perpetrator' is unsuitable for the erotic unraveling of sadomasochistic acts. The interplay of domination-subordination and pleasure-danger entails that these postures may be variously attached to either/both masculine and/or feminine roles and identities without pre-fixed meanings. Domination may be feminine, subordination may be masculine—just like any power position may be attached to any variously gendered subject. When this intimate sexual revolution put into effect on the sadomasochistic stage encounters the gendered human rights discourse, many questions arise. How does the ECtHR consider this intersection of pleasure and danger characterizing sadomasochistic practices? What role does the violence enshrined in certain sadomasochistic acts play in the eyes of the Court? How does the ECtHR apply the dualistic model of victim and perpetrator to sadomasochism? What is the Court's attitude towards the alteration of traditional models of woman-subordinated and man-dominator, replaced by

[1] Martha McCluskey, *How Queer Theory Makes Neoliberalism Sexy*, in FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 115, 125 (Martha Fineman, Jack E. Jackson, & Adam P. Romero eds., 2009).

various positionalities of both femininities and masculinities? Femininities, masculinities, domination, aggression, lust, and subordination intermingle in sadomasochistic practices. The following examination will dismantle the Court's gendered assumptions about sexual encounters, focusing particularly on the objectivity of pain and the conventional power relations of domination/subordination. By conceiving sadomasochism as a net of sexual interactions, this paper challenges the Court's reasoning which mirrors traditional gender normativity. This paper is a journey into the changing dynamics of gendered subordination and domination in relation to danger *and* pleasure, and danger *as* pleasure. This journey starts by defining the field of the concept and practices of sadomasochism, with specific attention to the reversibility of the dominative and subordinate roles (Section I). The sadomasochistic interaction as an unbalanced power relationship plays with the subjective boundaries between subjects and between danger and pleasure. As such, sadomasochism is a personal sexual choice expressed through the consent of the participants (Section II). This paper subsequently addresses how the ECtHR treats sadomasochistic acts by examining its case law (Section III). The analysis of the Court's case law between 1997 and 2020 focuses on how judges have applied Article 8(2) ECHR to cases concerning consensual acts of sadomasochism. The discussion addresses three aspects of the Court's reasoning in particular: the interpretation of violence in the context of sadomasochism (Section III.2), also in comparison with judgments on homosexual acts (Section III.1); the Court's tendency to victimize individuals actively engaged in the sadomasochistic act because of their subordinate position, as well as its ambiguous attitude toward considering sadomasochism as a sexual activity (Section III.3). Against this enigmatic connotation of sadomasochism as a less valuable sexual activity, the paper shows how the ECtHR constructs a hierarchy of sex value where 'non-traditional' sexual acts are relegated to lower positions (Section IV). Given this ECtHR's suspicion, there is reason to doubt the existence of a right to engage in sadomasochistic activities under the ECHR. Further, the paper finds that an approach to violence which is based on the degree of pain, such as the Court's approach, is conceptually and operationally limited in the light of the subjective and the cultural roots of the perception of pain (Section V). The conclusion suggests that a closer examination of the specifics of the sadomasochistic performance, including the roles, positions, and situational meanings of the subjects may provide the Court with a better understanding of the human rights implications of sadomasochistic practices.

I. SADOMASOCHISTIC PRACTICES

1.1. THE KERNEL: DOMINATION, PLEASURE, RECOGNITION

'Sadomasochism' refers to consensual sexual activity based on the pleasure of controlling or being subjected to others, as well as inflicting pain on and receiving pain from others. Sadomasochism is a portmanteau term merging 'sadism,' which is the enjoyment of sexual pleasure in inflicting pain, and

'masochism,' which is the taking of erotic pleasure in receiving pain. Sadomasochism is frequently referred to as 'SM,' 'S/M,' 'S&M,' as well as in combination with bondage ('B') and discipline ('D') in the acronym 'BDSM.'[2] Sadomasochism is often distinguished from dominance and submission ('D/S'), which, instead, is frequently a key part of the former. Throughout this paper, 'BDSM' will be used only where this term is deployed in the ECtHR's decision at stake. Otherwise, the paper will avoid any acronym and simply refer to sadomasochism as defined above, which may or may not include bondage meaning the consensual practice of binding, tying, or otherwise restraining a partner's movements.[3] Another definitional note concerns the identitarian connotations of sexual practices. Sadomasochistic acts can occur between individuals of the same or different gender: acts may be described as 'heterosexual' or 'homosexual' sadomasochistic. By 'homosexual sexual acts' with no further connotation, this paper will refer to non-sadomasochistic homosexual acts, especially throughout the comparison between the ECtHR's case law on decriminalization of homosexual acts on the one hand, and sadomasochistic practices on the other hand.[4]

Such a broad definition of sadomasochism comprises an array of practices characterized by a power imbalance that produces lust both in the presence or absence of pain.[5] Where pain is present, it (1) derives from various forms of domination; (2) produces pleasure; and (3) is a form of recognition that is a way for the subject to be recognized. This is the scope of sadomasochism for the purposes of this study. Accordingly, sadomasochism is one of those sexual activities that transcends and is not interested in the dynamics of the homosexual/heterosexual binary. Sadomasochism can still have a homosexual or heterosexual characterization. However, central to this specific form of sexuality is the alternation of domination and subjugation that occurs between the subjects performing it and the pain-pleasure stemming from it.[6]

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[2] On BDSM community assertions of sadomasochism as an identity, *see* Michel Foucault, *Sex, Power, and the Politics of Identity*, in ETHICS: ESSENTIAL WORKS OF MICHEL FOUCAULT 1954-1984 163-173, 167-170 (Paul Rabinow ed., 2000).

[3] Bondage, in turn, does not necessarily imply sadomasochism, since it can be used as an end in itself: *cf.* Theodore Bennett, *Human Rights (Sexual Conduct) Act 1994*, 35 SYDNEY L. REV. 541, 541 (2013).

[4] *See* infra, § 3.1.

[5] *See* STEVEN ALLEN, CINEMA, PAIN AND PLEASURE CONSENT AND THE CONTROLLED BODY 28 (2013).

[6] An exhaustive description of the practices of sadomasochism, their genealogy and developments furnishes scope for a separate paper; for a rich psychoanalytical study of the unconscious fantasies of masochism built on, among others, psychological pain and self-destructive violence, *see* ESSENTIAL PAPERS ON MASOCHISM, (Margaret Ann Fitzpatrick Hanly ed., 1995); for an example of ethnographic and sociological explorations on contemporary sadomasochistic culture, *see* STACI NEWMAHR, PLAYING ON THE EDGE: SADOMASOCHISM, RISK, AND INTIMACY (2011); DANIELLE J. LINDEMANN, DOMINATRIX: GENDER, EROTICISM, AND CONTROL IN THE DUNGEON (2012); on alternative narratives of consensual BDSM, *see* Bela Bonita Chatterjee, *Pay v. UK, the probation service and consensual BDSM sexual citizenship*, 15 SEXUALITIES 739, 741-743 (2012); on the relationship between subject and object in sadomasochism, *see* JEAN-PAUL SARTRE, L'ÊTRE ET LE NÉANT: ESSAI D'ONTOLOGIE PHÉNOMÉNOLOGIQUE 446, 475-76 (2017); RENÉ GIRARD, JEAN-MICHEL OUGHOURLIAN & GUY FORT, DES CHOSES CACHÉES DEPUIS LA FONDATION DU MONDE: RECHERCHES AVEC JEAN-MICHEL OUGHOURLIAN ET GUY FORT 3 (1978).

Physical pain is only one aspect of sadomasochism. Dominance and submission—also referred to as 'D/S' and often distinguished from sadomasochism—may take place in various manners that are not necessarily physically painful. Dominance-submission presumes that one or more individual(s) ('the dominator') assume(s) control over the other(s) ('the dominated') who relinquish(es) their power. Control is key to triggering lust in both the dominating and the subordinated individual. Control is often exercised through various forms of humiliation of the controlled subject. There are countless erotic fantasies about how control can be exercised. To name some of them: the 'golden shower' consists of urinating on the dominated; in 'foot worship' the dominated follows the dominator's orders, such as kissing or massaging their feet.[7] A conceptual, and somehow operational, clarification: the complementary agent of a masochist player is not a sadist person. The sadist person is one who enjoys harming the other. If the masochist finds pleasure in being harmed, there is no reason for the sadist to choose a masochist victim. Indeed, there is the inappropriate tendency to believe, as stressed by Gilles Deleuze, that it is possible to achieve unity in the complementarity of antonyms and therefore 'to obtain Masoch starting from Sade.'[8] As will be explained below, roles in the sadomasochistic play are not stable, but shift from dominative to subordinate positions, and *vice versa*.

Sadism and masochism have long been considered disorders of sexual development. The Diagnostic and Statistical Manual (DSM-5) of the American Psychiatric Association includes the so-called 'sexual masochism disorder' and 'sexual sadism disorder' which occur when the person suffers from significant distress caused by the psychosocial difficulties deriving from sadomasochistic sexual interests. Therefore, sadomasochism *per se* is not classified as a mental disorder under the DSM-5, but only when the individual experiences obsessive thoughts and/or distress, such as guilt, anxiety, and shame. Notwithstanding this evolution and the slight depathologization of sadomasochistic inclinations, criticism of the former as well as of the present DSM-5 approach to sadomasochism and other 'sexual disorders' are harsh.[9]

A central element of sadomasochism is consent. The sadomasochistic drive presupposes that, and is only possible if, the participants have given their

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[7] Danielle Lindemann, *BDSM as Therapy?*, 14 SEXUALITIES 151, 152–53 (2011).

[8] GILLES DELEUZE, MASOCHISMO E SADISMO 11 (1971).

[9] DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5, (American Psychiatric Association & American Psychiatric Association eds., 5th ed. 2013); for an overview of the ways in which the different editions of the DSM have dealt with sadomasochism and the criticism regarding the pathologizing inclusion of sadomasochism among mental disorders, see Richard B. Krueger, *The DSM Diagnostic Criteria for Sexual Masochism*, 39 ARCHIVES OF SEXUAL BEHAV. 346, 348 (2010); for a piercing criticism of the DSM-5, particularly the pathologization of normality and the stigmatization of healthy persons as mentally ill behaviors it operates, *see* ALLEN FRANCES, SAVING NORMAL: AN INSIDER'S REVOLT AGAINST OUT-OF-CONTROL PSYCHIATRIC DIAGNOSIS, DSM-5, BIG PHARMA, AND THE MEDICALIZATION OF ORDINARY LIFE (2014); on other arguments against pathologization, *cf.* Roy Baumaister & Jennifer Butler, *Sexual Masochism: Deviance without Pathology*, *in* SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT 225–39 (William O'Donohue & Richard Laws eds., 1997).

prior consent to what otherwise would most likely amount to wrongful acts violating, to mention a few, the individual's dignity, the right to physical integrity and the right to be free from cruel, inhuman and degrading treatments. In order to reach consent, individuals discuss the type of acts they wish to be engaged in. The agreement they reach is the result of negotiations focused on the activities they want or do not want to participate in. Precautionary measures are also included in the 'sadomasochistic contract' to signal an immediate halt to the practice.[10] Subjects—most likely the one receiving pain—can withdraw their consent explicitly by using a safe-word or a safe-symbol, i.e., a non-verbal action, especially where speech is restricted, that was previously agreed upon, such as a gesture or a noise.[11] There are some rules for the erotic game[12] of pain-pleasure to take place smoothly. However, if the (dominating) subject does not honor the safe-word or the safe-symbol, consensual pain-pleasure turns into non-consensual pain-abuse. If the rules of the game are not respected, the rules of the law apply to the misconduct. The regime of eroticism gives way to the legal regime. For some, consensual sadomasochism "appears to be on the cusp of a new understanding"[13] in the legal domain. For instance, the time for consensual sadomasochism "to be heard has come."[14] Before turning to the core question—what sadomasochism is for the ECtHR—the next section presents the configuration of sexual roles in sadomasochism as changeable, malleable, and prone to creative reinventions.

I.2 REVERSIBLE ROLES

Domination and subordination are not necessarily connected to one or other gender. The scheme of masculine domination, opposing a superordinate man dominator to a subordinate woman victim [m>f],[15] can actually be a *good* model, but only in two cases:

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[10] STACI NEWMAHR, PLAYING ON THE EDGE: SADOMASOCHISM, RISK, AND INTIMACY 75–78 (2011); MARGOT DANIELLE WEISS, TECHNIQUES OF PLEASURE: BDSM AND THE CIRCUITS OF SEXUALITY 78–85 (2011).

[11] *See* JAY WISEMAN, SM 101: A REALISTIC INTRODUCTION (1998).

[12] The conceptualisation of sadomasochistic activities as game playing dates back to Michel Foucault, *Sexual choice, sexual act: Foucault and homosexuality (interview)*, *in* POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984 286, 299 (Lawrence Kritzman ed., 1988); however, the idea was further developed by Nils-Hennes Stear, *Sadomasochism as Make-Believe*, 24 HYPATIA 21 (2009).

[13] Chatterjee, *supra* note 6 at 740.

[14] Darren Langdridge & Trevor Butt, *A Hermeneutic Phenomenological Investigation of the Construction of Sadomasochistic Identities*, 7 SEXUALITIES 31, 35 (2004).

[15] [m>f] was first introduced by Janet Halley as one of the essential claim underlying a certain form of American feminism: JANET E. HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 17–18 (2006); Dianne Otto further elaborated the concept and applied it to her criticism of sex and gender as interpreted under international human rights law. Dianne Otto, *International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry*, *in* THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY 197–214 (Margaret Davies & Vanessa E. Munro eds., 2013); the author has deepened and broadened the applications of this theoretical strand in human rights law, with specific reference to the case of surgeries upon intersex children: Giovanna Gilleri, *Gendered Human Rights and Medical Sexing Interventions upon Intersex Children: A Preliminary*

(1) If [m>f] is extrapolated from the societal context in which, for instance, human rights analysis, such as the one developed throughout this paper, applies it.
(2) If [m>f] is applied to sadomasochism, along with other dominative forms [>], including but not limited to [m>f], [f>m], [f>f], and [m>m].

The first case assumes an acontextual type of examination that clearly does not mirror the orientation of this paper. The second case, instead, is the direction that the last paragraphs of this inquiry will follow.

I.2.1 UNPREDICTABLE MASTERS AND SLAVES

The application of [m>f] to sadomasochism requires some conceptual premises on gendered subordination occurring *regardless of* the sadomasochistic stage. A structural legal element constitutes the primary force of gender-based male dominative institutions and practices in the so-called western world.[16] This finding has at least two implications. First, male domination is twofold in nature. It is 'individual' [m_i], that is, it depends on the single individual's will and (unconscious) desire. It is also and simultaneously 'social' [m_s]: it has social and cultural roots in rules and processes. [m_s] and [m_i] are separate yet interdependent. The individual exerts [m_i], which is partially grounded in the structural [m_s] and partially rooted in the individual will. By the same token, [m_s] exists and resists at the level of social, legal, cultural, and familiar infrastructures. However, it expresses itself also through the action of single individuals in the form of [m_i], which is never detachable from the system [m_s] where it operates. The 'm' of [m>f] should be read, therefore, as [(m_s + m_i)>f]. The acknowledgment of the structural component of gender domination has a crucial consequence for the positionality of femininity in the gender formula [(m_s + m_i)>f]. Indeed—and this is the second implication—there is no correspondence between [m_s + m_i] and a hypothetical [f_s + f_i]. Femininity does not express itself as a dominative structure socially and culturally ingrained. [f_s] simply does not find any reason to exist, at least in the western model of society and its representation in the letters and interpretations of human rights law. Hence, [f_s + f_i] is an incorrect understanding of what femininity actually is, for both individuals and social institutions. A final consequence is that the "f" and "m" of [m>f] are not, to quote Jessica Benjamin, "sovereign equals", since 'm' is the result of a combination of factors, unlike "f". As femininity, unlike masculinity, is not endowed with any historically structural dominative dimension, the reversed [f>m] will never be the reciprocal of [m>f]. This is because of the incommensurability of the constitutive terms of femininity and masculinity.

These premises are useful to understand what makes sadomasochistic interactions peculiar in gendered terms. While sadomasochism is not completely

Enquiry, 3 ASIAN Y.B. HUM. RTS & HUMANITARIAN L. 79 (2019).

[16] JESSICA BENJAMIN, THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION 216 (1st ed. 1988).

secluded from the above-described dynamics, the scheme [m>f] applied to sadomasochism ignores any consideration of the systematic domination of [m], making [m] the sum of [m_s + m_i]. The sadomasochistic act, regardless of the number of people performing it, is individual in nature: [m_i], [f_i], and [any_i]. Therefore, sadomasochism is a performance between, for instance, [m_i] and [f_i]. The subject's single action can transcend the structural character of male-driven domination underlying any socio-legal examination of gender-related violations. This conception of sadomasochistic practices as make-belief and/or simulation of individual acts has many implications. To mention some of these:

- [f_i] may actually enjoy the fact of being subject to [m_i];
- [f_i] is the subordinate subject, while [m_i] is the dominator;
- [f_i] and [m_i] have agreed that their relationship will take the shape of [m_i>f_i];
- [f_i] can in any moment stop the erotic game for any reason according to the rules the subjects have previously agreed upon;
- [m_i]'s conduct and existence are fully dependent upon [f_i] in practice.[17]

Clearly, the major implication is the transformation of [m_i>f_i] into any dominative combination such as [x>z]. To continue with the letters and identities of the above example, the relationship can well take the reversed direction of [f_i>m_i], without any major consideration concerning women's structural subordination in the world—this is the world *outside of* the sadomasochistic play, the world sadomasochism may simulate *inside of* its play.[18] The creative impulse of sadomasochism entails inherent asymmetry in relation to any feminine, masculine, or other gendered posture. The dominative matrix can occur in heterosexual, homosexual, and any other sexual relationships.[19] What is central to sadomasochism is its capability to invert social roles (the vulnerable man/the cruel woman), displace them from the social level to the mental and corporeal level, and eventually use them to generate new pleasures.[20]

The relation is reversible,[21] with the master turning into the slave, but it will never become equal or reciprocal—remember: the balance between self-

[17] According to a certain psychoanalytic interpretation of masochism, the masochist is indeed the one who actually commands the experience: *cf.* ROBERT JESSE STOLLER, SEXUAL EXCITEMENT: DYNAMICS OF EROTIC LIFE (1986); for an account of a personal experience confirming the psychoanalytical finding, *see* Susan Farr, *The Art of Discipline: Creating Erotic Dramas of Play and Power, in* COMING TO POWER: WRITINGS AND GRAPHICS ON LESBIAN S/M (Samois ed., Alyson Publications ed. 1981); *see generally* BENJAMIN, *supra* note 16 at 262.

[18] Saying that sadomasochism is a play does not mean that it is not real; rather, sadomasochism takes place and subverts our very human caves.

[19] This investigation scrutinizes how sadomasochist practices overturn the traditional asymmetries and axioms of human rights law; therefore, this section does not address the question as to how sadism and masochism have become associated with masculinity and femininity respectively: *see* BENJAMIN, *supra* note 16 at 74.

[20] *See* GIORGIO AGAMBEN, THE OMNIBUS: HOMO SACER 1124 (2017).

[21] On the fluidity of the sadomasochistic relationship, Michel Foucault stressed: 'S&M is the eroticization of power, the eroticization of strategic relations. What strikes me with regard to S&M is how it differs from social power. What characterizes power is the fact that it is a strategic relationship

assertion and mutual recognition is broken. Absence of reciprocity, however, is not synonymous with lack of recognition. Submission becomes a form of recognition for the slave ("this is me for you, take me and make the use of me as you wish"), while the master asserts power through domination ("this is me over you, I exert on you all the power that you granted me").[22] These are the core traits characterizing sadomasochistic performances where pleasure may come from pain and domination is "impossibly mixed up in subordination."[23]

I.2.2. BEYOND REPLICATION OF MASCULINE DOMINANCE

Femininities and masculinities may play various roles, not necessarily prefixed, on the sadomasochistic stage. The feminist debate on sadomasochism is fierce. The two extremes are sex-negative feminism and sex-positive feminism. The former condemns the objectification of women's bodies, the eroticization of violence, and the normalization of aggression and humiliation. All this happens, according to this line of thought, in the context of systemic sexual subordination [m>f]. It is believed that these kinds of sadomasochistic practices, with the woman being the subordinated subject, cannot but amplify and legitimize masculine dominance. This approach perpetuates the narrative of the woman suffering harm and therefore being the victim of the man, even if victimization happens within a consensual practice. The woman is not actively performing sadomasochism, because she lacks the sexual agency to enjoy beyond pain, because of pain.[24] For sex-negative feminists, sadomasochistic activities replay and propagate the unequal assumptions and harmful implications of structural sexism. As such, sadomasochism reiterates masculine prevarication and control over women and other (racially, gender-ly, ethnically) subjugated groups.[25] From this perspective, the subjugated subject's consent is not deemed sufficient to replace subordination with lust, pain with pleasure, and domination with exciting restraint. This is because violence is considered inherent to sadomasochism, even when desire and consent are at the basis of the sadomasochistic encounter. If sadomasochism is always violent, the radical feminist line of thought concludes, there is no clear difference between a sex offender and the dominant individual in the sadomasochistic relationship.[26] Accordingly, this sex-negative conceptualization

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which has been stabilized through institutions . . . At this point, the S&M game is very interesting because it is a strategic relation, but it is always fluid. Of course, there are roles, but everyone knows very well that those roles can be reversed. Sometimes the scene begins with the master and slave, and at the end the slave has become the master. Or, even when the roles are stabilized, you know very well that it is always a game. Either the rules are transgressed, or there is an agreement, either explicit or tacit, that makes them aware of certain boundaries': MICHEL FOUCAULT, ETHICS, SUBJECTIVITY AND TRUTH (THE ESSENTIAL WORKS OF MICHEL FOUCAULT, 1954–1984, VOL I) 169 (Paul Rabinow ed., 1997).

[22] See BENJAMIN, *supra* note 16 at 62.

[23] McClusky, *supra* note 1 at 125.

[24] Brenda Cossman, *Sexuality, Queer Theory, and "Feminism After"—Reading and Rereading the Sexual Subject*, 49 MCGILL L. J. 848, 861–862 (2003).

[25] *Id.* at 861–862.

[26] *See, e.g.*, Diana Russell, *Sadomasochism: A contra-feminist activity*, *in* AGAINST SADOMASOCHISM:

of sadomasochism as replication of structural gendered inequalities constructs women's subjectivities through the process of victimization. This is only a sketch of the two major different feminist positions; the discussion is more intricate than that.[27] Nevertheless, at least two questions arise: Do women always occupy the subordinate position in the erotic game of sadomasochism? And if so, do women always suffer from the pain they receive from their sadomasochistic partner?

In contrast to sex-negative accounts of sadomasochism, sex-positive feminism does not equate sexuality with subordination. Enslavement may trigger pleasure. The realities lived by sadomasochist individuals tell a story which is different from sadomasochism as *replication* of structural masculine privilege over women [m>f].[28] To the sex-negative model of replication, Theodore Bennett opposes sadomasochism as *simulation*. Sadomasochistic acts do not literally replicate everyday oppression, but they reproduce power differentials by recontextualizing and redeploying them in alternative manners.[29] Power inequalities in sadomasochism draw on consent and mutual pleasure. In a nutshell, the sadomasochistic war on subject formation between sex-positive and sex-negative approaches takes the shape of a threefold opposition: consent-mutuality-pleasure *versus* victimization-harmfulness-abuse.[30] Hence, it might well be that the masochist posture liberates women in that it frees them from the condemnation of being victims.[31] Sadomasochism may be a form of subversion for the woman-victim depending on the representation of power differentials it engenders. Instances of sadomasochism may or may not draw on pre-existing social systems of domination. The meaning of sadomasochistic activities is situational rather than inherently linked to socially entrenched inequalities.[32] This contextuality arises from intricate interactions between multiple factors including cultural history, the subjects' sociocultural positioning, and the audience's reaction.[33] In short, there is no such thing as 'sadomasochism.' The contingency and the malleability of any sadomasochistic performance depends on several situational specifics that make the meaning attached to it unfixed and unpredictable once and for all.[34] For instance, women can be dominatrices over men slaves: they may indeed play the role of the powerful subject, controlling themselves and the other. A revolution,

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A RADICAL FEMINIST ANALYSIS (Robin Ruth Linden et al. eds., 1982).

[27] Against sadomasochism, *see* AGAINST SADOMASOCHISM: A RADICAL FEMINIST ANALYSIS, (Robin Ruth Linden ed., 1982); for arguments in favor of sadomasochism, *see, e.g.*, Farr, *supra* note 17; THE SECOND COMING: A LEATHERDYKE READER, (Patrick Califia & Robin Sweeney eds., 1st ed. 1996); Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*, 11 TEX. J. WOMEN & L. 51–92.

[28] Patrick Califia, *Feminism and Sadomasochism*, 2 HERESIES 30, 30–34 (1981); Carol Truscott, *S/M: Some questions and a few answers*, *in* LEATHERFOLK: RADICAL SEX, PEOPLE, POLITICS, AND PRACTICE 15–36 (Mark Thomson ed., 2004).

[29] Gayle Rubin, *The Leather Menace: Comments on Politics and S/M*, *in* COMING TO POWER: WRITINGS AND GRAPHICS ON LESBIAN S/M 194, 224 (Samois ed., 3rd ed. 1981).

[30] Theodore Bennett, *Persecution or Play? Law and the Ethical Significance of Sadomasochism*, 24 SOC. & LEGAL STUD. 89, 99 (2015).

[31] *See* Darren Rosenblum, *Rethinking International Women's Rights through Eve Sedgwick*, 33 HARV. J. L. & GENDER 349, 356 (2010).

[32] WEISS, *supra* note 10 at 19.

[33] *See* Bennett, *supra* note 30 at 102.

[34] *Id.* at 103.

rather than a subversion, one might think, for a woman who has been continuously portrayed, in the law and in society, as the passive victim who takes and suffers, instead of giving and aggressing. Yet this is only an example reproducing a rather heterosexual matrix. Roles between men and women in sadomasochism are not necessarily reversed in the sense that the outside-world sexual subordination scheme unfolds with the man becoming the dominated, and the woman becoming the dominator. The type of relationship may not mirror the heteronormative matrix, with two gendered individuals performing specific roles. Subject positions, just like desire, are hardly coherent and highly ambiguous.[35] Therefore, roles may shift throughout time and during the same sexual encounter: from subject to object, from other-controlled to self-directed. A queer legal analysis of the below ECtHR decisions will identify that the Court is not yet capable of recognizing such instabilities and ambiguities in current sadomasochistic practices. Indeed, the Court struggles to repudiate a victim-based narrative.

Overall, sex-positive feminism celebrates the infinite spectrum of sexual possibilities: sadomasochism is only one among the legitimate practices of sexual pluralism.[36] This is a "reductionist" approach to sadomasochism, like the one assumed in this section. Sadomasochism is not "the" sexual practice alternative to stereotyped sexual intercourse, but "a" number of sexual practices among many other sexualities producing multiplicities of pleasures and dangers.[37] The cases that will be discussed below constitute different examples of how the ECtHR deals with individuals expressing their subjectivities through a specific form of sexual practice such as sadomasochism. These cases enshrine diverse gendered dynamics of domination and subordination, which form an integral part of the process of subject formation.[38] Before turning to the analysis of the ECtHR's case law, the next section will examine the interaction of domination-subordination from the perspective of consent and intersubjective boundaries. A psychoanalytically-inspired analysis will identify that these components of sadomasochism constitute modes of subject formation for those individuals participating in it.

II. A PATH OF SUBJECT FORMATION

Domination-subordination tells us something about who we are and what we wish to know about ourselves, and what counts for us as pleasure and/or pain. The following subsections demonstrate the diverse role that gender differentials may play in these sadomasochistic dynamics. After a psychoanalytically-inspired exploration of the meaning and interactions of subordinate/dominative postures (Section II.1), the paper explains why consent is necessary but not sufficient in understanding sadomasochism (Section II.2).

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[35] *See* Cossman, *supra* note 24 at 864–65.
[36] *See id.* at 850.
[37] *See* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY, (Carole S. Vance ed. 1984).
[38] *See infra*, § 2.

II.1. A QUEST FOR BOUNDARIES

Intersubjective relationships rely on the delicate tension between self-assertion and mutual recognition. This means that the subject recognizes their individuality as distinct from the other (self-assertion). At the same time, the other recognizes the subject and is recognized by the subject (mutual recognition).[39] Self-assertion and mutual recognition are in a delicate balance. What is the place for sadomasochistic practices in this scenario? Sadomasochistic fantasy materializes in the 'violation,' i.e. transgression against the other's body. The tension between self-assertion and mutual recognition is broken because self-assertion through domination disturbs the balance. Domination of physical boundaries replaces the tension between the self and the other.[40] Subjects are still in a relationship of dependency. However, reciprocity changes its shape—the boundaries of the violated are broken because the violated allowed the violator to break them. One desires to receive suffering (the violated), while the other (the violator) desires to inflict pain.[41] This complementary movement, although directed to the destruction of boundaries, is a quest for boundaries. To destroy the boundary, one needs to find them first. In this sense, Brenda Cossman recalls the psychology behind the solo practice of certain self-mutilators, who express themselves and trace their bodily frontiers by self-inflicting pain:

> Self-mutilators are sometimes said to be marking the borders between self and other, between inside and out by violating them; they are marking and asserting the border of the self through pain; it is an assertion of self-control.[42]

In the context of sadomasochism, seeking boundaries allows the violated and the violator to preserve their vitality. The search for boundaries is a search for survival and recognition. This is what distinguishes sadomasochism as an erotic encounter from abusive conduct, and sadomasochism as a fantasy of domination from real domination.[43] Eros as a pure experience free from dominative practices is an illusion as it is kneaded with assertion, mastery, and aggression. It is exactly this mix of love with death, and *eros* with *thanatos* which makes sexuality both a danger and a pleasure.[44] Destruction is around the corner, yet the survival of the subject makes sexuality so attractive in the eyes of those who play with boundaries.

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[39] *See* BENJAMIN, *supra* note 16 at 12, 62.
[40] *Id.* at 55.
[41] *Id.* at 64.
[42] Cossman, *supra* note 24 at 871.
[43] *Cf.* BENJAMIN, *supra* note 16 at 74.
[44] *Id.* at 73.

II.2. CHOICES AND CONSENT

Sadomasochism is a pleasurable danger. The idea of victimization in the sadomasochistic context can hardly be understood through the scheme and vocabulary of non-sadomasochistic practices. This is because sadomasochistic victimization is a source of pleasure in that it expresses a desire for recognition. Pain is not an obstacle to, but a precondition for, pleasure.[45] What many feminisms have often framed as negative postures of and for the weak woman victimized by a male-dominated system[46] may be, instead, various modes of erotic satisfaction and mutual recognition. Oppression, humiliation, and, more generally, submission may all be tempting if lived in complicity with one's desire. As seen, the issue at stake here is *prima facie* consent-related. For instance, there are acts of submission to violence and humiliation which are voluntary—that the individual decides to be subject to because these acts bring pleasure regardless of their painful effects. The following section will show that the ECtHR attributes an unstable role to consent. In the Court's decisions, consent seems central to the circumstances of the cases: applicants are described as 'consenting males,' 'consenting adults,' and the like. Yet, when a considerable degree of injury or harm is present, the voices of those consenting people are silenced throughout the Court's judgements. As will be explained shortly, for the Court, the degree of (potential) harm is determinative of whether the subject's desire expressed through consent has a weight and can be heard. A critical reading of these decisions will bring to light one of the limitations of the Court's approach to sadomasochism. That is, the State can outlaw the infliction of considerable harm to which a person decided voluntarily to be subjected to achieve lust. At that point, the subject's consent is not granted a central place anymore. Consent to painful-based and pleasure-oriented acts is relegated to the margins in the name of higher—at least from the community's perspective—interests to be protected such as public health, morals, public safety, prevention of crime or disorder, and the other grounds listed under Article 8(2) ECHR.

While the ECtHR decisions will be examined closely in the next section, one critical remark should be anticipated here. The Court's reasoning is as follows: the absence of consent between parties triggers the shift from legal eroticism to illegal conduct, thereby justifying a legal intervention and allowing for the re-establishment of the language of victims and perpetrators. In contrast, where the sexual encounter is consensual, that is based on prior agreement between the parties; the fact that the dominated subject did not enjoy the acts of

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[45] GEORG WALTHER GRODDECK, IL LIBRO DELL' ES: LETTERE DI PSICOANALISI A UN'AMICA 85 (1992).

[46] As Jessica Benjamin recalls, many feminists criticized the famous Pauline Réage's Story of O considering the novel the story of a victimized woman rather than an allegory of the desire for recognition: *see, e.g.*, SUSAN GRIFFIN, PORNOGRAPHY AND SILENCE: CULTURE'S REVENGE AGAINST NATURE (First Harper Colophon ed. 1982); Andrea Dworkin, *Woman as Victim: "Story of O"*, 2 FEMINIST STUD. 107 (1974); CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 266, fn 42 (1994); PAULINE REAGE, HISTOIRE D'O (1954); BENJAMIN, *supra* note 16 at 55.

subordination is not sufficient to make it actionable. What the Court fails to recognize is that sadomasochism is just another sexual choice.[47]

Against this backdrop, the intentional infliction of pain or emotional distress can be consensual and based on the previous agreement, or non-consensual and without prior agreement. A third mode is the negligent infliction of pain or distress[48] where, having received consent from the other(s) for specified acts, the sadomasochistic partner goes beyond the agreed sexual terms. The scenario of negligent infliction is a light 'manslaughter' that can be outlined as follows: *I wanted to suffer because that gives me pleasure; I gave my consent for that, but then my partner did not realize that they went beyond. The partner's intention, however, was far from making me suffer*. However, this narrative may not be compelling or may appear rather simplistic from a certain human rights perspective.

This is the crux of the challenge of the relation between human rights and sadomasochism: how far can consent negate liability for injuries inflicted during sadomasochistic encounters? Upholding the omnipotent nature of consent—a force that destroys any legal 'obstacle' to defend the individual(istic) will to enjoy lust—could pose particular difficulties for the domestic criminal justice systems in prosecuting abusers. However, this intricate matter requires a deeper reflection that cannot be exhausted within this investigation. What is certain is that reducing the discussion on the relation between sadomasochism and law to sheer consent is conceptually inaccurate. This is because the lens of consent is biased by the gendered echoes of domination and submission affecting the way in which one observes the sadomasochistic act. Gender-related premises and assumptions precede and surround the ECtHR's conception of consent, as the following analysis of the Court's case law demonstrates.

III. JUDGING SADOMASOCHISM, SADOMASOCHISM JUDGED

The ECtHR, set up in Strasbourg in 1958, examines alleged violations and ensures compliance by the States with their obligations under the ECHR.[49] The ECtHR is the only enforcement mechanism at the regional or international levels that has developed case law on sadomasochistic practices, specifically under Article 8 ECHR. Partially overlapping with Article 17 ICCPR,[50] Article 8

[47] *Cf.* Cossman, *supra* note 24 at 863 (noting that the dominant feminist narrative, sex radical feminism, and queer theory feminism have opposing interpretations of a sadomasochistic sexual act that a party consented to but did not enjoy).

[48] *Cf. id*. at 857-858 (describing the case of Twyman v. Twyman, where a woman unsuccessfully sued her husband for negligent infliction of emotional distress for encouraging her to continue a sadomasochistic dynamic after she stated the activities triggered her trauma from a previous sexual assault and engaged in sex that, while involving no bondage activities, was so rough it left her bleeding).

[49] On the ECtHR's functions and structure, and the procedure before the Court, see Convention for the Protection of Human Rights and Fundamental Freedoms, art. 19-51, Nov. 4, 1950, ETS 005 (entered into force Sept. 3, 1953).

[50] "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks." International Covenant on Civil and

ECHR protects the right to respect for private and family life, home, and correspondence. It reads:

> (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.

Under Article 8 ECHR, States shall guarantee the individual's privacy-related positive and negative freedoms. Precisely, States have a negative obligation not to interfere with private life and a positive obligation to take active steps to ensure the individual's effective enjoyment of the right to privacy.[51] This is the backdrop against which the ECtHR has judged a number of cases involving sadomasochistic activities.

The ECtHR has dealt with sadomasochism in *Laskey, Jaggard*, and *Brown v. UK*,[52] *K.A. and A.D. v. Belgium*,[53] *Pay v. UK*,[54] and *Mosley v. UK*.[55] Some commentators have applied a descriptive model of the ECtHR's decisions on sadomasochism, dividing them into two clusters on the basis of the nature of the obligations at stake.[56] The first group contains negative-obligations claims according to which States should have refrained from criminalizing sadomasochistic activities: *Laskey*, and *K.A.*. The second group comprises positive-obligation claims against States which, rather than intervening, have failed to enact laws to protect the privacy of individuals practicing sadomasochism: *Pay* and *Mosley*.[57]

While this taxonomy based on positive/negative obligations brings some descriptive clarity, the objective of this examination is different. Investigating gendered interplays in human rights law requires addressing sadomasochism from another perspective. For this purpose, this paper will scrutinize the Court's case law from different but connected perspectives. The key question is: what is

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Political Rights, art. 17, Dec. 16, 1966, 999 UNTS 171 (entered into force Mar. 23, 1976).

[51] Mosley v. U.K., 48009/08 [May 2011] ECHR 774 ¶ 29 https://hudoc.echr.coe.int/fre?i=002-533.

[52] Laskey, Jaggard and Brown v. U.K., App. No. 21627/93; 21628/93; 21974/93 (February 19, 1997) https://hudoc.echr.coe.int/eng?i=001-58021.

[53] K.A. et A.D. c. Belgique, App. No. 42758/98; 45558/99 (June 7, 2005) https://hudoc.echr.coe.int/eng?i=001-68354.

[54] Pay v. United Kingdom, 32792/05 [2008] ECHR 1007 (2008).

[55] Mosley, *supra* note 51.

[56] Bennett, *supra* note 3 at 547.

[57] *Id.*

sadomasochism for the ECtHR? This question can be split into the following sub questions:

1. Who are the subjects involved in the activity? What roles do these individuals play? Have they provided their consent to such practices? Can the consent be withdrawn at any time during the act?
2. Is sadomasochism a sexual practice under the ECHR?
   - **2a.** Does it belong to the private sphere and therefore fall under Article 8 ECHR?
   - **2b.** Does any sadomasochistic act constitute violence which should not be protected but rather condemned? If so, under what conditions is sadomasochism a form of violence?
3. Are national public authorities entitled to interfere with the practice of sadomasochistic activities as provided under Article 8(2)? If so, under which conditions and on which grounds?

Question (1) addresses the elements of sadomasochism. It investigates the factual and subjective elements of the conduct by looking at the parties involved in the sadomasochistic act and their interrelations, roles, and consent. As such, question (1) applies transversally to both questions (2) and (3). Question (2) concerns the scope and the nature of the conduct. Sadomasochism under (2a) is a form of sexual interaction, falling under the protection guaranteed by Article 8 ECHR; or it can be (2b) a form of (sexual, but not necessarily) violence, against which other rights apply, for example, the right to be free from torture or cruel, inhuman, degrading treatment ensured by Article 3 ECHR. Accordingly, there are reasons to wonder whether States can adopt measures to limit or prohibit sadomasochistic activities. Question (3) addresses the legitimacy of such interferences, in the light of the purported necessity of the intervention in a democratic society, as Article 8(2) provides. These questions are the lenses through which this paper analyzes the cases the ECtHR has dealt with so far. Answering these questions requires both a hermeneutical endeavor—how the Court interprets that specific element of sadomasochism—and a critical examination—why the Court embraces a certain interpretation of sadomasochism.

This section will unveil how the ECtHR's case law treats sadomasochism, first by problematizing the dichotomies of dominator=perpetrator and dominated=victim, and, secondarily, by analyzing whether and how these positions interlink with feminine and masculine postures. The next sections compare *Laskey, K.A.*, *Pay*, and *Mosley* in line with these purposes. Before examining these decisions, the next section shows how the ECtHR's case law on sadomasochism does not exist in a legal vacuum, but is connected to the Court's previous decisions on the criminalization of homosexual acts between consenting adults.

III.1. CRIMES AND PLEASURES: HOMOSEXUAL ACTS AND SADOMASOCHISM

Before entering the discussion of the ECtHR's case law on sadomasochism, a digression is necessary. It would be historically and legally

inaccurate to believe that decisions on sadomasochism came out of the blue in the ECtHR's jurisprudence. The interrelationship between sexuality and human rights was already debated in Strasbourg starting from at least the 1980s. In a series of decisions on the legitimacy of laws criminalizing homosexual sex acts, the Court scrutinized sexual intercourse between homosexual individuals. The comparison between sadomasochism and homosexual practices conducted here concerns, therefore, the type of conduct, rather than the identitarian characterization of the subjects performing it (gay, lesbian, heterosexual, trans, etc.).

The criminalization of homosexual acts was at the center of the ECtHR's decision in *Dudgeon v. UK*[58] (1981). This is a landmark case overturning the criminalization of consensual homosexual sexual acts. The Court held that the laws prohibiting homosexual acts between consenting adult men constitute a continuing unjustified interference with the applicant's right to respect for his private life.[59] The Court found a breach of Article 8 ECHR.[60] Two elements of the decision are crucial for the analysis of sadomasochism-related case law. First, the Court found no "pressing social need" to prohibit these sexual acts by considering them criminal offenses, "there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public."[61] Secondly, the Court considered sexual acts as belonging to the "most intimate aspect of private life."[62] In such cases, the Court specified, the reasons for interference on part of public authorities must be "particularly serious" to be considered legitimate under Article 8(2) ECHR.[63] The legitimacy test is stricter for acts related to the sexual sphere and has a higher threshold than other activities of private life covered by Article 8. The decision had positive reverberations on legislation of those Member States of the Council of Europe which still prohibited certain forms of sexual intercourse between adult men.[64] For instance, as a consequence of the decision, Northern Ireland decriminalized homosexual sex. *Dudgeon* became the key precedent for subsequent cases[65] where the criminalization of sexual acts between homosexual persons was successfully

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[58] Dudgeon v. United Kingdom, App. No. 7525/76 (October 22, 1981), https://hudoc.echr.coe.int/eng?i=001-57473.
[59] *Id.* ¶ 41.
[60] *Id.* ¶¶ 41, 63.
[61] *Id.* ¶ 60.
[62] *Id.* ¶ 52.
[63] *Id.*
[64] *See* ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER 132–33 (1997); PAUL JOHNSON, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS 15, 97 (2014); *cf.* DAMIAN A GONZALEZ-SALZBERG, SEXUALITY AND TRANSSEXUALITY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A QUEER READING OF HUMAN RIGHTS LAW 59–92 (2019).
[65] See N.Ç. v. Turkey, App. No. 40591/11 (2021) (concerning the existence of laws in the Turkish Republic of Northern Cyprus criminalizing certain acts between consenting adult men; however, the applicant withdrew the application since the concerned provisions of the criminal code had been amended; the Court decided to strike the application out of the list of cases, taking into consideration that no special circumstances concerning the protection of human rights required the examination of the case).

challenged, namely *Norris v. Ireland*[66] (1988) and *Modinos v. Cyprus*[67] (1993).

A more recent case on the criminalization of homosexual acts between consenting men is *A.D.T. v. UK*[68] (2000). This decision will be explored in-depth below in relation to the way in which the Court constructs the victim in cases concerning sadomasochistic and non-sadomasochistic activities.[69] This section anticipates the circumstances and the judgment of *A.D.T.*, which will later be compared as a case on non-sadomasochism to another case on sadomasochism.[70]

A.D.T. dealt with the violation of the right to private life following the seizure by police officers of a number of videotapes recorded at the applicant's house. The videotapes contained the recordings of sexual acts between the applicant and four other adult men. The applicant, convicted of the offense of gross indecency by the domestic court,[71] alleged the violation of his right to private life under Article 8 and the right to be free from discrimination on sexual orientation grounds under Article 14 in conjunction with Article 8. The ECtHR considered that the applicant had been a victim of interference with his right to respect for his private life with regard to the legislation criminalizing sex between consenting men and the conviction for gross indecency.[72] The Court held that the applicant had been prosecuted for the sexual activities themselves rather than for the recording or the potential public dissemination of it. These activities involved intimate aspects of private life, therefore the margin of appreciation was narrow as in other precedent decisions.[73] The Court found that the legislation prohibiting homosexual acts between men in private and the consequent prosecution and conviction were not justified given the absence of any public health consideration.[74] The ECtHR concluded that the State had breached Article 8, without further examination of the case under Article 14,[75] relying on the precedent *Laskey*.[76]

The following analysis of ECtHR's cases on sadomasochism builds on the above overview of the (de)criminalization of homosexual acts. As will be seen, the ECtHR's attitude towards sadomasochism has changed throughout the years. Sadomasochistic acts have rarely been considered protected from public interference under Article 8(2) ECHR. What matters at this stage of the inquiry is that the criminalization of homosexual acts and sadomasochistic acts, and the

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[66] Norris v. Ireland, App. No. 10581/83 (October 26, 1988), https://hudoc.echr.coe.int/eng?i=001-57547.

[67] Modinos v. Cyprus, App. No. 15070/89 (April 22, 1993), https://hudoc.echr.coe.int/eng?i=001-57834.

[68] A.D.T. v. United Kingdom, App. No. 35765/97 (July 31, 2000), https://hudoc.echr.coe.int/eng?i=001-58922.

[69] *See infra*, § 3.3.1.

[70] *Id.*

[71] A.D.T. v. U.K., ¶ 10.

[72] *Id.* ¶ 26.

[73] *Id.* ¶ 37; on the narrow margin of appreciation in cases concerning the most intimate aspects of private life, *see, e.g.*, Dudgeon v. U.K., ¶ 52.

[74] A.D.T. v. U.K., ¶ 38.

[75] *Id.* ¶ 41.

[76] Laskey, Jaggard and Brown v. U.K., App. No. 21627/93; 21628/93; 21974/93 (February 19, 1997), ¶ 70.

respective decisions from the ECtHR are, for some aspects, closely related, while, for other aspects, very far from one another.

The test of the legitimacy of the State's interference with private life relies precisely on what standard of sexual pleasure the Court applies. In this sense, the Court interprets and therefore gives a specific meaning to sexual relations by producing one or another juridical outcome. In order to assess whether sadomasochistic interactions constitute a form of violence or a form of (violent) sex, the ECtHR may embrace a conception of sex ranging from sheer sweet love made of tender so-called 'romantic' gestures to enjoyably painful actions variously performed. The choice of one conception over another influences the outcome of the judgment, of course. As will be explained below, intimacy can assume affection and exclude violence. For example, sadomasochistic acts may not be considered legally sexual acts. Against this backdrop, homosexual acts as such, with no further sadomasochistic connotation, (i) are sexual activities, which therefore (ii) fall under the "most intimate aspect of private life." This is not always the case with sadomasochistic acts. Where these acts are interpreted as violence, there are two consequences: (a) their sexual nature is denied; and (b) they are not granted the higher threshold in the legitimacy test for 'intimate acts.' This is because, in any case, framing sadomasochism as violence makes public authorities' interference legitimate under different possible grounds (health, morals. . .). Overall, sadomasochism and homosexual sex reconverge as to the treatment they receive when they are both prohibited under the heteronormative paradigm. Prohibition wipes out lust by erasing *any* act of pleasure which does not conform with the conventional *heteromantic* (hetero + romantic) sexual norm enforced by the Court. However, as will be seen shortly, sadomasochism receives a less favorable treatment in the hierarchy of sexual activities interpreted and judged by the Court.[77]

Starting with analogies, both sadomasochistic and homosexual acts may belong to the "most intimate aspect of private life," to quote Dudgeon again. Clearly, this applies to the former only when these are considered sexual acts. Indeed, where sadomasochistic practices are understood as violence rather than sexual acts, the conceptual distance between the two clusters of cases increases. The discriminatory factor between sadomasochism and (homo)sexual intercourse is, from the perspective of the respect of the right to be free from any interference to one's private life, the presence of a significant degree of injury.[78] How does the ECtHR interpret the infliction of and subjection to injury for the purposes of gaining pleasure? The investigation finally turns to the ECtHR's understanding of sadomasochism. To orient the reader, the following table contains the list of decisions including some basic information on the date, content, and outcome of the judgment. All of these decisions are discussed under different thematic subsections. The list includes three decisions on merits and one decision on admissibility. The inquiry relies on these and other decisions to conduct a

[77] *See infra*, § 4.
[78] *See infra* § 3.2.2; *cf.* Laskey, Jaggard and Brown v. U.K.¶ 45.

comparative examination of judgments on sadomasochistic homosexual and non-sadomasochistic homosexual sex.

Table 1. ECtHR's decisions on sadomasochism (1997–2020)

Decision	**Year**	**Type of decision**	**Sexual orientation**	**Type of sex** number of people	**Violation**
Laskey, Jaggard and Brown v. UK	1997	merits	homosexual	group (44)	no: art 8(2)
K.A. and A.D. v. Belgium	2005	merits	heterosexual	couple and group (club)	no: arts 6, 7, 8
Pay v. UK	2008	admissibility	homosexual	group (club)	inadmissible: arts 6, 8, 10, 14
Mosley v. UK	2011	merits	not specified	group (6)	no: art 8

III.2. SEX, VIOLENCE OR VIOLENT SEX?

The ECtHR has been criticized for upholding a "moralising and paternalistic disciplinary gaze"[79] in cases concerning criminalization of group sex and sadomasochistic practices among consenting adults, both homosexual and heterosexual. The chronologically first and most well-known case is *Laskey*.[80] The case was brought before the ECtHR by three of the defendants of *R v. Brown*, a controversial decision of the House of Lords (United Kingdom), outlawing participation in painful activities regardless of whether or not they were consensual or aimed at bringing sexual pleasure.[81] *R* conceptualized sadomasochism as violence rather than sex.[82] In *Laskey* and the subsequent cases the ECtHR elaborated on the notions of sexual activities in relation to the right to respect private life. This is done to assess whether sadomasochistic acts constitute sexual or violent acts, and whether, consequently, the public authorities' interference (commonly, criminalization of sadomasochism) is to be considered legitimate.

[79] *See, e.g.*, Francesca Romana Ammaturo, *The Council of Europe and the creation of LGBT identities through language and discourse: a critical analysis of case law and institutional practices*, 23 INT'L J. HUM. RTS 575, 582 (2019).
[80] Laskey, Jaggard and Brown v. U.K.
[81] R v. Brown [1994] 1 AC 212 (HL) p. 1 (appeal taken from Regina v. Brown, Regina v. Lucas, Regina v. Jaggard, Regina v. Laskey, Regina v. Carter, Court of Appeal, Criminal Division).
[82] Certain dissenting opinions considered sadomasochism a form of sexuality: *see, e.g.*, Lord Mustill's invite to 'leav[e] aside the repugnance and moral objection, both of which are entirely natural but neither of which are in my opinion grounds upon which the court could properly create a new crime,' as well as Lord Slynn's reflection on the prosecution's rhetorical question as to whether the court should 'adopt a paternalistic attitude as to what is bad or good for subjects, in particular as to deliberate injury.' *Id* ¶ 59.

III.2.1. THE CASE IN A NUTSHELL

Laskey concerned a group of forty-four people practicing acts provoking a certain level of pain for many of them. Having come in possession of a number of videos in the course of routine investigations for other matters, the British national authorities charged the applicants (and other participants) with offenses including wounding and assault for having performed sadomasochistic acts and filming them over a ten-year period. None of the injuries inflicted were permanent, had provoked any infection, or required any medical attention.[83] Activities were consensual and carried out in private for sexual pleasure, following specific rules agreed beforehand among participants, including the provision of a safe-word to be pronounced by the dominated subject to stop the act.[84] The applicants alleged that the public authorities' intervention constituted a violation of their right to private life, since it was an unjustifiable, unlawful, and unnecessary interference under Article 8(2) ECHR. The Court evaluated whether such an interference was "necessary in a democratic society" as provided under Article 8(2). The ECtHR deemed the interference necessary and found no breach of Article 8(2). Sadomasochistic sexual activities, the ECtHR maintained, performed in private and provoking a significant degree of injury and wounding, may be subject to restriction under Article 8(2) on the ground of general protection of health.[85]

III.2.2. THE COURT'S REASONING

The ECtHR specifies that Article 8 does not necessarily cover every type of sexual activity performed behind closed doors. Even though certain situations are clear, others pose complex questions regarding the scope of the right to privacy protected under Article 8.[86] While, as stressed in *Dudgeon*, sexual activities and sexual orientation belong to the intimate sphere of private life,[87] some private life is considered less private than others in different contexts. This is the case of *Laskey*. The Court brought to question the private character of the sexual activities, considering many factors including the large number of people, the recruitment of new participants, the existence of many equipped rooms, and the shooting of several videotapes (although distributed only among members of the group).[88] The Court dwelt upon the determination of the level of harm as the

[83] Particularly, "the acts consisted in the main of maltreatment of the genitalia (with, for example, hot wax, sandpaper, fish hooks and needles) and ritualistic beatings either with the assailant's bare hands or a variety of implements, including stinging nettles, spiked belts and a cat-o'-nine tails. There were instances of branding and infliction of injuries which resulted in the flow of blood and which left scarring" Laskey, Jaggard and Brown v. U.K. ¶¶ 8, 38.
[84] *Id.* ¶¶ 8–9.
[85] *Id.* ¶¶ 45, 50.
[86] *Id.* ¶ 36.
[87] Dudgeon v. U.K. ¶ 56.
[88] Laskey, Jaggard and Brown v. U.K. ¶ 36.

condition to assess whether the consent of the so-called 'victim'—the person who has voluntarily joined the sadomasochistic activity—is to be considered still valid, and therefore prevails over public interference. This determination lies with the State since it entails the protection of public health on the one hand, and individual personal autonomy on the other hand.[89]

In this respect, the Court distinguishes this case from previous decisions on consensual sexual acts between (homosexual) adults carried out in private spaces, including the above-mentioned *Dudgeon*, *Norris*, and *Modinos*.[90] In the pilot case *Dudgeon*, the ECtHR considered criminalization of homosexual acts an unnecessary interference because of the absence of pressing social needs. The low risk of harm to vulnerable societal groups and/or effects on the public requiring special protection did not provide sufficient justification for the State interference and classification of homosexual acts as criminal offences.[91] Like *Laskey*, the "non-sadomasochistic" *Dudgeon*, *Norris*, and *Modinos* did not involve a significant degree of injury for the people participating in the sexual activity. A reasonable deduction is that the shield of privacy should yield to public interference when the injury or wounding is considerable. What if the degree of injury is minor? It is hard to hypothesize abstractly and without context what the Court would say in situations featuring a lower degree of injury. It is foreseeable, on the basis of the threshold of sexually-driven injury established in *Laskey*, that the Court may accept "soft" acts of sadomasochism. This, as will be explained shortly, would also be consistent with the Court's recognition that certain acts producing pain are sexual acts.[92] The Court concluded that certain acts of violence can be transient or trifling in nature, whereas the State is entitled to punish serious acts of violence amounting to torture, irrespective of the consent of the victim. In particular, the Court specifies that

> some of these acts could well be compared to 'genital torture' and a Contracting State could not be said to have an obligation to tolerate acts of torture because they are committed in the context of a consenting sexual relationship.[93]

The Court draws a line between what type of sexual activity the law should tolerate and what type of sexual activity the law should criminalize. This line does not seem, however, particularly neat since the criterion for banning sadomasochism is not injury as such, but a certain level of injury. The Court's choice of relying on *Dudgeon*, *Norris* and *Modinos* as comparators for *Laskey* is not convincing. Indeed, the Court does not compare the present case with another where some degree of injury is present, but cases where injury is completely

[89] *Id.* ¶ 44.
[90] *See supra* § 3.1.
[91] Dudgeon v. U.K. ¶ 60.
[92] Laskey, Jaggard, and Brown v. U.K. ¶ 36.
[93] *Id.* ¶ 40.

absent. To recall again, these cases concerned non-sadomasochistic sexual performances.

In *Laskey*, the Court seems to adopt an effect-focused approach, as opposed to an act-based approach. Looking at the consequences of the conduct, it holds that the State's intervention is legitimate where there is a significant degree not of injury, rather than violence. One may be tempted to conclude that erotic games consisting in physically violent or psychologically humiliating acts cannot justify *prima facie* public intervention since they might not provoke directly a considerable degree of injury. Yet the Court specifies that while deciding for or against the prosecution, State authorities are entitled to consider both the actual seriousness of the harm and the potential harm the act could produce.[94] In light of the serious degree of potential harm, the Court finds that the measures adopted are sufficient and relevant for the protection of health in a democratic society within the meaning of Article 8(2).[95] Measures are necessary and proportionate considering the sophisticated organization behind the offenses, including wounding and assault, as well as the numerous charges of assaults that occurred over more than ten years.[96] Nevertheless, as the following Subsections explain, a number of aspects of the Court's reasoning are not clear, including the sexual nature of sadomasochism and the role attributed to the individuals involved in it.

III.2.3. IS SADOMASOCHISM SEXUAL?

Laskey offers evidence of the Court's inclination for prevailing behavioral sexual standards and its reluctance to conceive sadomasochism as a legitimate sexual activity.[97] The applicants' views upheld in the case are clear on this point. They submitted that

> their case should be viewed as one involving matters of sexual expression, rather than violence. With due regard to this consideration, the line beyond which consent is no defence to physical injury should only be drawn at the level of intentional or reckless causing of serious disabling injury.[98]

For persons seeking pain as a source of lust, sadomasochism is a form of sexual expression that they decide voluntarily to perform according to the rules agreed upon beforehand. For the Court, consent means acceptance of suffering but does not cover acts intentionally or inconsiderately aimed at provoking severe injury. Yet, for the ECtHR, the discriminatory factor between what is prohibited and what

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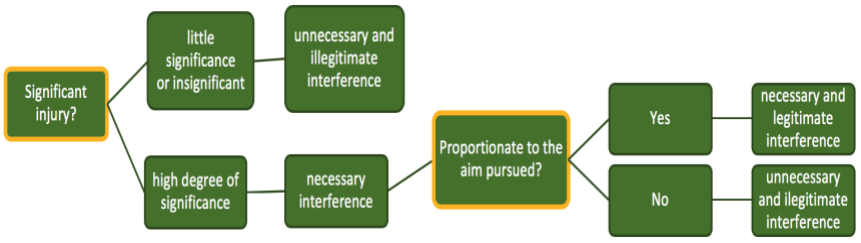
[94] *Id.* ¶ 46.
[95] *Id.* ¶¶ 48, 50.
[96] *Id.* ¶ 49.
[97] *See* Michele Grigolo, *Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject*, 14 EUR. J. OF INT'L L. 1023, 1033 (2003).
[98] Laskey, Jaggard, and Brown v. U.K. ¶ 39.

is allowed is the level of injury, rather than consent. Because of the complex role of consent under criminal law, the Court claims, States enjoy a wide margin of appreciation as to the preferred policy options, including criminalization.[99] The State determines the level of legally tolerated harm in cases with consent, since the circumstances entail consideration of: (a) public health; (b) the deterrent function of criminal law; and (c) the individual's personal autonomy.[100] Given the "extreme character", as well as "significant nature and degree" of the conduct in question, State authorities have acted within their margin of appreciation.[101]

Hence, for the Court, public authorities have intervened to protect citizens from a "real risk of serious physical harm or injury."[102] The degree of the injury is central to evaluating the legitimacy of the measure under Article 8(2). The criminalization of sadomasochistic acts is determined by whether the intervention is necessary in a democratic society. The notion of necessity requires that the public interference responds to a pressing social need and, as such, is to be considered proportionate to the legitimate aim it pursues.[103] The proportionality-test is logically and chronologically tied to the test on the significance of the injury. The latter is the precondition to determine the necessity of the measure, although both tests remain in conversation. The following flow chart demonstrates the steps the Court followed in the present judgment to assess the legitimacy of the public authorities' intervention in the sadomasochistic activities performed by the applicants and other participants.

Figure 1. ECtHR's evaluation of public intervention in sadomasochistic practices



The above flow diagram is limited in its scope because (a) the basis for its construction is one single case, *Laskey*; and (b) the diagram serves only as a schematized description of the Court's reasoning. A descriptive analysis of the tests of necessity and proportionality starts from the severity of the harm or injury the act has provoked or could have potentially provoked. Notwithstanding the informative value of this description, further considerations are needed to understand the meaning that the ECtHR attributes to the significance of the injury.

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[99] *Id.* ¶ 40.
[100] *Id.* ¶ 44.
[101] *Id.* ¶ 41.
[102] *Id.*
[103] *Id.* ¶ 42.

The Court adopts a standardized criterion to gauge the significance of the injury. The evaluation of painfulness relies on the objective perception that a specific act constitutes injury for *any* human being. The Court assigns to this objectivized perception a specific meaning. If there is a significant injury, sadomasochism can be criminalized as being a danger for health. Not all sadomasochism, however, is about physical pain. The relation of dominance-submission materializes in one partner (dominator) assuming control and the other (dominated) relinquishing their power. This can happen in a violent or non-violent manner. Control may take different forms, besides or beyond physical constraints. Psychological humiliation, as a source of erotic pleasure, may or may not reach the threshold of psychological harm.[104]

The Court's attitude towards sadomasochism as an expression of sexuality is ambiguous. The Court measures the erotic play performed against behaviors and meanings traditionally attached to sexual intercourses. That is, the Court's approach to sadomasochistic practices mirrors a specific cultural view of love and pleasure.[105] At first glance, it seems that the Court embraces a romantic view of sex according to which sex is an act of tenderness. If love cannot be but gentle, how can pain be enjoyable? If sexual interactions cannot be but affectionate, how can painful activities be conceived as sexual in nature? Yet the Court recognizes that pain may also be a vehicle to sexual gratification. The applicants do not find protection from the State's interference under Article 8(2). However, the Court refers to sadomasochistic acts such as whipping, flogging, branding and the application of hot wax as "sexual activities" meeting the "purposes of sexual gratification."[106] Hence, the consequence of the Court's reasoning, according to this investigation, is that interference is legitimate and sadomasochism is outlawed even though sadomasochistic activities are not considered to be violence, but rather as a vehicle of sexual pleasure. Put differently, the categorization of the sadomasochistic act as sexual is not a guarantee of legality. Sadomasochism consists of consensual sexual acts between adults, not violence. Yet it constitutes, for the Court, a danger for public health that makes the State's interference proportionate and necessary.[107]

III.2.4. UPSIDE DOWN VICTIMIZATION

Another relevant aspect of the case is the process of victimization, in addition to the relation between sexual acts and violence. The process is reversed or even blurred in *Laskey*. The dichotomic architecture of victims-*versus*-perpetrators collapses where sadomasochism enters the human rights vocabulary

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[104] For some examples of specific forms of physically non-violent practices, *see supra* ¶ 3.2.3; *see* Lindemann, *supra* note 7 at 152–53.

[105] *See* GEOFFREY MAINS, URBAN ABORIGINALS: A CELEBRATION OF LEATHER SEXUALITY 68 (3rd ed. 2002).

[106] Laskey, Jaggard and Brown v. U.K. ¶ 36; *see* Bennett, *supra* note 3 at 549.

[107] Laskey, Jaggard and Brown v. U.K. ¶ 49.

which relies on supposedly neat oppositions between doer and done-to. In Laskey, individuals involved in sadomasochistic activities do not identify themselves as victims of any purported violence.[108] The claimants' misrecognition of the criminal nature of their acts[109] coupled with their refusal to speak about themselves as victims of sadomasochistic activities disrupts the traditional narrative of victimization staged in Strasbourg. Applicants turn to the ECtHR alleging the breach of their right to respect for private life, materializing in a supposedly illegitimate public interference. In situations where the Court identifies the illegitimacy of public interference on moral or health grounds, complainants may be seen as victims. Here, such a narrative does not apply coherently. Applicants are implicitly perpetrators because they have committed harmful acts (sadomasochistic activities) upon other people. The State's prosecution, the ECtHR argues, is legitimate for reasons of health.[110] The State can retain the criminalization of sadomasochism, and applicants practicing sadomasochism become perpetrators. The Court and the applicants do not share the same, or at least similar, signified for the signifier "victim". "Victims," for the Court, are those participants in sadomasochistic group activities receiving pain from others (perpetrators).[111] The applicants suffered the violation of their right to private, particularly sexual, life by the State's interference: they see themselves as the "victims". Identifications are highly subjectified depending on the perspective adopted. The dichotomy of the victim-perpetrator is confusing at best, inappropriate at worst. The encounter of human rights and sadomasochism at the ECtHR creates a linguistic, conceptual and legal short circuit.

Overall, the interpretation of sexually-driven pain does not seem to follow a consistent path at the ECtHR. As the most recent jurisprudence shows, there is space for a shift from the conception of sadomasochism in terms of victimization to a form of sexual expression. Before addressing a number of sadomasochist-positive decisions, the next Section reflects upon the notion of victimization by comparing two cases, concerning respectively sadomasochist sex (*Laskey*) and non-sadomasochist sex (*A.D.T.*).

III.3. FROM VICTIMIZATION TO SEXUAL EXPRESSION

III.3.1. MORE THAN ONE VICTIMIZATION

Three years after *Laskey*, the ECtHR decided another case which does not directly concern sadomasochism, but raises some interesting points in relation to sadomasochistic practices. The Section above has already introduced a case on the criminalization of homosexual acts.[112] *A.D.T. v. UK*[113] (2000) is a case that may be considered the parallel case on non-violent consensual sex to the violent

[108] Ammaturo, *supra* note 79 at 582.
[109] Laskey, Jaggard and Brown v. U.K. ¶ 49.
[110] *Id.* ¶ 50.
[111] *See id.* ¶¶ 8, 10, 40, 44.
[112] *See supra* § 3.2.2.
[113] A.D.T. v. U.K., App. No. 35765/97, (Oct. 31, 2000), https://hudoc.echr.coe.int/eng?i=001-58922.

consensual sex of *Laskey*. The circumstances of *A.D.T.* are not identical to *Laskey*. First and foremost, in *A.D.T.*, the ECtHR clearly stated that: "[t]here was no element of sado-masochism or physical harm involved in the activities depicted on the videotape."[114] Nevertheless, although the two cases do not completely overlap, they share similar elements: group sex, between consenting homosexual individuals, recorded by one of the participants. In particular, to recall the facts of *A.D.T.*, already outlined above,[115] police officers seized certain video tapes containing the recordings of non-sadomasochistic sexual acts between the applicant and other four adult men at the applicant's house. The applicant complained about the violation of his right to private life under Article 8 and the right to be free from discrimination on sexual orientation grounds under Article 14 in conjunction with Article 8. The ECtHR held that the applicant's privacy rights had been violated with regard to (a) the existence of legislation criminalizing sex between consenting men, and (b) the conviction for gross indecency.[116] According to the Court, the applicant had been prosecuted not for the recording or the potential dissemination of, but rather for the sexual activities. Regarding these sexual activities, which are the most intimate aspects of private life, the margin of appreciation was narrow as similar to other precedent decisions.[117] The issue of the margin of appreciation will be examined shortly. For the Court, in the absence of any public health consideration, the legislation prohibiting and prosecuting homosexual acts in private was not justified.[118] Relying on the precedent in *Laskey*,[119] the Court held that there had been a violation of Article 8, without further examination of the case under Article 14.[120]

The remainder of this Section will not elaborate on the Court's reasoning, but instead concentrate on the construction of the "victim" before the ECtHR in these two cases. Unlike *Laskey*, in *A.D.T.* the applicant is successful in conveying to the Court the perception that he has been a victim of the State's interference. The non-sadomasochistic activities were considered "genuinely private."[121] Therefore, given the private character of the sexual interactions, the State was afforded a narrow margin of appreciation. In any case, the narrative of who is a victim of a State's interference takes root more easily in non-sadomasochistic circumstances. This narrative takes root because victimization occurs, according to this inquiry, at different levels in sadomasochistic and non-sadomasochistic cases, the so-called "narrative victimization" and "judicial victimization." "Narrative victimization" refers to the connotation of individuals as victims in the factual and legal parts of the decision, before the merits. In "judicial victimization", the sexual subject becomes a victim only after the Court decides

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[114] *Id.* ¶ 10.
[115] *See supra* § 3.2.2.
[116] A.D.T. v. U.K. ¶ 26.
[117] *Id.* at 37.; on the narrow margin of appreciation in cases concerning the most intimate aspects of private life, *see, e.g.*, Dudgeon v. United Kingdom, *supra* note 58 ¶ 52.
[118] A.D.T. v. U.K. ¶ 38.
[119] Laskey, *supra* note 76.
[120] *Id.* ¶ 41.
[121] A.D.T. v. U.K. ¶ 64.

the case. The latter, therefore, occurs where the Court finds a breach of a right and identifies a victim of that breach. This paper identifies that the question about the level of consideration that applies to non-sadomasochistic sexual intercourse presumes a neutral connotation regarding the subjective roles people assume when taking part in sexual acts. Participants have sex with others, in this case four people, and they all (seem to) enjoy it. They are sex-peers because they are sexual actors on the same level. Equally, various acts are supposed to produce sexual gratification on an equal footing. Power dynamics are not evident (albeit present) in this configuration of sex as an exchange of pleasures. Under this power conception, there are no victims in this purportedly harmonious erotic scheme. "Narrative victimization" does not operate. The sexual subject becomes a victim only after the Court decides the case "judicial victimization". In *A.D.T.*, the State had violated the applicant's right to private life because of its unnecessary interference. The applicant has been a "victim" under Article 8(2) in the human rights jargon because he has suffered a violation. But before the judgment, the applicant was *just* an applicant, with, of course, all those features attached to the sexual role he played according to the facts described in the decision.

In this sense, sexual performances are impervious to the judicial verdict of "narrative victimization" given their conventional non-violent nature. Consenting and non-violent intercourse does not make the subject a victim of either the other subject participating in the sexual act or the State's inability to protect them from abuses committed by non-State actors. The perspective adopted at this stage of the investigation is the one of the judgments. This formalistic approach deems the victim a legal creature. The victim is a person who has suffered a violation of their rights according to the Court's decision. It is the Court that finds whether or not there has been a breach of a right, and, therefore, whether the applicant is a victim of a human rights violation. While this is the analytical perspective embraced here, it is clear that a person having suffered from a form of violence considers themself to be a "victim" of that act regardless of what the Court holds in its decision. I can define myself as a victim of sexual abuse, even where the Court does not consider me a victim because it determined that the State was not in breach of my rights or its obligations.

From a formalistic perspective, instead, the victim is a juridical product that cannot exist outside of a certain outcome of a judicial proceeding. In contrast with the personal sense of victimhood and injustice, there is no victim before a judicial decision is issued from the perspective of the judiciary because the narration of the facts and the Court's reasoning do not label any individual as a "victim" *a priori*. It is only when and if the Court holds the State accountable for a human rights violation that the applicant becomes a victim. This victimization is uncertain at the outset of the trial as it is only one of the possible results of the proceedings.[122] "Victimization of individuals" and "juridification of sexuality" are two distinct yet related concepts, which do not always coincide.[123] The

[122] Those practicing non-sadomasochistic homosexual acts are not necessarily victimized in the socio-legal hierarchy of sexual activities: on the pyramid of erotic desire describing the acceptability of various sexual conducts, *see infra* § 4.

[123] The concept of "victimization of individuals' concerns the interaction between the judge and the

combination of the two concepts shows the different modes through which the judiciary interprets individuals' sexual behavior and ascribes to those individuals specific roles of either victim or perpetrator. More precisely, "juridification of sexuality" is the process through which behaviors are evaluated according to the type of sexual activities performed. As the sexual subject enters the legal proceeding when they knock at Strasbourg's door—sexuality constitutes only one of the manifold elements that fall under the Court's scrutiny. A European Court of *Human* Rights cannot but consider, consciously or unconsciously, sexuality as one of the human markers of the applicant and the other subjects involved in the case. Juridification may lead, as a possible outcome, to victimization. "Victimization of individuals" concerns chronologically different moments, and it may or may not happen at different stages of the trial. Depending on the circumstances of the case and the Court's reasoning, the result of the first victimization ("narrative victimization") may not correspond to the result of the second victimization ("judicial victimization"). Despite its name, "narrative" victimization is also judicial in its origins, as it stems from the judges' voices. The narrative presented by the ECtHR is imbued with diverse conceptions judges have about sexual practices, having subjectified the cultural and socio-political influences inside and outside the Court's environment. "Subjectivation" is, for instance, the subject's elaboration of alterity. Each individual gives a personal meaning to the reality making and surrounding them through the process of subjectivation.[124] The different perspectives judges have in regards to sexual practices and sexual roles constitute the subjective conceptions that consciously or unconsciously orient them before and while developing the legal reasoning leading to a final decision. The victims of the two processes (narrative and judicial victimization) may or may not correspond. For instance, non-sadomasochistic sexuality, as explained above, consists of sex among peers. There are no victims during the sexual act, because the juridification of non-sadomasochistic sexuality does not distinguish between victims and perpetrators of a sexual act which is

subjects described in the facts of the case, including, but not limited to, the applicant who claims to be the victim of a violation; the concept refers to the process through which the judiciary attributes the label of "victim" to one or more individuals before (assumption), during or after the judgment (decision).; As such, the theoretical frame of 'victimization of individuals' overlaps but does not correspond to more generic theories on victimizsation which are not necessarily concerned with the judge's positionality; on theories of victimology, the structural underpinnings of victimizsation, including its twofold configurations as primary and secondary victimization, *see* LORRAINE WOLHUTER, NEIL OLLEY & DAVID DENHAM, VICTIMOLOGY: VICTIMISATION AND VICTIMS' RIGHTS 13–50 (2008); Paul Rock, *Theoretical Perspectives on Victimisation*, *in* HANDBOOK OF VICTIMS AND VICTIMOLOGY (Sandra Walklate ed., 2018).

[124] Subjectivation is a key concept in Jacques Lacan's psychoanalytical theory; subjectivation unfolds through two overlapping but ontologically different moments. It is both (1) the process through which the subject is construed; and (2) the process through which the subject constitutes their singularity; in the first sense, subjectivation relates to the impact of alterity (otherness) on the subject's body, therefore the subject is subject to otherness; in the second sense, the subject uses otherness to create their own uniqueness; actually, Lacan addresses subjectivation in three different moments of his reflection, concentrating on the dialectic of desire, the constitutive effect of desire and the break-in of enjoyment (*jouissance*): *see* MASSIMO RECALCATI, JACQUES LACAN: DESIDERIO, GODIMENTO E SOGGETTIVAZIONE (2012).

believed to bring equal pleasure to all its participants. The judgment is constitutive of victimization, which is, indeed, a so-called "judicial victimization." Victimization comes with the Court's decision stating that the applicant has been victim of illegitimate State interference. In this case, "judicial victimization" and "victim" belong to the linguistic code used within the human rights regime.

In contrast, sadomasochist sexual acts involve overlapping processes of victimization and juridification. Sexuality in its sadomasochistic form implies dominators and dominated subjects, as opposed to the peer roles within non-sadomasochistic sex. Power dynamics are plain to see in sadomasochistic sexual acts. The presence of subordination, materializing in humiliating yet exciting acts for the persons enjoying them, makes the Court interpret the sexual interaction as a risky, unbalanced game among non-peers. Those who dominate are perpetrators, and those who are subject to domination are victims. Victimization takes place before the Court's decision. This is the "narrative victimization" that underlies the description of the circumstances and influences the Court's reasoning. Unlike non-sadomasochistic activities, where the Court looks at sexual individuals as equal peers, in judgments on sadomasochism the Court describes individuals occupying a subordinate position as victims (narrative victimization) before or even without judging them to be a victim of a human rights breach. *Laskey* is a clear example of how narrative victimization is untied from judicial victimization. In that case, narrative victimization is not followed by judicial victimization. As seen above under Section III.2.3, the subjects described as victims of sexual activities in the facts and the reasoning, do not continue to be victims in the outcome of the judgment. Those receiving pain are the victims, while those inflicting pain are the perpetrators in the factual and legal discussion. However, the Court does not consider the applicant—narratively the perpetrator of sexual violence—to be a victim of the public authorities' interference being the intervention was "necessary in a democratic society" under Article 8(2).

This version of victims *versus* perpetrators in the context of sadomasochism constructs a binary opposition which is not always neat, as has been repeatedly stressed in this Article. Equally, the narrative of victimization about sexually subordinated subjects neglects two purposes/effects that sadomasochism produces for and are sought by those engaged in it. The first is lust, the sexual pleasure that can take manifold shapes, colors and vibes. The second, usually untold in mainstream accounts, is therapy. Sadomasochism may produce therapeutic benefits. From a psychological perspective, sadomasochistic practices involve intimate relations that individuals can use as a "gateway to self-awareness."[125] This is because sadomasochistic intercourse can help psychological healing by constituting a psychodramatic sexual scenario.[126] Field research on professional dominatrices has shown that these dominatrices characterize themselves as "therapists" and consider their work to be

[125] Lindemann, *supra* note 7, at 154.

[126] *See* Meg Barker, Camelia Gupta & Alessandra Iantaffi, *The power of play: The potentials and pitfalls in healing narratives of BDSM*, *in* SAFE, SANE, AND CONSENSUAL: CONTEMPORARY PERSPECTIVES ON SADOMASOCHISM 197–216 (Meg Barker & Darren Langdridge eds., 2007).

psychological treatment for their clients.[127] From this perspective, sadomasochism is a form of self-help with the potential to "transform an individual by providing a window into his or her identity."[128] In addition to the ECtHR's assumptions underlying victimization(s), the Court has not taken a clear stance (yet) on the overall question of prohibiting or protecting sadomasochism. The remainder of this Paper addresses different answers to this question.

III.3.2. AN ENIGMATIC POSTURE

A potential turning point for the ECtHR jurisprudence on sadomasochism is *K.A. and A.D. v. Belgium*[129] (2005), where the Court held that non-consensual sadomasochism can be criminalized.[130] The case involved a small group of individuals practicing sadomasochism. The two applicants (a judge and doctor) were convicted at domestic level. Charges included serious assault provoking bodily harm on a third person, that is the first applicant's wife, in a sadomasochistic session held in a locale rented for that purpose.[131]

The first applicant's wife suffered extensive injuries.[132] Various practices provoked wounds, burns and notches on her body as a result of, among others, the application of needles, burning wax and red iron marking. She experienced electrical shocks, anal insertion of a hollow bar used as a beer funnel for defecation; the insertion in the vagina and the anus of vibrators, clamps, weights, as well as the others' hands and fists. Further, the other participants sewed her vulvar labia and hoisted her up through a rope between her legs.[133] These acts were, according to the Court of Appeal, of particular gravity. Indeed, they were likely to provoke serious injuries because of the pain, distress, and humiliation even if the only long-lasting consequences were only a number of scars.[134] Because of these supposed interventions, the applicants claimed the violation of, inter alia,[135] their right to respect of private life under Article 8. The ECtHR found no violation of Article 8(2) for the reasons summarized as follows. The Court held that the State's interference was foreseen by the law[136] and pursued legitimate aims in compliance with Article 8(2): the protection of general public health; the prevention of crime and disorder; the protection of the 'victim's (according to the

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[127] Lindemann, *supra* note 7, at 156–162; *see* LINDEMANN, *supra* note 6.

[128] Lindemann, *supra* note 7, at 154; Andrea Beckmann, *Deconstructing Myths: The Social Construction of Sadomasochism Versus Subjugated Knowledges of Practitioners of Consensual SM*, 8 J. CRIM. JUST. & POPULAR CULTURE 66, 80 (2001).

[129] K.A. et A.D. c. Belgique, App. No. 42758/98 and 45558/99, ¶¶ 39–61 (Feb. 17, 2005), https://hudoc.echr.coe.int/eng?i=001-68354.

[130] *Id.* ¶ 85.

[131] *Id.* ¶¶ 11–14.

[132] *Id.* ¶¶ 15, 50.

[133] *Id.* ¶ 14.

[134] *Id.* ¶ 16.

[135] Applicants also alleged a violation of Article 6 (failure to communicate the reporting judge's report prior to the public hearing at the Court of Cassation) and Article 7 (*nullum crimen sine lege*). *K.A. et A.D.*, App. No. 42758/98 and 45558/99, ¶¶ 39–61.

[136] *Id.* ¶ 80.

above mentioned 'narrative victimization') rights and freedoms.[137] The ECtHR found that the interference was necessary in a democratic society because of the conditions in the session.[138] For instance, the applicants did not respect the woman's wish to stop the erotic interaction, who pronounced the pre-agreed safe words ('*pitié*' and '*stop*').[139] By using the safe words, the third person withdrew their consent to the continuation of the practice. However, the applicants did not stop the acts when the third participant no longer consented.[140] Further, applicants had lost their sense of control due to their high alcohol levels.[141] The intensity of violence had soared to the point that applicants had acknowledged that they were unable to predict where the session would have ended.[142] In light of these conditions, the Court deemed the measures adopted proportionate, recalling the decision *Christine Goodwin v. UK*.[143] The ECtHR stressed that Article 8 protects the right to personal development, including the right to establish and maintain relations with other humans in the sexual domain. The right to freely engage in sexual practices derives from the right to decide about one's own body. [144] As such, the right also implies a duty to respect the others' freedom of choice to express their sexuality. Where such conditions are not met, the interference is necessary and proportionate.[145] The third person's wish to stop the painful conduct constituted a limit to the applicants' right to engage in sexual practices. The disrespect of the third person's right justified the State's intervention.

Unlike in *Laskey*, in *K.A. and A.D.* the Court stresses that States can prohibit any—consensual or non-consensual—act of sadomasochism in presence of a significant degree of injury. *K.A. and A.D.* might be a promising interpretive development, but this remains only potential because of two limitations: (1) the opaqueness of the finding; and (2) the narrative character of victimization. First, the Court does not uphold the legitimacy of consensual sadomasochism, but only the legitimacy of criminalizing non-consensual sadomasochism. It is unclear whether consensual sadomasochism is protected under human rights law and, consequently, whether States have the negative obligation not to prohibit consensual sadomasochism. The Court remains vague and hypothetical on this point, even where it explicitly refers to Belgian domestic courts. The ECtHR argues that it can be "deduced" from the Court of Appeal's decision that the law does not prohibit all sadomasochistic practices; however, these activities can be justified from the domestic perspective only where authorized by the law.[146] This

[137] *Id.* ¶ 81.
[138] *Id.* ¶ 82.
[139] *Id.* ¶ 57.
[140] *Id.* ¶ 15.
[141] *Id.* ¶ 17.
[142] *Id.* ¶ 85.
[143] Christine Goodwin v. U.K., App. No. 28957/95, ¶ 90 (July 11, 2002), https://hudoc.echr.coe.int/eng?i=001-60596.
[144] K.A. et A.D. c. Belgique ¶ 83.
[145] *Id.* ¶ 85.
[146] "Si l'on peut déduire des décisions rendues en l'espèce par la cour d'appel et la Cour de cassation que la loi ne sanctionne pas toute pratique sadomasochiste, de telles pratiques ne pouvaient toutefois être justifiées en droit interne que dans les limites de l'autorisation de la loi, c'est-à-dire dans le respect des règles applicables dans ce domaine." *Id.* ¶ 56.

reading is of no interpretive help. The generic guidance sounds like the following: sadomasochism can be practiced only within the limitations of the law. Another example of the Courts' ambiguity towards sadomasochism is explained when defining the scope of the right to engage in sexual practices. The Court identifies one person's freedom of choice (to express their sexuality) as a limit to the exercise of another participant's right to engage in sexual practices.[147] In support of its argument on the necessity of public interference with the sexual activities performed in *K.A. and A.D.*, the ECtHR discloses its veiled opinion on sadomasochism by quoting *Pretty v. UK* (2002). In this decision, the Court stated that

> the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned.[148]

This quote in the context of a judgement on sadomasochistic sex does not manifest any blatant disapprobation of sadomasochism itself, or, at least, of that form of sadomasochism consisting of extremely violent practices. Yet the Court's position is obscure, almost contradictory, if read in its context, i.e., the proportionality test of the State's interference. On the one hand, the Court recognizes that one has the right to make the choices they want on their body and mind, even if these are dangerous or harmful. Therefore: "perform sex however you want!" On the other hand, morality is one of the evaluating criteria on which an external observer relies in order to build their 'perception'—or 'judgement'—of the connotations these activities acquire in their eyes. Therefore, "perform only proper sex!"

Secondly, closely related to this latter point is the Court's vocabulary through which it addresses the third participant. She is, for the Court, a 'victim' of sadomasochist acts. The vocabulary mirrors the Court's sometimes blurred, sometimes moralistic position towards sadomasochistic actors. Here, the word 'victim' appears frequently, denoting a protective sympathy for the subject who has (voluntarily) received pain and a further an implied disapproval of sadomasochistic practices.[149] Against this backdrop, one may reasonably ask who the victim is and what her legally relevant specificities are. The first and second applicant are clearly identified for their professions, a magistrate and a doctor respectively, which form also the basis for aggravating their negligent conducts

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[147] *Id.* ¶ 83.

[148] Pretty v. United Kingdom, App. No. 2346/02, ¶ 62 (April 29, 2002), https://hudoc.echr.coe.int/eng?i=001-60448. The French version of the judgment, quoted by the ECtHR in K.A. et A.D. c. Belgique (not available in English) states: "la faculté pour chacun de mener sa vie comme il l'entend peut également inclure la possibilité de s'adonner à des activités perçues comme étant d'une nature physiquement ou moralement dommageables ou dangereuses pour sa personne." K.A. et A.D., App. No. 42758/98 and 45558/99, ¶ 83.

[149] *See,* e.g., K.A. et A.D. ¶¶ 55–57, 76, 81, 85.

and ignorance of the law.[150] However, very little is said about the 'victim': she is the first applicant's wife (*épouse*), although she is referred to more often as 'victim' than 'wife.'[151] The wife-is-a-victim reiterates perfectly the scheme of woman's subordination to man's power [m>f]. The existence of a non-sexual interaction between the husband and the wife does not emerge. Their roles are separated: on one side is the 'victim,' on the other the 'first applicant,' the perpetrator. Notably, the victim is portrayed as a passive subject, subject to the others' actions, rather than a person participating in and consenting, until a certain point, to sadomasochistic sex. The two other participants, or 'perpetrators,' are two men with specific social roles that allow them to own the agency of the game while being the active players of the sexual encounter. Their bodies do not attract any specific narration, while their actions are minutely described: for instance, the doctor sews the victim's vulvar labia,[152] and the two male applicants beat the victim brutally.[153] Their body becomes attractive only from the perspective of what they do upon the victim.

In contrast, the decision shapes the victim according to the passive role of receiving the others' acts. Admittedly, the detailed description of the acts serves as a factual basis for the Court's legal reasoning resulting in the decision on the necessity of public intervention. Ultimately, the victim *is* her body. She is a female, rather than a woman, because she is less a socialized 'wife' than an almost gender-less but sex-full 'victim.' One learns the contours of the victim's body through the specific reference to what are typically considered feminine traits: for example, 'vulvar labia' (*lèvres vulvaires*), 'breast' (*seins*), 'vagina' (*vagin*)[154] and 'nipple' (*mamelon*).[155] Her voice remains silenced and her positionality unknown—as perceived by her—within this series of sessions of sadomasochistic group sex. She is given voice through the applicants, who highlight her sexual complicity: "the applicants . . . underscore that the concerned person [the 'victim', the 'wife'] was consenting, that she never lodged a complaint and she never joined the prosecution as civil plaintiff."[156] While here is not the place to find the judicial truth, and neither any other truth, this point substantiates even further the argument that sadomasochism remains for the ECtHR an enigmatic question.

One thing is clear. Subordination does not equate to victimhood, just like domination does not equate to perpetration from a sadomasochistic perspective. Instead, lust stems from subordination and domination. This makes sadomasochism a practice protected under the right to decide on one's own body by deriving pleasure with specific sexual activities. Nevertheless, another crucial matter is unclear. Is there a moment and, if any, what is the moment when the first applicant's wife becomes a victim for both the human rights system and the sadomasochistic ethos? Does it correspond to the infringement by the two

[150] *Id.* ¶¶ 21–22, 55–56.
[151] *See, e.g., Id.* ¶¶ 12, 25, 50.
[152] *Id.* ¶ 22.
[153] *Id.* ¶ 13.
[154] *Id.* ¶ 13.
[155] *Id.* ¶ 15.
[156] Author's translation: 'les requérants . . . soulignent que l'intéressée était consentante, qu'elle n'a jamais déposé plainte et ne s'est jamais constituée partie civile,' *Id.* ¶ 76.

applicants of the safe-word rule? Ultimately, some extreme sadomasochistic conducts appear easily identifiable as violations. Other sadomasochistic acts merge and mingle with human rights abuses but the line between the two remains so far unknowable through the reading of the EctHR's case law. Against this specific interpretive issue, some partially different conclusions may be drawn from the Court's most recent global approach to sadomasochism.

III.3.3. SADOMASOCHISTIC PERFORMANCE AS SEXUAL EXPRESSION

Recently, the EctHR has been able to capture certain traits of sadomasochism which are fundamental to understand its sexual nature. In *Pay v. UK*[157] (2008), a decision declaring the inadmissibility of the application, the Court recognizes that public performance of sadomasochistic gestures is part of sexual expression.[158] The case concerned the suspension from the job of a probation officer working in the Lancashire Probation Service where he offered treatment to sex offenders. The employer directed an inquiry to all employees as to whether or not they were freemasons. The applicant responded negatively but disclosed to be a member of a number of sadomasochistic organizations. Among these was Roissy Workshops Ltd ('Roissy') of which the applicant was the director. A few months after the questionnaire, the Lancashire Police received an anonymous fax describing Roissy's advertisements of its main activities on the internet: (1) supplier and builder of products for bondage, domination and sadomasochism ('BDSM'); and (2) organizer of BDSM performances and events. The fax included also a picture of the applicant wearing a mask, with two semi-naked women.[159] The Lancashire Probation Service suspended the applicant from his job, having discovered the character of Roissy's activities, the applicant's leading role in Roissy and the registration of the organization at the applicant's home address. Further, the employer uncovered that Roissy's website included links to other BDSM-related websites containing a number of photographs of the applicant involved in BDSM performances.[160]

The applicant complained that his dismissal amounted to a disproportionate interference with his right to respect for his private life under Article 8, to freedom of expression under Article 10 and to be free from discrimination for his sexual orientation under Article 14.[161] Finally, the applicant alleged a violation of Article 6(1), complaining about the length of the proceedings.[162] The Court rejected this last complaint as it did not consider the length of the proceedings excessive.[163] This section scrutinizes the Court's

[157] Pay v. United Kingdom, App. No. 32792/05 (Sep. 16, 2008), https://hudoc.echr.coe.int/eng?i=001-88690.
[158] *Id.* ¶ 12.
[159] *Id.* ¶ 2.
[160] *Id.* ¶ 11.
[161] *Id.* ¶ 7.
[162] *Id.* ¶ 9.
[163] *Id.*

reasoning concerning Articles 8, 10 and 14. The core of the case concerns the nature of the activities (whether they fall within the scope of private sphere) and the content of the right to sexual expression (whether it encapsulates the performance of BDSM acts). These two questions intersect, as the following discussion shows.

The applicant considered the activities he performed with Roissy in the BDSM club a vital part of his sexual orientation and expression. Therefore, these acts fell within the scope of private life. He also believed that the performative side involved in his act in the club constituted a fundamental, rather than accessory part of his sexual expression. The context where the performances took place was, the applicant stressed, private: a private club, with limited access and a milieu for the sexual expression of selected participants.[164] The Court recognized that 'private life' is a broad expression, not lending itself to exhaustive definition. Article 8 clearly protects important aspects of the intimate personal sphere such as gender identification, sexual orientation, sexual life, as well as the right to identity and personal development, the right to establish relationships with other human beings.[165] As such, Article 8 applies to professional or business activities. "Private life," therefore, may well cover interaction among persons in what is physically conceived as a public context.[166] One of these zones of interaction was the BDSM nightclub. The Court noted, indeed, that the nightclub where the applicant's performance took place was 'likely to be frequented only by [a] self-selecting group of like-minded people and that the photographs of his act which were published on the internet were anonymized.'[167] Further, the ECtHR specified that the interference with his private life did not materialize in the prohibition of practicing BDSM activities. The dismissal from his job was, however, a direct consequence of sadomasochistic activities.[168] In the light of this interpretation of the scope of 'private life,' although without finally deciding on this point, the Court maintained that Article 8 was applicable.[169]

Notably, the Court addressed the question of sadomasochism in the context of contemporary Western times. It recognized that 'the applicant may be correct' in believing that 'consensual BDSM roleplay . . . is increasingly accepted and understood in mainstream British society.'[170] The Court recalled tolerance, pluralism and broadmindedness as the hallmarks of a (Western) democratic society. However, the Court also held that the public authorities' cautious approach towards the applicant's sexual activities did not exceed the margin of appreciation, considering the applicant's sensitive work with sex offenders.[171] Hence, the Court did not find the measure disproportionate, and thereby declared the complaint under Article 8 manifestly-ill founded.[172] Despite the progressive

[164] *Id.* ¶ 9.
[165] *Id.* ¶ 11.
[166] *Id.*
[167] *Id.* ¶ 12.
[168] *Id.* ¶ 10.
[169] *Id.* ¶ 12.
[170] *Id.* ¶ 13.
[171] *Id.*
[172] *Id.*

statement on 'pluralism, broadmindedness and tolerance', its contextualization within the judgment makes its meaning controversial. The Court dismissed the complaint under Article 8 by accepting the respondent's position that sadomasochistic performance may hinder the public reputation of the probation service. The Court did not fully explain why the probation officer's reputation would be jeopardized, leaving a twofold implication. First, consensual sadomasochism is inaccurately conflated with non-consensual sex offending.[173] Secondly, upholding the dismissal of an employee whose sexual performance does not meet conventional standards without explaining why it clashes with his duties risks future application to any other public employment with no further justification.[174]

The applicant claimed that sadomasochism, as an erotic form of artistic expression, fell within the scope of Article 10. The Court identified that the probation office dismissed the applicant from his job due to the expression of certain traits of his sexual identity. Yet, for the same reasons applied to the Article 8 complaint, the Court considered the interference necessary in a democratic society.[175] Finally, regarding the alleged discrimination on sexual orientation-grounds under Article 14, the applicant complained that he was a victim of differential treatment due to his sexual identity.[176] The Court held that the dismissal was not motivated by the applicant's sexual orientation, but his involvement in BDSM nightclub performances which, being likely to come to the knowledge of the general public, might hinder the quality of his work.[177] For these reasons, the complaint was declared manifestly ill-founded.[178]

For the purposes of this investigation, *Pay* is unique for different reasons. First, the Court for the first time embarks on a discussion on sadomasochism and, more broadly, considering these activities a form of sexual expression. Not only does sadomasochism belong in the realm of sexual expression, but the sadomasochistic performance is an essential component of sexual expression and sexual identity. Secondly, *Pay* abandons dichotomic conceptions of spheres (public/private) and subjects (victim/perpetrator). Therefore, the Court scrutinizes subjectivities, their locations and their positionalities within the BDSM arena through a sophisticated gendered lens. For instance, the distinction between the private and the public realms loses sharpness. With BDSM performances happening in a club in front of other individuals sharing the same ethos of the applicant-performer, the border between the private sphere and the public sphere blurs. By claiming that 'the environment was one of shared sexual expression,'[179] the Court underscores that a commonality of interests can turn a so-called 'public' space into a 'private' one. That is, a space considered public because of its location

[173] Chatterjee, *supra* note 6 at 750.
[174] *Id.* at 748.
[175] Pay v. U.K. ¶ 13.
[176] *Id.* ¶ 8.
[177] *Id.* ¶ 15.
[178] *Id.*
[179] *Id.* ¶ 9.

outside home and the presence of 'other' people (unknown persons, or otherwise not part of one's family in the broad sense) becomes private because the shared form of sexual expression replaces the extraneousness of these people. In this way, the evaluation of what is private and what is public in the realm of sexual expression should be made on a case-by-case basis. A community of individuals performing sadomasochism gathering in a specific place outside home may therefore constitute a private space. Sites can be hybrid: not solely private, not solely public. '[P]ublicity and privacy' Phil Hubbard argues, 'co-join differently in different places.'[180] Spatiality is a construct: in fact, the ethos and the actions of the gendered subjects making use of it determine its private/public connotations. Sexual performances can take different shapes. Sadomasochism can be conceptualized as

> a desire for a *private life*, but performed as communicative, democratic and equal, requiring a specifically *public* context of performance such that it is not socially and legally closeted, repressed or otherwise subjugated.[181]

A group of individuals sharing a specific way of living their gendered expressions create a milieu defined 'private' because of the closeness of its members and the closure to outsiders. As the applicant of this case shows by stressing the importance of considering his (public) performance as part of his (private) sexual identity, sadomasochism transcends the rigidity of public/private divides.

In addition, the Court avoids the rhetoric of victims of sadomasochistic activities. This might be due to the circumstances of the case, precisely the specific focus on the applicant's dismissal from work due to the potential impact of his sexual activities upon his sensitive work with sex offenders. Yet, unlike the conclusions reached in the above subsection on the role of the wife-victim in *K.A. and A.D.*, *Pay* does not show the existence of 'victims' in relation to sadomasochism. Women occupy a subordinate role, but only because of sadomasochistic dynamics. The only details known are the following. First, there were two semi-naked women in the photograph portraying the applicant.[182] Second, the applicant's sadomasochistic performance took place in a private members' club and 'involved male domination over submissive women.'[183] Otherwise, the Court only deploys 'victims of sex crime'[184] to refer to the persons negatively impacted, according to the Lancashire Probation Service, by the advertisement of the applicant's sexual activities.

Pay was a decision not on merits but on (in)admissibility. A decision on the merits would have presented more detailed information on the facts and therefore a greater occasion to build a narrative—on victimhood, womanhood,

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[180] Phil Hubbard, *Sex Zones: Intimacy, Citizenship and Public Space*, 4 SEXUALITIES 51, 67 (2001).
[181] Chatterjee, *supra* note 6, at 752.
[182] Pay v. U.K. ¶ 2.
[183] *Id.* ¶ 2.
[184] *Id.* ¶ 13.

and so forth. Nevertheless, this study notes that the Court recognizes *prima facie* in an admissibility decision that sadomasochistic performance is part of sexual expression[185] without explicitly victimizing the actors of the BDSM play.

III.3.4. SADOMASOCHISM BEHIND THE CURTAIN

Sexual expression under Article 10 is the veil behind which the Court hides sadomasochism in two cases that this section examines: *Akdaş c. Turquie*[186] and *Mosley v. UK*[187].

In *Akdaş*, the Court deals only indirectly with sadomasochism regarding the right to expression under Article 10. More precisely, *Akdaş* addressed the right to artistic expression regarding narration of erotic acts including sadomasochistic activities. The case dealt with publication of the Turkish version of Guillaume Apollinaire's *Les onze mille verges*. The erotic novel described explicitly sexual practices including sadomasochism, pedophilia and vampirism.[188] The publisher had been convicted domestically for publishing a work of obscene and immoral nature, exciting and exploiting the population's sexual desire.[189] The publisher alleged a violation of his right to freedom of expression under Article 10, considering the seizure of the book an unjustified interference.[190] In the present case, the Court did not address whether sadomasochism is a legitimate sexual activity when evaluating the necessity of the State's intervention in a democratic society.[191] While discussing the changeable meaning of morals[192] across different times and cultures, the Court stressed that States should acknowledge the coexistence of different cultural, religious and philosophical communities.[193] Nevertheless, the Court did not develop the notion of cultural communities as including sexual communities such as the sadomasochistic community. In the light of the diverse social components, the Court explained, the State would be accorded, in principle, a broad margin of appreciation. However, the Court underscored that the work had already been published throughout Europe in different languages, having become part of the public European cultural patrimony.[194] Therefore, according to the Court, no pressing social needs justified

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[185] *Id.* ¶ 12.
[186] Akdaş c. Turquie, App. No. 41056/04, (Feb. 16, 2010), https://hudoc.echr.coe.int/eng?i=001-97297.
[187] Mosley v. U.K., App. No. 48009/08, ¶ 3 (Sep. 15, 2011), https://hudoc.echr.coe.int/eng?i=001-104712.
[188] Akdaş c. Turquie ¶¶ 5–6.
[189] *Id.* ¶ 8.
[190] *Id.* ¶ 22.
[191] *Id.* ¶¶ 26–27.
[192] On the violation of the right to freedom of expression in a case where public morals were deemed an insufficient justification for the seizure order and the confiscation of all the copies of the issue of a magazine published by a cultural research and solidarity association for homosexual people, *see Kaos GL v. Turkey*, App. No. 4982/07 (Nov. 22, 2016), https://hudoc.echr.coe.int/eng?i=001-168765.
[193] Akdaş c. Turquie ¶ 27.
[194] *Id.* ¶¶ 28, 30.

the Turkish legislation providing for, *inter alia*, the seizure of the book.[195] The Court held that neither the seizure nor the heavy punishment inflicted to the applicant constituted a proportionate measure.[196] It therefore found a violation of Article 10, concluding that the intervention was unnecessary in a democratic society under Article 10(2).[197]

The conflict between the right to private life (sadomasochistic encounter) and the right to expression (publication of pictures and videos) is at the heart of the case *Mosley v. UK*. The case triggered great uproar at international level because of the person at the center of the issue and the type of activities he had been supposedly involved in. The applicant was Max Mosley, former president of the *Fédération Internationale de l'Automobile* (FIA), who alleged that the UK had violated its positive obligations under Article 8 and Article 13, failing to protect his right to private life.[198] Unlike the previous cases on (de)criminalization of and the State's interference in private life, in this case the ECtHR does not develop further its conceptualization of sadomasochism as a sexual practice. One of the reasons why the Court does not elaborate on the connotation of sadomasochist practices is the scope of the *quaestio iuris*. The applicant's complaint does not concern directly, for instance, the sexual activities he was involved in or the State's interference in his personal life. Rather, the question at stake here is whether Articles 8 and 10 provide for a duty for newspapers to pre-notify to the concerned person the content of a piece of news concerning them. Therefore, the legal question is about a supposed pre-notification duty rather than the States' interference in private life through the prohibition of consensual or non-consensual sadomasochism. This section will therefore examine the parts of the decision which are relevant from the purposes of this investigation, starting from the facts.

The News of the World, a Sunday newspaper owned by News Group Newspapers Limited, published an article with the headline 'F1 Boss Has Sick Nazi Orgy with 5 Hookers' on its front page. The article described Max Mosley "exposed as a secret sadomasochistic sex pervert."[199] A number of pages told the story inside the newspaper, accompanied by photographs taken from video footage one of the participants had secretly recorded upon payment. The newspaper's website also published an extract of the video and several images.[200] The newspaper portrayed Mosley as a 'pervert' because he had participated in a sadomasochistic encounter and because the sexual activity was allegedly Nazi-themed.[201]

Mosley alleged before the ECtHR that the UK had been in breach of Article 8, both alone and together with Article 13. The applicant complained that the UK had failed to comply with its positive obligation to impose a duty on the newspaper to pre-notify him before the publication of the article and the online

[195] *Id.* ¶ 31.
[196] *Id.*
[197] *Id.* ¶ 32.
[198] Mosley v. U.K. ¶ 3.
[199] *Id.* ¶ 9.
[200] *Id.*
[201] *Id.* ¶ 12.

material.[202] This would have allowed him to prevent the publication violating his right to respect for private life through an interim injunction.[203] The Court found that the complaint under Article 13 concerning the absence of an effective remedy was a subsidiary reformulation of the complaint under Article 8. It therefore considered only the complaint under Article 8.[204] Apart from this complaint, the applicant did not dispute that the sexual activities had taken place, but contested the connotation of the acts as Nazi-themed.[205] The Court's reasoning focused on the (i) balance between Article 8 and 10; and (ii) the legal question as to whether Article 8 provides for a legally binding pre-notification requirement to be put into place by the State.[206] The two points intermingle.

Article 8, the Court held, provides for the States' (negative) obligation not to interfere with private life and (positive) obligation to ensure the enjoyment of the right to privacy by individuals.[207] The choice of the type of measures adopted to comply with the latter positive obligation falls within the State's margin of appreciation.[208] As to the pre-notification requirement under Article 10, the Court stressed that this article does not prohibit prior restraints on publication, although the dangers inherent to such an imposition call for a close scrutiny.[209] In general, prior restraints may be justified where there are no pressing needs for immediate publication and for contributing to a debate of public interest.[210] In order to assess the existence of a pre-notification duty, the Court then noted the availability in the country of: (a) civil proceedings and interim injunctions; as well as a (b) system of self-regulation of the press, established with the guidance and oversight of a number of professional organizations.[211] Article 8, nevertheless, did not require that States establish a legally binding pre-notification requirement. The Court concluded that there had been no violation of Article 8 in the absence of such a requirement in UK's law.[212]

Further, the Court distinguished between sensationalist reporting, as in the case at stake, and, on the other hand, political reporting and serious investigative journalism. A duty of pre-notification would be general and therefore affect both types of press,[213] while only investigative and political journalism would be of public interest, thereby justifying an interference to the right to private life. Indeed, the evaluation of the existence of a public interest in the publication should concentrate on "whether the publication is in the interest of the public and not whether the public might be interested in reading it."[214] In

[202] *Id.* ¶ 81.
[203] *Id.* ¶ 65.
[204] *Id.* ¶ 66.
[205] *Id.* ¶ 12.
[206] *Id.* ¶ 72.
[207] *Id.* ¶ 106.
[208] *Id.* ¶ 107.
[209] *Id.* ¶ 117.
[210] *Id.*
[211] *Id.* ¶ 119.
[212] *Id.* ¶ 33.
[213] *Id.* ¶¶ 121, 135.
[214] *Id.* ¶ 114.

this respect, the editor and the reporter of the newspaper claimed that the publication was justified because the sexual activities had 'nazi overtones.'[215] The Court relied on the domestic considerations of the High Court's judgment where sexual activities were connotated by no Nazi element. This detail was important for the ECtHR to explain why there had been no public interest to justify the publication of the photographs, articles and video images. As a result, there had been a 'flagrant and unjustified invasion' of Mosley's private life.[216] The Court specified that the protection under Article 10 may yield to the requirements of Article 8 if the information is 'of a private and intimate nature and there is no public interest in its dissemination.'[217]

What is more meaningful for the purposes of this investigation is the relation between the character of the activities (intimate sphere of private life) and the margin of appreciation accorded to the State. The Court's reasoning is quite subtle. The intimate details of the sexual encounter would attract, normally, a narrow margin of appreciation,[218] as already stated in relation to: the interference of domestic law with a crucial facet of personal identity (*Christine Goodwin v. UK*);[219] an important aspect of identity or existence (*Evans v. UK* and *A, B and C v. Ireland*);[220] and the most intimate aspects of private life (*Dudgeon v. UK* and *A.D.T. v. UK*).[221] Nevertheless, the specific complaint concerning the pre-notification requirement makes this case different from the preceding ones. Given the absence of European consensus on a pre-notification requirement and the broader impact of imposing such a duty beyond the present case, the Court concluded that the State's margin of appreciation in this case was wide.[222]

Overall, in *Mosley v. UK* the ECtHR addressed sadomasochism to a limited extent. The Court touches upon the character of sadomasochist group practices by relying on the domestic court's conclusions. The definition of the practice as sadomasochism is not disputed. Yet the supposed connotation of sadomasochistic activities, that is a Nazi role-play according to the editors of the newspaper, is relevant to classify the published news 'of public interest.' The case deals with the intersection of and the clash between the right to privacy and the right to expression. Perhaps because of this specific focus, it is difficult to detect any implicit or explicit Court's opinion on the compatibility of one's participation in sadomasochistic practices with their social, public or professional position. Notably, it is not expressed nor assumed whether the applicant's involvement in

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[215] *Id.* ¶ 127.
[216] *Id.* ¶ 104.
[217] *Id.* ¶ 131.
[218] *Id.* ¶¶ 109, 123.
[219] Christine Goodwin v. U.K., App. No. 28957/95, ¶ 77 (July 11, 2002), https://hudoc.echr.coe.int/eng?i=001-60596.
[220] Evans v. United Kingdo*m,* 2007-I Eur. Ct. H.R. 353, ¶ 77 (2007)*;* A, B and C v. Ireland, 2010-VI Eur. Ct. H.R. 185 ¶ 232 (2010).
[221] Dudgeon v. United Kingdom, App. No. 7525/76 ¶ 52 (October 22, 1981) https://hudoc.echr.coe.int/eng?i=001-57473; A.D.T. v. U.K., App. No. 35765/97, ¶ 37 (Oct. 31, 2000), https://hudoc.echr.coe.int/eng?i=001-58922.
[222] Mosley v. United Kingdom, App. No. 48009/08, ¶¶ 124, 132 (Sep. 15, 2011), https://hudoc.echr.coe.int/eng?i=001-104712.

sadomasochistic activities would be incompatible with his role as President of the FIA.

A (weak) criticism may stem from the relation between the ECtHR and the domestic court. The ECtHR relies on the High Court's assumption that, had Mosley's activities been Nazi-themed, a public interest in knowing the fact would arise.[223] This would have made him unsuitable for his role.[224] Yet the ECtHR does not call into question directly in the present decision the applicant's suitability as President of the FIA because of his involvement in sadomasochistic activities. It would be a hasty conclusion to liken *Mosley v. UK* to *Pay v. UK*. In the latter, the Court dismissed the complaint under Article 8, assuming that the applicant's sadomasochistic performance may hinder the public reputation of the probation service where he was employed. This is not vaguely intimated in *Mosley v. UK*.

There is a substantive difference between the two cases in relation to the form of the violation and the State's direct or indirect involvement in it. While in *Pay v. UK* the applicant complained about the acts of a State institution (the Lancashire Probation Service), in *Mosley v. UK* the applicant complained about the State's failure to protect his rights (by preventing the newspaper from publishing the visual material). Yet this difference is not particularly relevant for the purposes of this inquiry. What is less disputable is the wasted opportunity for the Court to dismantle the oft-mentioned link between sadomasochism and unsuitability to work in a certain domain and/or specific roles. The Court missed the opportunity to deny the notion that the shape of one's sexual preferences raises doubts about their attitudes towards other subjects in social and professional interactions.

A final note, that the ECtHR did not make explicit. The involvement in Nazi-themed sadomasochistic practices does not imply any affinity for or affiliation with Nazism. This is especially true if one denies the essence of sadomasochism as a replication of historical oppression, whilst considering it a role-play, a make-believe game, or, in any case, a simulation of social power differentials.[225] However, there is always the risk deriving from the mismatch between how the individual conceives that practice and what the public perception of it is. There might also be a widespread impression that the concerned person is unsuitable for a public role. Indeed, meanings attributed to the sadomasochistic practice involving a (Nazi) role-play can well differ.[226]

IV. SOME SEX IS BETTER THAN OTHER

As seen throughout the above sections, sadomasochism and sexual orientation intercross in at least two ways. First, from a formal perspective, a consistent fraction of cases brought before the ECtHR concern sadomasochistic

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[223] *Id.* ¶ 104.
[224] *Cf.* Bennett, *supra* note 30 at 93.
[225] On the different conceptions of sadomasochism as replication, simulation and erotic game, *see* above, § 1.2.2.
[226] *See* Bennett, *supra* note 30 at 105.

activities between homosexual individuals. For instance, in *A.D.T. v. UK*, the applicant raised sexual orientation as a discriminatory ground in private life under Article 14 taken together with Article 8, given that 'no provision of domestic law regulated sexual acts between consenting adult heterosexuals or between lesbians.'[227] Yet the Court, having found a violation of Article 8 and referring to the precedent of *Laskey, Jaggard and Brown v. UK*,[228] did not deem it necessary to examine the case under Article 14.[229] Secondly, both heterosexual and homosexual orientations are involved in the sadomasochistic practices and identities often stigmatized by the Court's misunderstanding of pain-driven pleasure.[230]

There is also a third lens through which to look at the relation between sadomasochism and sexual orientation. The ECtHR case law on the (de)criminalization of, on the one hand, homosexual intercourses between consenting adults and, on the other hand, sadomasochistic practices between (homo-/heterosexual) consenting adults shows that these two groups of complainants occupy different positions.[231] Non-sadomasochistic homosexuality seems a cause of vulnerability which deserves protection by the Court. Homosexual individuals constitute a group in need of protection only where their activities, however, are made of romantic sex. Persons practicing and receiving painful sexual acts have not gained a similar status in front of the Court yet. In *Laskey*, the Court analyzed the interference with the applicants' right to respect for private life on general health grounds. It concluded that it is not necessary to evaluate whether the interference would be justified based on the protection of morals.[232] Yet the concurring opinion of Judge Pettiti stresses the centrality of morality to the interpretation of Article 8(2), referring indirectly to sadomasochistic practices as base and criminally immoral. Judge Pettiti affirms:

> 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.[233]

Discussing the content of the protection of the right to private life, Judge Pettiti concludes his concurring opinion with a tone particularly paradigmatic of the judicial and popular disapprobation towards sadomasochism outlined above. This judicial adverse attitude towards sadomasochism may also indicate to the influence of the medical field, particularly mainstream psychiatry, on justices.[234]

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[227] A.D.T. v. U.K. ¶ 40.
[228] Laskey, Jaggard and Brown v. U.K. ¶ 70.
[229] A.D.T. v. U.K. ¶ 401.
[230] *See* Ammaturo, *supra* note 79 at 582.
[231] *Cf.* PATRICK CALIFIA, PUBLIC SEX: THE CULTURE OF RADICAL SEX 144 (1994).
[232] Laskey, Jaggard and Brown v. U.K. ¶ 51.
[233] *Id.* ¶ 16.
[234] *See* Lord Templeman's views on sadomasochism expressed in R v. Brown and reported by the ECtHR in Laskey, Jaggard and Brown v. UK: "The violence of sado-masochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defence of consent for sado-

As sketched at above,[235] medical authorities have historically pathologized sadomasochism. Both sadism and masochism were considered disorders of sexual development for a long time. The current edition of the American Psychiatric Association's Diagnostic and Statistical Manual (DSM-5) does not classify sadomasochism as a mental disorder *per se*, but only in situations where the individual experiences obsessive thoughts or psychosocial distress deriving from the activities practiced.[236] One thing is the DSM-5 as a book—along with its scientificity venerated by many and criticized by many; another thing is the living social disapprobation for practices which have been officially depathologized quite recently.[237]

The message is clear. Some sex is good. Other sex is bad, including sadomasochism—but also fetishism, prostitution, transvestitism, and certainly many other deviations from binary-normative romantic sexual interactions.[238] This argument mirrors Gayle Rubin's "hierarchical system of sexual value" according to which sexual activities and individuals performing them are ranked on the basis of their social, legal, political and moral acceptability.[239] This hierarchy takes the shape of an 'erotic pyramid.'[240] In this vein, some have compared *A.D.T.* to *Laskey* because of their difference in terms of margin of appreciation on the one hand, and, on the other, the similar absence of sadomasochistic acts in the seized videotapes.[241] For instance, Francesca Ammaturo stresses that in *A.D.T.* (small number of people performing sex) the margin of appreciation enjoyed by the State is narrower than in *Laskey* (group sex). The wider margin accorded to the State in *Laskey* is an indicator of, Ammaturo suggests, the lower rank attributed in the ECtHR's erotic pyramid to the sadomasochistic intercourse in a homosexual couple compared to sadomasochistic group sex.[242] That is, the group trumps the couple because the

masochistic encounters which breed and glorify cruelty . . . Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilized." *Id.* ¶ 20.

[235] S*ee id.* § 1.

[236] *See id.* § 1.1; Ammaturo, *supra* note 79 at 582.

[237] For example, at the outset of 2020, Indonesia's Draft 'Family Resilience' Bill has been harshly criticized for treating homosexuality, incest and sadomasochism a 'sexual deviation' for which individuals would be subject to government-sanctioned rehabilitation centres for treatment. Stanley Widianto, Tabita Diela & Agustinus Beo Da Costa, *Indonesia bill on family targets surrogacy, "sexual deviations,"* REUTERS, Feb. 19, 2020, https://www.reuters.com/article/us-indonesia-rights/indonesia-bill-on-family-targets-surrogacy-sexual-deviations-idUSKBN20D0ZZ.

[238] *See* Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267–319 (Carole S. Vance ed., 1984); Bennett, *supra* note 3 at 541.

[239] Rubin, *supra* note 238 at 151; Gayle Rubin coined also the expression 'sex/gender system' to refer to the set of arrangements by which 'a society transforms biological sexuality into products of human activity, and in which these transformed sexual needs are satisfied'; Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, *in* TOWARD AN ANTHROPOLOGY OF WOMEN 159 (Raina Reiter ed., 1975).

[240] Rubin, *supra* note 238 at 151.

[241] Ammaturo, *supra* note 79 at 582–83; PAUL JOHNSON, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS (2014); Grigolo, *supra* note 97.

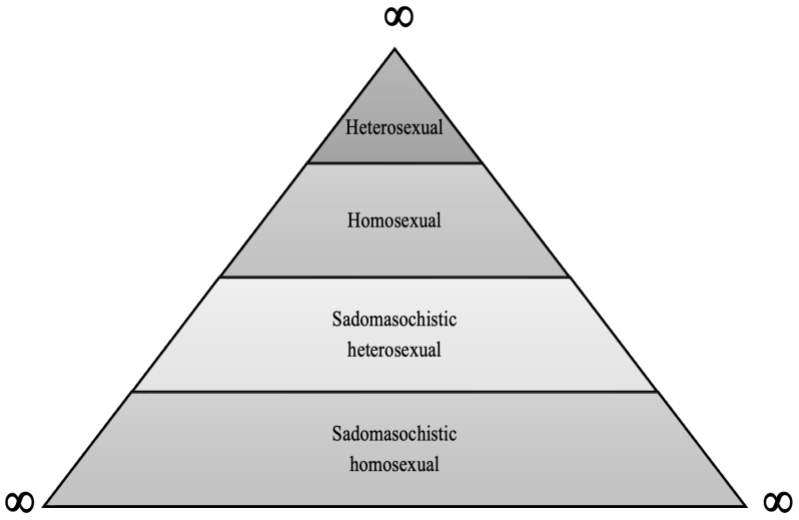
[242] Ammaturo, *supra* note 79 at 582–83.

couple is sacred. This is certainly an original application of the erotic pyramid to human rights law-making. Its development can be further imagined. At the top of the pyramid is non-sadomasochistic heterosexual sex within a couple, followed by non-sadomasochistic heterosexual group sex. This apex surmounts the category of sadomasochistic sex, including, in order, group sex and couple sex. Sadomasochistic couple sex occupies the lowest level of the hierarchy because it challenges the supposedly golden pure practices occurring in heterosexual couple sex. Depending on the weight attributed to one element or another, the basis of the hierarchy may be otherwise occupied by sadomasochistic group sex as it challenges both the romantic standard and the exclusiveness characterizing the you-and-me sexual intercourse. This analysis is piercing. It uncovers, in fact, not only the heteronormative hierarchy of sexual intercourse constructed by the Court, but also the (moral) admissibility of sadomasochistic practices under human rights law. However, what is unconvincing is the use of the number of persons involved in the sexual act as a discriminatory criterion for the Court to build the erotic pyramid, since the argument is based on two decisions only. Rather, what is particularly relevant is the convergence of sexual orientation with sadomasochism.

Three unsuccessful cases brought before the Court concern sadomasochistic activity between consensual heterosexual individuals, namely *Mosley, K.A. and A.D.V.*, and *Pay*. More precisely, *K.A. and A.D.V.* and *Pay* contain the ECtHR's unease at best; discomfort at worst with adjudicating 'non-conventional' sexual practices. In these cases, the Court addresses morality as the value to be balanced with the objective of cultivating a broad-minded society. In *Mosley*, the Court only touches upon the issue of morality with the aim of appraising the lawfulness of sadomasochism. This is blatant: the ECtHR constructs a hierarchy of sex value where 'non-traditional' sexual acts are relegated to lower positions. Then comes the sub-order considering the sexual orientation of those who perform the act.[243] As the following explanatory figure shows, sexual orientation intersects with sadomasochistic and non-sadomasochistic sexual activities, creating a sexual hierarchy based on heteronormative assumptions.

[243] *Cf. id.* at 582–83.

Figure 2. Erotic pyramid: sexual intercourse as interpreted by the ECtHR.



While the heteronormative rule operates transversally, the overriding hierarchical criterion is the nature of the conduct (sadomasochistic or non-sadomasochistic) rather than the sexual orientation of the persons involved in the act. This means that homosexual intercourse prevails over the sadomasochistic heterosexual act. This scheme is meant to show how sexual orientation and the variety of (some) sexual practices intermingle and exist according to hierarchical relations. Nothing more: this pyramid is flawed because of its limited levels. For example, it is conceptually and practically incorrect to unify all same-sex sexual activities under one adjective 'homosexual.'[244] Subjective specificities within the groups of men and women, as well as systemic subordination of women under men caution against the homogenization of gay and lesbian experiences. The sexual practices analyzed in this paper concern all persons who identify themselves as men. To hypothesize where the ECtHR would place sexual activities conducted by (the diverse group of) women in the erotic pyramid, lesbian sex would be placed above sadomasochistic gay sex, but below gay sex. Gay sex would occupy the top position of homosexual sex, while sadomasochistic lesbian sex the last position among homosexual practices, both sadomasochistic and non-sadomasochistic. A similar discourse applies also to the array of queer existences, who live and perform sexualities variously.

[244] *See, e.g.*, Monique Wittig, *One is Not Born a Woman*, *in* THE LESBIAN AND GAY STUDIES READER 103–09 (Henry Abelove, Michele Barale, & David Halperin eds., 1993). Monique Wittig's point on lesbians' ambiguous positioning in the sex-gender binary: women have a double identity (1) being morphologically women and (2) not women, not meeting the heteronormative rule of attraction to men; *see* Mira J. Hird, *Gender's nature: Intersexuality, transsexualism and the "sex'/'gender" binary*, 1 FEMINIST THEORY 347, 348–49 (2000).

This pyramidal model is useful for exemplificatory purposes, but it has a limited contextual sensitivity. If (mis)understood as a comprehensive representation of the sexual world, this type of pyramid is misleading. Let us take two examples. First, the ranking order depends upon the perspective of who designs the pyramid, therefore it is prone to subjective changes according to the perceptions and expectations of its creator. For instance, the mind behind the above pyramid is a queer person (the author), describing themselves as a gender non-conforming person, with sexual and romantic preferences for women. This queer view of the sexual hierarchy is different from many others that one can imagine. For example, many Western heterosexual men, those who usually dictate the norms of gender, conceive lesbian sex as something exciting and erotic to be seen. From the perspective of this form of voyeurism, lesbian sex is just sex between women, in absence of a man, being performed for the sole pleasure of the voyeur man's eye.

Secondly, several factors influence the construction of the pyramid. These can be linked to the subjective perception not of (same-)sex as such, as in the case of voyeurism, but of the different markers attached to the persons performing the sexual activity. I have already stressed above that in the same sexual interaction multiple dimensions may overlap and determine a different placement of type of sexual activity in the pyramid. The example outlined above portrays the pedophile male homosexual sexual act at the lowest hierarchical level. Many other layers can multiply depending on the connotations the designer selects as relevant to construct the pyramid. Hence, gender, age, and sexual orientation, do not clearly exhaust the possibilities of intersecting personal features. In addition, the other (i) attaches specific social markers to a person, who might or not identify with that marker, including the designer of the pyramid, who (ii) judges morally that sexual activity, relying on their personal conceptions and biases.

Thirdly, the pyramid is inherently unable to mirror the existing variety of sexualities, by dividing the world of lust dichotomously into homo/hetero and non-sadomasochistic/sadomasochistic acts. In any case, it would be pretentious for the author to claim to be able to know all the human characteristics existing and the sexualities performed *now* in *this* world. This is the reason for the inscription of the sign of infinity (∞) at the three angles of the figure. It would be simply naïve to believe that this paper offers enough space to draw a pyramid of indefinable height.

V. RIGHTS AND PAIN

V.1. A HUMAN RIGHT TO SADOMASOCHISM?

It is unclear what legal status sadomasochism has gained before the ECtHR. What is clear, instead, is the Court's suspicious attitude toward sadomasochism. The legitimacy of sadomasochism as one among a manifold of sexual practices is in doubt even if it is performed in private between consenting adults. Notwithstanding the Court's shy reference to sadomasochistic acts as

sexual activities in *Laskey*,[245] the individual positions of those practicing such erotic activities do not seem worthy of the Court's legal protection so far. The Court appears to navigate with more confidence the 'certainty' and 'stability' of the heterosexual and homosexual binary as the only protected sexualities.[246] However, this type of approach disregards the infinite ocean of sexual encounters that inhabit human lives along with their most varied configurations. It would be a step too far to uphold, after this kind of analysis, the existence of a human right to engage in sadomasochistic activities. Yet, divorcing from the variety of erotic realities can hardly be considered a human rights-oriented choice.

V.2. THE SUBJECTIVE PERCEPTION OF PAIN

The agreement upon a safe word before the erotic game starts, its modes of expression and the respect of it by the other participants are key for sadomasochism to be an admissible practice under human rights law. The recent case law points out that the safe rule does not suffice. Public interference can be legitimate if they are necessary in a democratic society. Therefore, sadomasochistic acts should not cause, actually or potentially, a significant degree of injury. The time is not yet ripe to uncover through the voice of the Court when and how the threshold of 'significant injury' is met. In the current absence of specific case law on the (in)tolerability of harm in sadomasochist intercourses, the socio-cultural construction of pain and its contextual relativity should caution against any automatic and rigid application of precedent decisions to new controversies.

A high degree of subjectivity is involved in evaluating when and how one perceives that pain has achieved a level of significance which is intolerable and, therefore, attracts legitimate public intervention. The pain-test is challenging because of its *ex post* (actual injury) or *ex ante* (potential injury) and externally-driven nature. Added to these elements of difficulty is the instability of meanings attached to the signifier 'pain.' Indeed, the evaluation is made by a subject different from the one who experienced the 'pain.' As such, the evaluation is not simultaneous. It either occurs after the infliction of the injury or it consists of a projection of harm where its potentiality should be foreseen. Overall, the assessment of the tolerability of pain should take into account the changeability of its meaning, that is what pain means to that specific individual living in that specific culture, milieu and circle.

CONCLUSION

The examination conducted in this paper showed how sadomasochism unsettles the binaries of domination/subordination and perpetrator/victim. The

[245] Laskey, Jaggard and Brown v. U.K. ¶ 36.
[246] *See* GONZALEZ-SALZBERG, *supra* note 64 at 75; Carol Johnson, *Heteronormative Citizenship and the Politics of Passing*, 5 SEXUALITIES 317, 329 (2002).

sadomasochistic stance brings to the human rights stage a different—sometimes opposite—perspective. For instance: subordination is not always synonymous with abuse; the dominator controls the dominated for the pleasure of both. A dominator inflicting pain is not necessarily a perpetrator; an individual is excited being subjugated to the other's control; the slave is not a victim in the same way as the master is not a perpetrator. The exploration of the ECtHR's case law on sadomasochistic practices under Article 8 ECHR and, partially, Article 10 ECHR, proved that power differentials enacted for the purposes of lust do not simply reproduce but simulate the power inequalities existing in today's gendered system. Sadomasochistic performances dismantle gender binaries in various ways: (a) introducing women-masters dominating men-slaves; (b) confusing the genders of who controls and who is controlled; (c) erasing the heteronormative boundaries of sexual activities, not necessarily based on sex-as-penetration; and (d) transcending the heteronormative rules as to whom is expected to behave how according to their gender. This gendered revolution also happens in front of the ECtHR. Yet, sadomasochism as just one among a plethora of sexual practices has not gained full legitimacy before the Court. Overall, the ECtHR makes generalized assumptions when dealing with the prohibition of sadomasochism about the ethical significance of sadomasochism, as one single marble block of sexual practices. Otherwise, the Court is reluctant to develop an analysis of sadomasochism as a sexual activity protected under specific conditions under Article 8. A context dependent approach would provide a better understanding of the gendered human rights implications of the concerned practices. This entails a close examination of the specifics of the sadomasochistic performance, including the subjects' roles, positionalities and situational meanings.