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The Discourse of Violence, Persecution of Sexual Culture and Criminal Convictions of Sadomasochism:

A Study of the Politics of Sexual Consent in the Case R v Brown (1993)

By

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Abstract

How sexual consent is evidence and operationalised in criminal courts affect not only sexual rights but also the implementation of social justice. While sexual consent is regarded as a protocol of agreement in vernacular practices, the legal definition is seemingly more complicated than a mutual agreement. There is very little research looking into the limits of sexual consent imposed by legal authorities, leaving a large gap in the understanding of the politics of consent and the sexual ideologies behind the limitations. To this end, this thesis proposes the theory of cognitive limits on sexual consent to examine how normative cognition of sex shapes the politics and jurisprudence of sexual consent and affects the implementation of social justice.

Through a socio-cognitive approach to critical discourse analysis to the verdict *R v Brown* (1993), the results suggest that sexual consent can be a discursive tool to manipulate sexual ideologies by prohibiting non-normative sexual practices. This study contributes to the legal discussion between "sex" and "violence", theoretical discussion on consent, and promotes sexual rights by reflecting how a well-negotiated culture on sexual consent can combat rape culture.

Key words: politics of sexual consent, sexual culture and norms, sadomasochism, critical discourse analysis, sexual rights and implementation of social justice

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Abbreviations and Terminologies

Abbreviations

BDSM - Bondage, Discipline, and Sado-Masochism

UK - United Kingdom

Terminologies

Legal

R v XXX - abbreviation for *Rex* (king) or *Regina* (queen) versus XXX

Volenti non fit injuria - Latin: "*to a willing person, injury is not done*"

In loco parentis - Latin: "*in the place of a parent*"

A-priori - Latin: "*from what comes before*"

Malum in se - Latin: "*wrong or evil in itself*"

Prima facie - Latin: "*on its first encounter or at first sight*"

Mutatis mutandis - Latin: "*once the necessary changes have been made*"

Cultural

Gay leather - Gay men who identify with a community, generally centred on the sexualisation of leather and domination (Getsy, 1998)

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Chapter 1: Introduction

1.1 Sexual Consent: The Politics of Sexual Rights

Rape refers to a sexual activity that is carried without a protocol of consent. But in criminal courts, evidence of consent can be distilled down to one's outfit, personal histories, the interactions between the victim(s) and the perpetrator(s), and other contextual elements (Fanghanel, 2020a). Yet, protocols of consent in consensual sadomasochistic conduct can be regarded as null and void by legal authorities. How sexual consent is evidenced and operationalised in criminal courts are seemingly more complicated than a protocol of agreement. What is the politics of sexual consent? This question relates not only to sexual rights but also the implementation of social justice.

Sexual consent is not merely a voluntary agreement to participate in a sexual activity, the granting of consent is a kind of revocable contract that distinguishes sexual behaviours from rape or sexual assaults. However, sexual consent is also a product of cultural politics, it is entrenched in cultural cognition of sex. Cultural cognition of sex includes conscious and unconscious processes of what sexual activity ought to be. In parallel with the cognition, sexual consent controls what sexual practices people can give consent to and under what circumstances sexual consent can be legally binding. When the majority conform to a socially shared cognition of sex, the cognition becomes sexual norms and develops criteria for the "normal" spectrum of sexual behaviours. As a result, it appears as a normative sexual culture that distinguishes "normal" sexual activities and sexual perversions (Janssen, 2020). However, if legal authorities attempt to resolve disputes between sexual cultures by imposing normative sexual values, it will inevitably (re-)produce social injustice. Imposing limitations on sexual consent can be their tool to prohibit deviant sexual ideologies. As a result, sexually minoritised practices are subject to cultural persecution.

Historically, activists in sexual rights movements have strived for the rights to consent as a way to counter suppressions from normative sexual cultures. For instance, gay liberation movements urge legal recognition of same-sex sexual activity and counter the societal presumptions on appropriate sexual activity (Hoffman, 2007). Similarly, one of the goals of feminist movements is to urge women's sexual autonomy. For example, activists have advocated for the rights to give and retract sexual consent within married couples in order to

counter the societal presumption that marriage is a non-revocable matrimonial consent to sex. The movement led to revisions on statutory rape laws (Harvard Law Review Association, 1999). These cases show that the legal rights to give and retract sexual consent are a key to the implementation of social justice.

Sadomasochism commonly involves a reciprocal relationship in giving and receiving pains to obtain sexual gratification. Sexual consent is a fundamental element in sadomasochistic practices, it distinguishes practitioners' shared enjoyment in sadomasochistic play from harm and functions as a safety mechanism to prevent predatory behaviours (Taylor & Ussher, 2001; Connolly, 2006; Weinberg, 2006; Moser & Kleinplatz, 2007; Yost, 2010). Negotiation of consent differentiates BDSM from abuse and psychopathological behaviours (Connolly, 2006; Newmahr, 2011; Ortmann & Sprott, 2012), and coercive sex (Cross & Matheson, 2006; Yost, 2010; Martin et al., 2016). Negotiation of consent is a key practice in BDSM, BDSM practitioners have almost made a fetish out of negotiation and culture of revocable consensuality. The operation of sexual consent in BDSM is almost like a model of sexual ethics, it emphasises the rights to give and retract consent and also a transparent process of negotiation. Sexual consent functions to maximise the shared enjoyment and minimise the risk of unpleasant experience. However, normative cognition of sex tend to stigmatise BDSM practices, practitioners are even subject to persecution. Well-negotiated culture of sexual consent seems not as important as the cognitive standard of sex.

1.2 Sexual Consent: Why Legal Authorities Matter?

Sexual consent is commonly exclusively connected with sexual assaults both legally and academically (Beres, 2007; Muehlenhard et al., 2016). Sexual consent distinguishes sexual practices from violence. Any conduct without any signs or signals of consent or involve coercive practices are rape and sexual violence. Consent can also be a functional defence to criminal conduct, for example, the "victim's" consent can potentially invalidate certain allegations like rape. When there are concerns of consent violations, people can also seek legal support to resolve the dispute.

Does judicial decision ensure personal sexual interests and look into the context of sexual consent? Seemingly not. Evidence of consent at the legal level can be presented through contextual elements (Fanghanel, 2020a). How sexual consent is evidenced and

operationalised at the legal level differs a lot from everyday practices. Legal authorities take causes, contexts, environments, and many elements into consideration rather a direct question on whether negotiations of consent exist. Cultural cognitions can shape the understanding of sexual consent and affect the implementation of social justice. For example, in a heteronormative culture, heterosexual (reproductive) sex is recognised as the standard, practices that fall outside this standard are regarded as morally deviant and socially abominable (Rubin, 1993; Goodman & Gorski, 2014). If judges adopt a normative cultural cognition of sex, sexual consent can be a tool to prohibit immoral behaviours. By initiating cognitive limits on sexual consent, legal authorities can impose the normative sexual culture and restrict what activities people can consent to. Participating in socially unacceptable behaviours can face criminal offences, for example, sadomasochistic conduct is explicitly illegal in the UK since the verdict *R v Brown* (1993).

The following section briefly introduces the Spanner case, the legal precedent on sadomasochism in the UK and also the European Human Rights Court. This section illustrates how legal institutions seek convictions for ideological manipulation in sexuality rather than social justice.

1.3 The Clash of Sexual Cultures: Sadomasochism or Violence?

Inflicting bodily harm, aiding, or even abetting assault against one's self are illegal in the United Kingdom (*Offences against the Person Act 1861*). While British law defines "*inner mental state*" with voluntariness as the foundation of sexual consent (Stevenson et al., 2004: 9), some consensual practices can be overridden by statute or judicial ruling. For example, despite the consent exists and without any victim complaints, sadomasochistic practitioners were criminalised in the Spanner case (*R v Brown*, 1993). The verdict generated concerns on human rights and thus ended up in the European Court of Human Rights for the final appeal, even though the convictions had also been upheld.

In the 1980s, Manchester Police acquired a video cassette film portraying a group of men engaging in sadomasochistic activities, including beatings, genital abrasions, and lacerations. A police cooperation codenamed Operation Spanner was launched, led by the Obscene Publication Squad (known colloquially as the Vice Squad or the "Dirty Squad") of the Metropolitan Police. The Vice Squad interviewed 43 gay men and eventually charged 16

gay men with more than a hundred offences. Ranged from assault occasioning actual bodily harm, unlawful wounding, aiding and abetting assaults against themselves. Prosecutions were made without a victim complaint, the Vice Squad upheld the "public morality" and prosecuted these men who showed "*scenes of unimaginable violence and perversion*" (Furlong, 1991: 1). Any acts might corrupt the normative sexual values could face prosecutions by the Vice Squad (Cocks, 2016).

In 1990, these gay men pleaded guilty in a trial, the ruling concluded that people cannot consent to bodily harm. They appealed to the House of Lords by asserting their mutually consented private acts should be lawful, especially their activities were discovered by an unrelated police investigation (*R v Brown*, 1993). The Lords dismissed the case by the conclusion that consent could not be a defence to bodily harm. These men brought their appeal to the European Court of Human Rights by arguing that the conduct they engaged in was *volenti non fit injuria*, the decision by the panels of the House of Lords violated their rights in private sex play (*Laskey, Jaggad, and Brown v The United Kingdom*, 1997). Yet, the EU court upheld the decision by commenting that sadomasochistic acts involve a significant degree of injury and the UK authorities have the rights to intervene to protect public healths and morals.

Sadomasochistic acts were discussed based on the normative cognition of sexual activity. The rulings attempted to impose normative sexual values by setting up cognitive limits on consent. Legal authorities sought convictions to prohibit the "perverted" violent acts ("Midland men,", 1990; Lyne, 2019). The limits on sexual consent appears as a tool to manipulate sexual ideologies. However, the reasoning of sexual consent in the legal realm is under-explored. How do normative sexual values affect legal reasoning? How does normative cognition of sex shape the politics and jurisprudence of sexual consent? How do cognitive limits on sexual consent affect sexual equality? These are important questions to address. They affect not only the development of sexual rights but also the implementation of social justice.

1.4 Research Aims

This thesis provides a new angle to the legal discussion on the relationship between sadomasochism, "sex", and "violence" in law (e.g. Moran, 1995; Bix, 1997; Hanna, 2001; Pa,

2001; Cowan, 2011), by bringing in the consideration of cultural conflicts between sexual cognitions. Following a sex-positive legal approach (Kaplan, 2014; Williams et al., 2015; Bennett, 2018), this study advocates for minority sexual rights and social justice by challenging the legal assumptions on sexuality influenced by the normative sexual culture. Through a socio-cognitive approach in critical discourse analysis (van Dijk, 2015), this research aims to dissect how does normative cognition of sex affect the politics and jurisprudence of alternative sexuality and shape the implementation of social justice.

Moreover, this thesis aims to propose the theory of cognitive limits on consent to investigate sexual inequalities at the legal level. This study explores the relationship between sexual cognition and judicial decision by addressing how do cognitive limits on consent manipulate sexual ideologies and (re-)produce social injustice.

1.5 Research Questions

(1) How does normative cognition of sex shape the politics and jurisprudence of sexual consent?

(2) How do cognitive limits on sexual consent affect the implementation of social justice?

This study aims to explore the extent to which legal institutions stand *in loco parentis* and impose normative sexual values. This thesis focuses specifically on how does normative cognition of sex affect the representation of BDSM practices and the judicial decision. By a socio-cognitive approach in critical discourse analysis (van Dijk, 2015), this study investigates how normative cognition of sex affect the the politics and jurisprudence of sexual consent. The analysis looks into how do the Lords set out limitations on sexual consent by demonstrating normative sexual values and how do the limits on sexual consent shape the implementation of social justice.

1.6 Thesis Outline

This thesis is organised into 7 chapters. This chapter provides a brief introduction to the political significance of sexual consent and the Spanner case (*R v Brow*n, 1993). Chapter 2 introduces the critical background of this research by illustrating the connection between culture and law, and also the importance of critical legal studies and sex-positive legal approach. Chapter 3 demonstrates the core of the thesis, it starts with the theory of consent,

then suggests the theory of cognitive limits on consent to investigate sexual inequalities. By illustrating what is the theory of cognitive limits on consent, this chapter demonstrates how cognitive limits can relate to manipulation on sexual ideology. The next chapter outlines the methodological background of this thesis and explains the reason for adopting a socio-cognitive approach to critical discourse analysis. Chapter 5 provides an in-depth description of the Spanner case including the investigation background, the actors involved, and also the legacy of the case. Chapter 6 approaches the verdict *R v Brown* (1993) via a socio-cognitive approach to critical discourse analysis and analyses how normative cognition of sex affects the construction and application of sexual consent. Lastly, Chapter 7 first provides a brief summary of how the findings correspond to critical legal studies and everyday politics. Then it lays out why this decades-ago court case is still relevant to contemporary political debate. This chapter ends with suggestions for future studies, the implication and application of this thesis.

Chapter 2: A Critical Approach to Law and Culture Politics

2.1 Introduction

This chapter integrates the critical background of this thesis. The first section demonstrates the relationship between culture and law and points out how cultural cognitions can cause biased jurisprudence. The aim of this section is to demonstrate how the realities of sadomasochism practitioners intersect with criminal law and cultural politics. The next part focuses on the critical legal framework of this thesis. By illustrating the aims of critical legal studies, feminist jurisprudence, and sex-positive legal approach, this section explains the importance of critical studies in relation to alternative sexuality.

2.2 Criminal Justice, Law and Cultural Politics

Political scientists have a rich tradition in the field of criminal justice by studying the institutions that generate and implement criminal law, policy, and also the relationship between criminal justice systems and the political opinions and also behaviours of the citizens. Those scholars share the same understanding that political institutions, attitudes, and behaviours shape the political outcomes of crime and justice (Miller & Wozniak, 2013). For example, Beckett and Theodore (2004) have illustrated that crime is a political and cultural issue by revising the history of crime, the politics of crime control, the media depictions of crime, mass opinion, and political movements in the United States. Similarly, Marion (2007) has investigated the relationship between legal institutions, crime rates, and public opinion and suggested that culture intersects with criminal laws and justice.

Culture also influences the operation of criminal justice systems. Walker (2011) has conducted a systematic overview on how cultural values shape the mechanism of criminal justice systems. Cultural cognitions can affect the perception of crime and generate legal consequences (Tonry, 2011). For instance, if a cultural cognition define some acts as morally unacceptable behaviours, it leads to imprisonment or even death penalty so as to make people away from embarking on a life of crime (Welsh & Farrington, 2012). Cultural cognitions are an inevitable mechanism for people to contract meaning out of reality, it is not something that people can put on or abandon easily (Rosen, 2008; Chase, 2015). Cultural values shape the understanding of law, and jurisprudence (Wiedmer et al., 2012). Hence, culture and law are

interconnected, criminal justice systems can represent the normative culture and carry legal penalties to diminish socially unacceptable conduct.

In order to analyse criminal justice and law, it is essential to understand the reasoning behind them since it shows the dynamics of legal institutions and the role of law in society. Legal reasoning refers to the process of devising and justifying certain legal acts and decisions for speculative opinions about the relevance and also the meaning of the law (MacCormick, 1994: 1). On the other hand, legal reasoning can also be regarded as a form of guidance that informs people on what to do or adjudicates some already done actions or a proposed course of action (e.g. Aarnio, 1987; Alexy, 1988; Atienza & Ruiz Manero, 1998). There are presuppositional standards behind laws, legal reasoning can be a tool to impose presumed values (Dworkin, 1977; MacCormick, 1994).

The Hartian model of law (Hart, 1961) has provided a mutually interrelated two levels perspective to dissect the operation of standards in a legal system. The primary rule regulates the duties of the individuals in a society, and the secondary one empowers the private or public capacities of the persons to vary the incidence. The whole system unifies by the secondary rule since it develops criteria to identify the rules which settle the duty of officials to remark and give effect to other rules. Functionaries in the legal system regard "shared social standard" as their "internal point of view" to determine legal actions. In Hartian model, laws depend on social attitudes and perceptual duties of individuals (Ramírez Ludeña, 2016). Legal functionaries share the same criteria to identify law and commit to imposing normative social values. Yet, Dworkin (1977) has criticised Hart's perspective on mutual "internal point of view" by pointing out that there are disagreements between officials. The presence of disagreement indicates that there is no unique answer to a case, the commonly shared criteria is illogical. Dworkin has proposed the non-conclusive concept of "principle" to replace the concept of "rule" in which individuals have the right to win the case by utilising arguments based on principles. These principles do not depend on the legality of previous legal recognitions, the duty of judges is to "guarantee the rights of individuals" (17). Thus, lawyers can disagree about what the law establishes, even if one side is wrong (81). Regardless of the perspectives on mutual acceptance or internal disagreement, social standards play an influential role in legal reasoning and determine the legal consequence of a case.

However, the process of devising and justifying laws, decisions, and rules are entrenched in cultural morality. Alf Ross (1975) has highlighted that legal terms like "guilt", "responsibility" and "punishment" are constructed within moral contexts. Ross has further explained that "*the legal rule is neither true nor false; it is a directive*" (2) and "*the norm is directed at judges rather than citizens*" (33). In this legal realism perspective, there is no *a-priori* validity to provide law with some special position (Ross, 1975), law involves "inter-subjective control" (261). Thus, legal institutions are morally driven, their interpretations of laws affect by presumptions on the appropriate functions and conduct of social actors. The socio-psychological study by Olivercrona (1971) has indicated that the ideas of rights and duties are entrenched in laws that carry assumptions about social functions and conduct. Legal institutions are bound up with "social standards" and those cultural values can shape the implementation of justice. For example, Dhar (2020) has used an "unusual trial" in Bengal to demonstrate that cultural cognitions can cause the court to follow "not-so-sound evidence" and lead to oppressive judgement through "not-so-sound" interpretations of the case. Hence, cultural cognitions affect not only legal reasoning, but also the implementation of social justice.

Yet, culture is not monolithic, there are various cultures in a society that can lead to cultural conflicts. Harrison and Huntington (2000: xxi) have suggested that when there are cultural conflicts, normative cultural values can be a "local prerogative" that limit the progress of a society. Similarly, Douglas (2004) has commented that normative culture is something that authorities cling to maintain but the citizens have abandoned. Imposing an normative culture can generate negative impacts on social development (Servais, 2005). The findings from Smith (2018) have revealed that the authorities in the UK adopted phallocentric cognitions of gender and sexuality, these cultural illiteracies saw nothing worthwhile in sexual representation. Their cognitions of sex led to the development of the obscenity law (*Obscene Publications Act 1959*). As a result, distributing "obscene" pornography both on- or off-line will face prosecutions, for example, if someone distribute BDSM pornography can face imprisonment. The clash of sexual cognitions can shape the operation of justice systems, legal authorities can be affected by normative cognitions of sex and as a result distribute biased rulings.

The case *R v Brown* (1993) indicates how legal institutions represent the normative sexual culture and oppress non-normative sexual values. Tellis (2020) has suggested that legal institutions tend to represent the hegemonic culture and oppress sexual minorities. Similarly, Chatterjee (2012) has indicated that legal institutions tend to support normative sexual values and persecute consensual BDSM practitioners. Legal prejudice can shape the realities of people in alternative cultures. Plenty of research has pointed out that BDSM practitioners rely heavily on self-policing behaviours and refuse police interference when there are non-consensual abusive behaviours (Holt, 2016; Langdridge & Parchev, 2018; Dunkley & Brotto, 2020; Fanghanel, 2020b). The fear of prosecution hinders victims of abusive behaviours to seek legal support since they might also be prosecuted due to their involvements in illegal sexual activities. Decriminalising sadomasochistic conduct can diminish the stigma of the practices and thus encourage practitioners who have been assaulted to take legal action, report criminal misconduct and seek legal protection without the fear of rebuff or prosecution by legal authorities (Pa, 2001).

This study, therefore, follows a critical legal study approach that focuses on the relationship between sexual culture and jurisprudence. To this end, this thesis elucidates how legal authorities disfavour sadomasochism by imposing normative cognition of sex and as a result affect the implementation of social justice.

2.3 From Critical Legal Studies to Feminist Jurisprudence

In critical legal studies, laws are ideological, with social biases, and ideological assumptions (Lucarello, 2012). Critical legal theorists aim to demonstrate the ambiguity and biased outcomes of impartial legal doctrines and reframe legal arguments to achieve social justice (Singer, 1984; Segall, 1993). For example, Singer (1974: 5) has suggested that critical legal studies aim not to discover how to apply laws correctly, but what laws ought to be. The basis of this approach is the acceptance of diversity and equality in jurisprudence (9). Critical legal studies can also provide an equal perspective on legal reasoning through subjectivity and indeterminacy (Lucarello, 2012). In Lucarello's account, if all jurisprudential thought is subjective and indeterminate, then, all jurisprudential thought must also be viewed equally and relevant in critical legal studies. Thus, critical legal studies can investigate the politics of the development and adjudication of laws with an equal subjectivity, but not a fictitious search

of universal truth or objectivity (621). Therefore, legal systems are another construct of various voices that represent the diversity of jurisprudential ideologies. Seeking an objective, neutral, and determinant view towards jurisprudence and laws are a "false consciousness" created by society (Reich, 1995). But Reich has further noted that "false consciousness" is essential since it is a vital means to understand the power of the legal authorities and also the power structure of their belief. This important function lays out the essentialness of critical legal studies, it can critically review that how certain laws are a product of self-delusion and fundamentalism, and unmask the "false consciousness" within laws.

Feminist jurisprudence also shares the critical legal framework in questioning the "neutrality" in legal adjudication. Feminist legal scholars focus on the inequality and power that might influence legal reasoning (Lacey, 1998). Lacey has elicited that there are differences between feminist critics on law and feminist jurisprudence, feminist legal theory goes beyond particular laws or sets of laws and focuses on the hierarchically gendered structure of modern law (2). For example, Gilligan (1982) has demonstrated how masculinity appears in constructing moral problems and shapes legal reasoning through two approaches: (1) the ethics of rights, an institution adopts certain values in a hierarchical and legalistic way to formulate rules then frames those rules as the facts; (2) the ethic of care or responsibility, a less conclusive but more complicated approach to moral problems which takes context, relationships, and values into consideration. Despite the ethics of rights model can explain the hierarchical structure of law, Lacey (1998: 6) has criticised that the care or responsibility model tend more to be legally irrelevant or incomplete under the substantive and evidential rules. Also, the conceptualisation of law can be biased. For instance, Fineman (2005) has suggested that the men-written history depicts social arrangements, gender, and human nature with biases which contribute to a patriarchal conceptualisation of law that subordinates women. Feminists in legal sphere are dedicated to advance jurisprudence by challenging the political visions embedded within the doctrines of law and also calling for considerations on the diversity of various voices and the importance of a multicultural society (Minda, 1995). The goal of feminist jurisprudence is to change the status of women by reworking the legal assumptions on gender (Scales, 2006).

Feminist legal theorists emphasise on deconstructing the objective and neutral claim of law and advocate to use feminism to replace the patriarchal value in traditional jurisprudence.

Smart (1989) has regarded law as a self-contained and self-reproducing system which polices its own boundaries by the substantive rules and rules of evidence. In this aspect, "truth" of law exists but it is constructed and is being reproduced, thus this approach rejects the objective or neutral claims on law. Similarly, MacKinnon (1989) has described objectivity as the expression of a male point of view and this perspective is known as the epistemological argument. MacKinnon has explained that the knowledge constructed by law is commonly understood as objective, but it actually represents intersectional positions that compose gender, class, ethnicity, and other elements. On this account, the male perspective adopts an epistemological assertion of cognition which is being claimed as the "objectivity" to construct the text of the law.

Lacey (1998: 3) has provided a systematic overview of feminist jurisprudence and pointed out two foundational claims and a methodological orientation of feminist legal scholarship. Firstly, at the sociological level with a wide range of disciplines, feminist scholars treat gender as an important social structure which shapes the operation of law. Thus, these scholars aim to provide a more complex conceptualisation of law than the influences towards gender. Secondly, at the normative or political level, feminist legal theorists construct gender as an axis that composes differentiation, discrimination, and domination which influences social institutions. Hence, these scholars look into how law can be developed in more gender-equal ways. On top of the two foundational claims, the methodological orientation is central to feminist jurisprudence, the idea that gender is a product of culture not of nature is shared almost universally between feminist legal theorists. Social constructionist perspective contributes to the view that gender relations can be revised via the modification and reinterpretation of social institutions, for example, alterations in law or legal institutions. In sum, Lacey (1998: 7) has argued that feminist jurisprudence aims to deconstruct the claim that law is unassailable knowledge, objective, and neutral, "*the project of feminism is to replace them*" (8). The advocacy of replacement is commonly endorsed by feminist legal theorists, they call for modification and reinterpretation but not abandoning the "reasonableness" in making legal judgments (Cornell, 1995).

Yet, feminist legal research works predominantly on gender-based political, economic, and social inequality such as reproductive freedom, sexual abuse, workplace discrimination, etc. Leaving a large gap in the application to sexual diversity, especially to sexual minoritised

practices. Feminist jurisprudence can deconstruct the asymmetrical sexual normative values in law, and capable to call for modification and reinterpretation for prejudiced legal judgement. Thus, this research will combine feminist jurisprudence and a sex-positive legal approach (Kaplan, 2014; Williams et al., 2015; Bennett, 2018) to examine how do normative sexual values lead to biased jurisprudence and affect the implementation of social justice.

2.4 Sex-Positive Legal Approach

A sex-positive legal approach recognises the "unique benefits" (Kaplan, 2014: 155) and "inherent strengths" (Williams et al., 2015: 7) of non-normative sexuality. This approach values sexual autonomy and regards sexual gratification can be positively gained through various forms of consensual sexual conduct (Dixon, 2008). Sex-positivism emphasises sexual diversity and rejects heteronormative and other dominant sexual cultures that oppresse alternative sexuality (Kaplan, 2014). A sex-positive legal approach can better reveal the complexities of sexual consent in legal thinking and sexual cultures (Bennett, 2018: 9). The core of sex-positive legal study is to challenge the legal assumptions on the values of sexual activity (Kaplan, 2014: 89). By dissecting and rejecting these assumptions in law, sex-positive legal scholarship can re-examine the justifications on "what we regulate" and "how we regulate" (164). As a result, a sex-positive legal approach can challenge the biased sexual presumptions in law and advocate for sexual diversity by recognising and appreciating alternative sexual practices.

This research follows the critical legal studies perspective on law that law is ideological, with social biases and ideological assumptions (Lucarello, 2012). In line with feminist jurisprudence, this study challenges the political visions embedded within legal institutions and advocate for diverse and multicultural society (Minda, 1995). Through a sex-positive legal approach, this research emphasises sexual diversity and challenges dominant normative sexual culture that suppresses sexual freedom. This thesis focuses on how does normative cognition of sex affect the politics and jurisprudence of sexual consent which as a result oppress the existence of sadomasochism. This study utilises the theory of cognitive limits on consent to investigate sexual inequalities at the legal level. By analysing the cognitive limits, this study examines how does sexual cognition shape legal reasoning and affect the

implementation of social justice. The next chapter introduces the theoretical core of this research: theories of consent and theory of cognitive limits on consent.

Chapter 3: From the Theory of Consent to the Theory of Cognitive Limits on Sexual Consent

3.1 Introduction

This chapter demonstrates the core of this thesis, it first presents theories of consent and how it relates to sexual activity and why sexual consent is special in sadomasochism. Afterwards, this thesis introduces the theory of cognitive limits on consent considering there are situations that the protocol of consent can be overridden by limitations. By illustrating what is theory of cognitive limits on consent, this chapter demonstrates how the limits can be a tool to manipulate sexual ideologies.

3.2 Theories of Consent: The Threshold and Limits

Consent appears when someone voluntarily agrees to something that is proposed by another. Political scientists commonly discuss the relationship between consent and obligation, for example, whether consent can ground a source of obligations to obey the law (Simmons, 1979). Beran (2019 [1987]) has considered consent from a state-citizen level that only expressed consent can bring out political obligations, yet it requires formal procedures for the person to signify the consent. This perspective emphasises the voluntariness of consent that members of an institution should be entitled to the rights to obey or repudiate the system, including law. Yet, some political philosophers have criticised that it is hard for members to make a truly voluntary consent (Klosko, 2005: 123-129; Horton, 2010: 34). In sum, there is a border philosophical approach in discussing the applications of consent at the state level and how it relates to political obligations.

On the other hand, some researchers discuss the theory of consent from a practical societal perspective. Plamenatz (1968) has proposed that participation should also be count as consent, for example, voting should be seen as causal consent that is made by the voter. Steinberger (2009: 219) has shared a similar point of view that “active participation in an institution” should be regarded as causal consent such as calling the police for help. On top of active participation, some philosophers consider passive acceptance as a source of consent. For example, Murphy (1997: 126) has used the example of “surrender of judgement” to illustrate that when someone allows practical judgements of their conduct by others (a person or a set of rules), that acceptance is a sense of consent. Gilbert (2006: 290) has expressed a

more radical approach on consent that voluntariness is not necessary, consent is a "joint commitment" which needs not prior deliberation or decision, even if someone did, there was little choice but to incur. These institutional perspectives have highlighted how voluntary participation and societal "joint commitment" can shape the conceptualisation of consent.

These theorists have pointed out the conditions that certain consensual behaviour could be void if it is wrong to consent to the authority of another. If someone attempts to give a non-revocable or unconditional consent such as to sign a contract and be a slave of another, this assertion of consent will be null even if it genuinely reflects the will of the agent. Estlund (2007) has provided a theoretical reconceptualisation by suggesting that normative consent is subtle and sophisticated. There are conditions that not consent to the authority of another would be considered as morally wrong. For example, laws are regarded as morally necessary tasks by legal authorities and so people are with moral duties to obey to the law, otherwise they will be considered as morally wrong. The wrongfulness of non-consent demonstrates how authoritative power shape the operation of consent, thus normative consent is a subtle and sophisticated existence. Under the normative theory of consent, the moral requirements of consent come from a state/institutional level for which the authorities are with the power to determine the "wrongfulness" of not consent. This perspective is crucial to this research in discussing what consent ought to be under normative values and does "wrongfulness" present in the case of sexual consent. If sexual consent links with normative values within legal institutions, then where is the threshold, what are the limits it might generate, and what consequences it might create?

3.3 Consent: What it Means to Normative Sexual Activity?

There are neither universal standards of sexual battery, sexual assault, or rape, nor universally agreed definition of consent. Legal definitions vary across jurisdictions (Eileraas, 2011), and it is difficult to disentangle what consent really means to sexual activity (Muehlenhard, 1995/1996). Sexual consent is commonly exclusively connected with sexual assaults for both legal and academic definitions (Beres, 2007; Muehlenhard et al., 2016). The statutory definition of consent in the UK is defined as "*if* (*s*)*he agrees by choice, and has the freedom and capacity to make that choice*" (*Sexual Offences Act 2003*). Sections 1-4 have highlighted three conditions that the person (A) is guilty of an offence: (1) Acts intentionally,

(2) Does not consent to the act, (3) A does not reasonably believe that the other person consents. A is responsible to ensure the other person's consent to the sexual activity at the time in question and the consent can be withdrawn at any time. Consent to sexual activity can refer specifically to one kind of activity, for example, someone consented to vaginal sex yet not anal sex or consented to intercourse with a condom only (National Health Service, n.d.). If there is a victim complaint, investigators will look into what established steps (if any) the suspect obtained the consent from the complainant. Unlike other criminal offences, sexual offence connects closely with morality (Gabb, 1991). Both legal institutions and general public agree that it is the duty of law to suppress public nuisance, certain sexual behaviours carry damages to the public and thus ought not to exist. On this account, sexual offences are value-laden and always relate to public sexual morality. Legal institutions like police and judges depict those acts as grossly immoral from a paternalistic role and aim to penalise and even eliminate certain socially unacceptable sexual behaviours.

Muehlenhard (1995/1996) has defined consent in two perspectives: (1) a mental act, an internal consent that is made by internal decision of someone willing to engage in the sexual activity; (2) a verbal act, an explicit expression of someone's willingness to engage in the sexual activity. Yet, the mental definition is void at legal level since it is impossible to know whether a person has consented to certain sexual activity or not and the perceived internal consent may not be accurate. Regarding verbal act, the external manifestations of consent can be affected by cultural misbeliefs. Plenty of research has pointed out that gendered sexual scripts generate perceptual differences in the intent of engaging in sexual activity (e.g. Briton & Hall, 1995; Lindgren et al., 2008). The perceptual differences can also be considered as the consequences of asymmetrical power relations between men and women (Chambers et al., 2004; Mellor, 2012). For example, men tend to perceive sexual consent differently from women, men are more likely to take contextual elements into considerations rather than following an explicit verbal consent (Muehlenhard & Hollabaugh, 1988; Muehlenhard & McCoy, 1991). O'Sullivan and Byers (1996) have conducted a quantitative research with 298 participants and discovered that explicit verbal consent did not occur in most cases. These studies have indicated that conceptualisation of sexual consent is often ambiguous in normative sexual culture. Consent is essential in sexual activity yet not sufficient as a

regulative concept of sex, normative sexual values can affect the perception of consent (Alcoff, 2018).

3.4 Consent in BDSM Practices: A Model of Sexual Ethics?

BDSM as an alternative sexual culture has distinct differences in the operation of sexual consent. BDSM practitioners commonly acknowledge consent as the fundamental part in their practices, the use of consent can distinguish their shared enjoyment in sadomasochistic play from harm (Taylor & Ussher, 2001; Connolly, 2006; Weinberg, 2006; Moser & Kleinplatz, 2007; Yost, 2010), sexual abuse and psychopathology (Connolly, 2006; Newmahr, 2011; Ortmann & Sprott, 2012), and coercive sex (Cross & Matheson, 2006; Yost, 2010; Martin et al., 2016). Protocol of consent is essential for BDSM activities since the informed consent outlined precautions evaluations before, during, and after a BDSM scenario (Fulkerson, 2010; Pitagora, 2013; Holt, 2016). For example, via transparent communications and negotiations, practitioners establish mutual agreement on what activities are going to be conducted and consent can be rescinded at any time (Weinberg et al., 1984; Wiseman, 1996; Holt, 2016). While it is common for BDSM practitioners to engage in risky behaviours, protocol of consent can function as safety mechanism to prevent predatory behaviours but also maximise their level of satisfaction. For example, practitioners create series of safewords before playing a scene, when someone is approaching or crossing the physical, emotional, or moral boundary, the person can use the code to stop or slow down the play (Taormino, 2012). Negotiation of consent is a key practice in BDSM, BDSM practitioners have almost made a fetish out of negotiation and a culture of always revocable consensuality. The operation of sexual consent in BDSM is nearly a model of sexual ethics, a person is capable of giving and retracting consent and the process of negotiation is transparent and reciprocal so as to maximise the shared enjoyment.

Even though BDSM is such an ideal model of sexual ethics, the carefully constructed consent can be rendered null and void and even criminalised by laws and court decisions. BDSM practitioners face continuous prejudice from medical and legal professions (Langdridge & Barker, 2013; Langdridge, 2014). For example, practitioners can be prosecuted if they leave visible bodily marks on others (Dunkley & Brotto, 2020). Weait (2007) has suggested that bodily harm in jurisprudence is considered from a reactively

descriptive premise. It defines "body" as a health system that should be both mentally and physically intact, integrated, and autonomous. In this regard, any behaviours produce risks to the wholeness of the body, such as sadomasochistic activity, is unacceptable (Langdridge & Parchev, 2018). These discursive constructions situate consensual BDSM behaviours as legally disapproved and practitioners cannot lawfully consent to sadomasochistic activities.

The unlawful status of sadomasochism hinders practitioners to seek legal support, even if they are victims of assaults, since they can also be prosecuted for their involvement in criminal behaviours. BDSM practitioners rely mainly on self-policing mechanism, for example, different practitioners groups have their own code of conduct which sets out boundaries of safe and consensual BDSM activities (Holt, 2016). Violation of rules are serious offence in practitioner groups (Taylor & Ussher, 2001; Jozifkova, 2013), violators will be blacklisted by the community (e.g. prohibited to participate in their events) and shunned at interpersonal level (Fulkerson, 2010; Holt, 2016; Dunkley & Brotto, 2020). Despite there are also communities that protect dangerous practitioners and consent violators (Fulkerson, 2010; Holt, 2016), BDSM practitioners prefer not to have police interferences when there are abusive behaviours (Luminais, 2015; Holt, 2016). In sum, even though consent plays an essential role in BDSM activity to ensure personal safety and maximise sexual gratification, their protocols of consent will be null if legal institutions impose limits on sexual consent.

3.5 Theory of Cognitive Limits on Sexual Consent

From the legal discourse of consent to the practices in normative and BDSM culture, there are discernible differences between sexual cultures. Even though there are various research proposed different ways to interpret the decision-making process of sexual consent (e.g. O'Sullivan & Byers, 1996; Beres, 2007; Humphreys & Brousseau, 2010; Jozkowski et al., 2014), there is still a large research gap in the constructions of the limits on sexual consent. Vashist (2020: 278) has pointed out the complexity of consent and suggested scholars to take law and feminism into considerations. Consent relates to various complexities, contradictions, complicities, and violence in human sexuality, bringing in law and feminism can better understand how human subjectivity shapes the conceptualisations of consent.

This study suggests that cognitive limits on sexual consent can shape the operation of sexual consent both behaviourally and legally. Cognitive limits are a cultural artefact, it is a

belief system based on sexual culture and impose limitations on sexual consent for the best interest of the culture. Using the term cognition (cognitive) since it relates to both conscious and unconscious processes in the construction and perception on what sexual activity ought to be. Considering sexual consent is objective conduct to ensure personal willingness in sexual activity, cognitive limits serve to ensure people to follow the presumptions of what sexual practices ought to be in that culture. Different sexual cultures have their own cognitive limits. There are two levels of cognitive limits, behavioural level and legal level. At the behavioural level, cognitive limits serve to guide people on what to do and how to do, for the best interest of sexual gratification. At the legal level, it functions to impose a normative culture by preventing people to engage in deviant impermissible acts. By prohibiting practices of alternative sexual culture, cognitive limits serve to protect the best interest of the normative culture. Even if there are protocols of consent, it can be overridden by cognitive limits and people engage in these behaviours can face legal penalties.

3.6 Application of Cognitive Limits

As suggested above, it is called cognitive limits since it is supported by a belief system. The belief system can be presumptions of social or public roles. For example, in a patriarchal culture, people tend to follow the sexual script in sexual activity and behave according to their cognitive sex role. Like the belief of "saying No means Yes", these cognitions are perpetuated through different means like media, films, and literature, these mediums interpellate beliefs that women resist sex while desiring it and their refusals are "insincere" (Sprecher et al.1994; Guerrero et al., 2013). Consequently, protocols of consent cannot function under the cognitive limits. However, sexual cultures can clash and create dispute. In a more gender-equal culture, these sexual cognitions are regarded as false beliefs, they are gender-based misinterpretations. If someone treats "saying No means Yes" or "wetness is the body language of consent" and attempts to ignore sexual consent, it can be considered as an abusive behaviour (Abbey, 1982; Briton & Hall, 1995; Chambers et al., 2004; Lindgren et al., 2008; Mellor, 2012). Every culture has its own cognitions on sexual behaviours, it guides people on what and how they should behave, alternative behaviours are deviant or abusive conduct which subjects to cognitive limits. This is the behavioural implication of cognitive limits.

At the legal level, cognitive limits function to protect the best interest of the normative culture. Legal authorities can enforce cognitive limits to impose the normative culture, for example, by prohibiting people engage in non-normative practices. The cognition of sex can lead to biased judicial rulings. For example, it was a capital crime to engage in homosexual acts, the protocol of consent could not function under the cognitive limits. Even if the acts were conducted in private space and without a witness, they could face capital punishment. Homosexual activities were considered as "*a gross indecency against the will of God and Man*" which against the normative sexual culture (*R v Jacobs*, 1817). Cognitive limits can also serve to maintain asymmetrical power relations. For example, matrimonial sex was regarded as one of the legally recognised conjugal rights between spouses. Hence, rape could not happen between spouses, the rights to reject sexual intercourse was rescinded when one signed a matrimonial contract. As a result, women could not reject having sex with their husbands, cognitive limits overrode the meaning of consent. In a contemporary context, cognitive limits also function in criminal court cases and override sexual consent. "Rape myths" is one of the beliefs recognised by scholars that diminish the meaning of sexual consent (e.g. Gerger et al., 2007; Leverick, 2020). Legal authorities and jurors tend to look for causes, context, interactions in the scenario, and even personal histories but resistant to indicate the protocol of consent (Leverick, 2020: 273). These behaviours derive from the cultural cognitions that something could justify the sexual conduct, it poses cognitive limits on the meaning of sexual consent. This thesis focuses on cognitive limits at the legal level and how it relates to the implementation of social justice.

3.7 Moral Limits vs. Cognitive Limits

Scholars in moral philosophy have suggested a similar concept named moral limits. Fienberg (1987) developed the harm principle to determine whether conduct is "objectively harmful" for the purpose of criminalisation. Legal paternalism implies moral limits to prevent "*moral harm to the actor themselves* (*himself* in original text)" (22-23). Thus, it is morally legitimate to penalise people involved in victimless crimes like drug use, moral limits provide "a good reason" for legal authorities to prevent someone "*becoming a worse person*"(23). Baker (2009) has further elaborated Fienberg's idea and suggested that moral limits function as "rational autonomy" that aims to alienate someone's "power of rational choice" (105).

Echo to Kantian approach on morality, this perspective emphasises that the nature of rationality connects with the sense of human dignity (humanity) (Gregor & Korsgaard, 1998), moral limits aim to protect this intrinsic value (Baker, 105). Moral limits can also set out limits on sexual consent in respect to humanity. For example, in the case *R v Konzani* (2005), despite the defendant claimed that the complainants were aware of the defendant's HIV positive condition and consented to unprotected sexual intercourse, there are risks of transmitting the infection and thus the consent was rendered null and void in the court. Moral limits prevent potential harmful consequences to humanity such as transmitting diseases.

Despite theory of moral limit can effectively explain how morality leads to criminalisation of behaviours which carry harms on humanity, it is insufficient to explore the complexity of sexual consent. Conflicts between sexual cultures appear because of ideological differences. Theory of moral limits cannot effectively investigate the disputes between sexual dynamics, the dynamic relations shape the politics of sexual consent. Limitations on sexual consent become a political tool to manipulate sexual ideologies, it is about hierarchy of sexual behaviour but not humanity. Hence, this study suggests the theory of cognitive limits on sexual consent which focuses on sexual inequalities.

Cognitive limits at the legal level operate differently from moral limits. Cognitive limits are a cultural artefact to maintain a hierarchy of sex. Legal authorities seek convictions for ideological manipulation in sexuality. They acknowledge sexual consent, but tend to look for elements to distil the evidence of consent. For example, they attempt to find elements to replace the presence or absence of protocol of consent as the evidence in court when there are cases of non-normative sexual behaviours. Those elements can override how consent is supposedly evidenced and operationalised in normative sexual culture. Legal authorities can on the one hand cherish sexual consent in normative sexual culture. On the other hand, they can distil the evidence and meaning of sexual consent in non-normative practices. It does not like moral limits that have a strong standpoint regarding humanity, it operates to maintain an ideology of sex by prohibiting alternative sexual values. It changes the operation of evidence, evidence of consent in court is no longer objective when cognitive limits appear, sexual consent will be overridden to protect the best interest of normative sexual values.

3.8 Summary

Cognitive limits on sexual consent is a theory to discover sexual inequalities. Different cultures have different cognitions of sex, but if legal authorities impose their normative sexual values, it can result in social injustice. When legal authorities stand *in loco parentis* and uphold the normative sexual culture by prohibiting non-normative sexual behaviours, it is persecution on sexually minoritised practices. If legal authorities attempt to take normative sexual cognition for granted, it affects what elements will be evidenced and operationalised in the court, the meaning of sexual consent can be distilled. As a result, it (re)-produces social inequalities.

This study applies the theory of cognitive limits on sexual consent to investigate the case *R v Brown* (1993). Based on the controversy of the conceptualisation of sexual consent, this case can be a powerful sample to examine the politics of consent and cognitive limits. On the one hand, the Lords reaffirmed the convictions and rejected the meaning of sexual consent by referencing normative cognitions of sex. On the other hand, the defendants highlighted that the activity they engaged in were *volenti non fit injuria* by demonstrating their well-negotiated consents. The contradiction between the operations of sexual consent indicates the importance to understand the role of sexual cognitions and cognitive limits on consent in jurisprudence. Thus, this study explores how does normative cognition of sex shape the jurisprudence of sexual consent in the case of sadomasochism. This research examines how the Lords structure sadomasochism as a wrongfully harm-doing through normative cognition of sex and distinguish these conducts from sex. By focusing on the conflicts between normative and alternative sexual cultures, this research investigates how do cognitive limits on sexual consent relate to cultural persecution and affect the implementation of sexual justice.

Chapter 4: Methodology

4.1 Introduction

This chapter first provides an overview of methods in legal research and explains how an interdisciplinary legal study can better examine the relationship between law and ideologies. The following sections introduces critical discourse analysis and the socio-cognitive approach by van Dijk (2015). After that, this chapter illustrates the motivations for using a case study approach to analyse the verdict *R v Brown* (1993). This methodological chapter ends with the criteria for data collection and limitations of the thesis.

4.2 From doctrinal to interdisciplinary legal research

For the methodology in conducting legal research, legal studies have been mostly dominated by normative analysis of law before the rise of empirical research (Monahan & Walker, 2011). Legal scholars are dedicated to discuss on moral, legal, and political philosophy and to explore the ideal balance of rights and obligations under the regulations of law (Monahan & Walker, 2011; Saks & Spellman, 2016). Scholars in this "black letter law" era tend to analyse what law ought to be rather than law in action (Diamond & Mueller, 2010). This methodology is also known as doctrinal legal research methodology and scholars focus on the letter of the law, for example, contract and property law. Legal research has enhanced the accuracy, accurate factual information by adopting empirical methods. Tyler (2017) has stated that the empirical research method in legal studies is "evidence-informed law" which can describe legal facts or identify empirical associations (130). The use of accurate factual information can produce more accurate legal decisions and can better fit with the considerations of substantive justice. Tyler (2017: 141) has concluded that legal studies should expand the current dominant framework by bringing in social science theories. It can understand the operation of law and identify related factors for predictions more effectively. On this account, methodology in legal studies should take accurate factual information into considerations, it affects not only the ability to identify elements for predictions, but can also contribute to a more comprehensive discussion on substantive justice.

While the doctrinal legal research methodology has been criticised as "inflexible, intellectually rigid" and "inward-looking" (Vick, 2004: 164), a number of legal scholars have drawn attention to non-doctrinal approaches that represent a new way of studying law in a

broader social and political context. These methods bring in approaches from other disciplines to study law such as socio-legal studies, feminist legal studies, and critical legal studies (Gordon, 1993; Travers, 2005). An interdisciplinary approach expands the scope and application of law especially to prepare for non-doctrinal questions in the court by adopting various kinds of applied social science methods to analyse the workings of legal, social and cultural processes (e.g. Cotterrell, 1995; Travers, 2005; Cowan, Halliday, & Hunter, 2006; George, 2006). Hence, interdisciplinary legal studies can effectively examine the relationship between law and gender, social class, ethnicity, religion and other social relations of power (Collier, 2005).

4.3 Critical Discourse Analysis

In order to find out the relationship between the use of language in the court and the highlighted socio-cultural structures of a society, this study employs the strategies of critical discourse analysis. Fairclough and Fairclough (2012:18) have suggested that analysing a deontological speech in persuading what course of action is right of what point of view is decent can reveal certain presumed rights, obligations, and commitments. Using a critical analytical method can dissect the ideological manipulation behind a jurisprudence.

Critical discourse analysis roots in critical theory and focuses on power relations in language (Hart, 2014; Wodak & Meyer, 2016). The core of critical discourse analysis is "critiquing" which directs to address social problem and achieves social change (Bloor & Bloor, 2013). Van Dijk (1998: 468) has commented that critical discourse analysis does not require a "unitary theoretical framework" since it involves an array of directions. This analytical method places the focus on "language as social practice", the "context of language use", and how language intersects with structural relationships (Fairclough & Wodak, 1997). It studies primarily on "*the way social power abuse, dominance and inequality are enacted, reproduced and resisted by text and talk in the social and political context*" (van Dijk, 2001: 352). A study of discourse should consider the framework (in linguistic term: genres) of discourse since it relates to interpretive procedures and sets of expectations which connect with certain characteristics that people in specific roles are expected to fulfil (Goffman,1986; Hanks, 1987; Bauman, 2004; Hodeges, 2015).

The primary source of discourse analysis is text. Text is the crucial element to understand a context which links with discursive constructions and social practices (van Dijk, 1990; Fairclough, 1992). In order to understand an ideological discourse, it has to take the related commonly-shared social and cultural contexts into consideration (van Dijk, 1997). Schiffrin (2003) has summarised three main definitions of discourse: (1) Linguistically, anything beyond the sentence; (2) Linguistically, the use of language; (3) Sociologically, the use of language relates to a broader range of social practices. This study uses the third definition and focuses on the use of language in socio-moral contexts. Briggs and Bauman (1992: 158) have suggested that the claims and narratives of truth are the foundation of ideologies. Similarly, Foucault (1972) has regarded discourse as an entity of sequences and signs that allow the speaker to interpellate meanings to the language which implies inter-relation between power and knowledge. The discursive practices *"systematically form the objects of which they speak*" (49). For example, in order to classify social subjects as "homosexual" or "heterosexual", it needs the discourse of sexuality in providing sexuality-related assumptions, explanations, and expectations (Foucault, 1978). This research examines the discourse in the court and the underlined contextual power relations.

4.4 Legal Critical Discourse Analysis

Legal discourse has been widely examined by researchers in different disciplines, for example, psychology (Levinson, 2018), sociology (Chow, 2018), legal studies (Scott, 2009), and political science (Habermas, 1998). Scholars focus on the discourse to study legal phenomena such as written legislation, courtroom interaction, and also evidence in court. The goal of legal critical discourse analysis is to examine the inter-semiotic relationship between discourse, law and society (Cheng & Danesi, 2019).

Brown (n.d.) has regarded legal discourse as the interplay between law and language which place law alike language and is also a language itself. Legal discourse analysis focuses on the speaker-hearer situation, locution and action by exploring the ideology of a discourse. For example, Goodrich (1987) has theorised legal discourse as a form of historical and traditional rhetoric. The linguistic practices of legal text can indicate certain social and historical genesis which implement social regulation and discipline. Critical legal discourse analysis can dissect the affinities and conflicts within the socio-historical and political

structure. Bennett and Feldman (1981) have shared a similar approach that considers law as a narrative, legal arguments in court are a "*literary mode of narrative*". The verdict and the narrative in relation to social prejudice and can potentially overturn scientific (empirical) evidence. Carlen (1976) has adopted discourse analysis to examine the socio-linguistic categorisation of elaborated and restricted codes in the magistrates' courts. The result has suggested that the use of language in the court commonly connects with presumed structures of the society.

In sum, discourse links with power relations by signifying certain values, identities, roles, and behaviours to specific social actors. Critical discourse analysis dissects the ideological manipulation of discourse and directs to address the social problem and achieves social change. Even though critical discourse analysis emphasises on a critical perspective in looking at language, there are various approaches to analyse discourse, such as dialectical-relational approach (Fairclough, 1995), discourse-historical approach (Reisigl & Wodak, 2005), and systemic functional grammar (Halliday, 1985). This research adopts the socio-cognitive approach by van Dijk (2015) to precisely explore how does normative cognition of sex affect the implementation of social justice.

4.5 Socio-cognitive Approach to Critical Discourse Analysis

This research follows the socio-cognitive approach to critical discourse analysis by van Dijk. Van Dijk (2015: 64) has suggested that discourse operates through the cognitive interface: "*the mental representations of language users as individuals and as social members*". This perspective has highlighted the cognitive processes of individually and socially shared knowledge play an essential role in discursive constructions. Socially shared knowledge, ideologies and personal mental models of social members, these subjective elements outline the contexts of a discourse (van Dijk, 2014: 12). A socio-cognitive approach aims to (1) trace the network of knowledge and values that contribute to the production and interpretation of discourse, and (2) examine how cognitions shape the structures and interpretations of the discourse (van Dijk, 2018). In sum, it focuses on the cognitive aspects of the formation and comprehension of discourse in a particular society. Using this approach can effectively dissect how certain values (mental models) and socially shared knowledge operate in a communicative situation.

In order to decrypt a message in a given communicative situation, researchers need to deconstruct the "*mental models*" of the speaker/receiver (van Dijk, 2015b). "*Mental models*" refers to the intention of the conduct of a speaker including the use of words links with the presumed interests and knowledge of the receiver (van Dijk, 2012). Decrypting the use of language of a speaker can reveal the socially shared generic knowledge and the knowledge-based interactions, these elements can dissect the production and comprehension of discourse (van Dijk, 2018). This approach can dissect how certain socially shared knowledge reinforce a larger social phenomenon. As such, this thesis dissects the language of those in power and how these discourse (re-)produce inequalities. In doing so, this study adopts a case study approach to develop an in-depth investigation on how legal institutions utilise social shared knowledge to reinforce sexual inequalities.

4.6 Case Study Approach

Case studies are in-depth investigations of real-life phenomena or situations by detailed contextual examination of certain instances (Babbie, 2010). Yin (2009: 10) has suggested that a case study is a preferred method when (1) questions of "how" or "why" are being posed, (2) the researcher has little control over the event, and (3) the research focuses on a contemporary phenomenon within a real-life context. A case study approach can allow the investigator to better delineate a particular phenomenon from another, pose challenges to extant theories assumptions and also develop conceptual clarity (Miller, 2018). *Courts* (Shapiro, 1986) and *Getting Justice and Getting Even* (Merry, 1990) are two classical legal studies that demonstrate how a case study method functions as the foundational analysis in legal scholarship. A legal case study can elucidate "*the causality, and/or a rejection of received evidence*" of a given legal phenomenon (Miller, 2018: 384). Even though utilising a comparative- or multiple- case study can have more substantial analytic benefit (e.g. Elibert & Lafronza, 2005; Yin, 2009), a single case study can better explain the complexities of deviant or crucial cases whose outcome does not parallel with previous empirical pattern (MacMillan, 2008; Bennett & Elman 2010). This thesis employs a single-case study approach to analyse the precedent sadomasochism legal case in the United Kingdom to examine the complexities of the politics and jurisprudence of sexual consent.

4.7 Motivation of the Case (*R v Brown* ,1993)

This research positions itself within the core of critical discourse analysis, with the aim to address social problems and achieve social change through an analysis of language. The Spanner case went through all levels of court in the UK and even appealed to the European Human Rights Court (the Strasbourg Court). This case establishes the legal precedent for sadomasochism. Those sadomasochism practitioners were prosecuted with victimless crime and received moral judgements. Concerning the common law system, the doctrine of precedent applies, future legal decisions or even foreign courts can cite the case and adopt the same doctrine. Misinterpretation or misapplication of law can cause long term effects until a supreme court overturn a precedent (e.g. *R v Jogee*, 2016).

Moreover, the decision by the Strasbourg Court stressed public concern with the protection of public health or morals. The rulings connect with certain underlined cultural cognition of sex and affect both social justice and also the development of sexual rights. Therefore, the case raises a social problem of sexual equality. By analysing the Lords' use of language, this research maps out how normative cognitions, precisely normative sexual values, affect the politics and jurisprudence of sexual consent. Thus, this thesis collects the use of language in the verdict to explore the extent to which the Lords depend on social values to construct ideological discourses about sexual activity.

4.8 Criteria for Data Collection

This thesis collects data from the verdict *R v Brown* (1993) which is the judicial conclusion and justifications by the panel elected by the House of Lords (the highest legal authority at that time). Language is one important means to indicate the regulatory norms in the case of sexuality. Thus, this research looks into the words and phrases that the Lords used to describe sexual activity, sadomasochism, and consent. By analysing the relationship between the use of language and cultural cognitions, this thesis examines how does normative cognition of sex affect the politics and jurisprudence of consent and eventually how it relates to social justice.

This research collects descriptive vocabularies and phrases about sex and the meaning or criteria of sex in the verdict to unravel the cultural cognitions behind. Through a socio-cognitive approach, this thesis aims to point out how sexual consent can be a discursive tool

to manipulate sexual ideologies. After data collection, those vocabularies and phrases will be analysed through two categories: (1) normative cultural cognition of sex ; and (2) sex-positive cognition of sex. The analysis focuses on how these use of language affect the jurisprudence of sexual consent.

4.9 Limitations

This section reflects on the challenges and limitations of this thesis. This study relies on public documents and secondary sources, no human subjects were involved in this research. This thesis adopts a sex-positive legal approach (Kaplan, 2014; Bennett, 2018) to advocate for recognising sadomasochism as a sexual activity. However, it has to acknowledge that BDSM sexual culture is not perfect, there are also problems of consent violations, violent behaviours, and other concerns as with the normative sexual culture (Beckmann, 2004; Williams et al, 2014; Wright et al., 2015). Due to the limitation of space, this study does not cover the problems of consent in BDSM culture. In general, this thesis has two limitations.

Firstly, geographical limitations. Even though the verdict is published online, this study does not have access to some archives like newspaper, legal documents, etc. The Spanner case happened in the 80s and the 90s, a great number of documents do not have digital copies and mainly archive in physical libraries in the UK. Due to the pandemic, the author have not had a chance to travel to those libraries and look for more information. More news articles can better construct the cultural background of sadomasochism in the 90s. However, the documentary *Lasting Marks* (Lyne, 2019) provides numbers of news articles to present the social hostility towards gay leather in the 90s. Thus, combining with other secondary sources, this study still able to construct a general cultural background of sadomasochism practitioners' realities in that period.

Secondly, due to the limitation of space, this study adopts a single case approach for the analysis. It will have more substantial analytical benefits if this thesis utilises a comparative or multiple-case approach (Elibert & Lafronza, 2005; Yin, 2009). Yet, *R v Brown* (1993) is a legal precedent for sadomasochism, it does not parallel with previous empirical patterns. Thus, a single case approach can better capture the complexities of this deviant and crucial precedent (MacMillan, 2008; Bennett & Elman, 2010).

Chapter 5: A Brief Legal History of Sexuality in the UK: Sexual Culture and Law

5.1 Introduction

This chapter provides a legal historical approach to the relationship between sexual culture and law. It first introduces legal histories of sexual consent through the lens of sodomy laws and rape laws. The next section illustrates the origin of the Operation Spanner. Through the role of the Vice Squad, this section explains how the operation relates to normative sexual values. After that, it demonstrates how the defendants went through all levels of courts for the controversy of sexual consent. The next section focuses on the defendants' final appeal in the European Court of Human Rights to show the relationship between human rights and sadomasochistic practices. This chapter ends with the legacy of *R v Brown* (1993) by illustrating how the verdict affects the contemporary political debate on sexual consent.

5.2 Legal History of Consent: Relationship between Sexual Culture and Law

Changes in law are symptoms of and responsive to social changes. Changes in law are also causes of social change. Law and social change often clash in legal history. Sometimes the law is not responsive to social changes and sometimes social change is not responsive to the law. This section utilises the changes in sodomy laws and rape laws in the UK to demonstrate the relationship between law and sexual culture.

Before the 20th century, homosexual activity in Britain was legally defined as "unnatural intercourse" and "gross indecency in opposition to the will of God and Men" by court decisions and statutory laws (Gryden, n.d.). Sodomy and buggery was a capital crime under the Criminal Law Amendment Act 1885 (section 11). Whether or not a witness was present, people engaged in homosexual acts could be prosecuted even if the acts were committed privately. In the 1950s, there was a significant rise in prosecuting gay men. Newspapers euphemistically reported those cases under the name of "gross indecency" due to the fear that mentioning homosexuality could encourage teenagers to try the "abnormal behaviour" (Bedell, 2007). The increase of prosecutions, the gay liberation movements, and a great number of psychological and sociological studies pointed out that homosexuality is not a mental illness, these changes in cultural cognition of sex pushed the UK government to decriminalise homosexuality (Cook et al., 2007). The *Sexual Offences Act 1967* was passed, male-homosexual practices were then legally acknowledged as acceptable sexual activity. The

age of consent was set at 21 for male-homosexual sexual practices (lowered to 16 in 2001), 5 years higher than heterosexual and lesbian sex. The legal amendment acknowledged the status of same-sex relations by granting them the rights to give consent. The amendment of sodomy law demonstrates that consent is not just an interpersonal agreement, it relates to normative sexual values. The capability to give consent is a matter of legal recognition about a sexual activity, people cannot consent to sexual activity if the law defines it as unlawful conduct. Hence, the possibility to give consent relates to the legal status of the activity and the status connects with normative sexual values.

Similarly, the amendment of rape law links with the development of women's rights, especially the awareness of women's sexual autonomy to give and retract consent. Women liberation movements and the rise of feminism has contributed to a whole cultural change regarding the women's status and lead to a variety of legal change. In the past, rape could not happen between spouses. Marriage was regarded as an irrevocable matrimonial consent to sex that a woman has given, wives were presumed with obligations to have sexual intercourse with their husbands in all circumstances. Thus, "*the husband cannot be guilty of a rape committed by himself upon his lawful wife*" (Hale, 1800: 629). Lord Lane overturned previous judiciary rules and abolished the legal fiction of a marital rape exemption by commenting that "*in modern times any reasonable person must regard that conception [marriage as an irrevocable consent to sex] as quite unacceptable*" (*R v R*, 1991). The legal reform changes the landscape entirely, marriage is no longer an irrevocable consent to sex, women are with the rights to give and retract consent. As a result, coercive intercourse between spouses can be found guilty of marital rape.

These cases demonstrate that legal rights to give sexual consent link with sexual culture. Socially shared cognition of sex can shape judicial decisions and jurisprudence, changes in sexual values also generate legal change. The key concern is legal recognition of a sexual activity, it determines the rights to consent and also sexual rights. Cognitive limits on sexual consent can be a tool to manipulate sexual ideologies by imposing limitations on what practices people can consent to. The following sections presents the legal precedent for sadomasochism which establishes a new legal principle in ruling alternative sexual behaviours. Similar to previous examples, the decisions were established from a cultural perspective that sadomasochistic practices are socially unacceptable behaviours.

5.3 Operation Spanner: The Starting Point of the Story

In October 1987, Manchester Police acquired a video cassette film portraying a group of men engaging in sadomasochistic activities, including beatings, genital abrasions, and lacerations. They believed that the men in the video were murdered and so they launched a murder case investigation. The police seized more related videotapes during their investigations and later formed a cooperative investigation, named Operation Spanner, led by the Obscene Publication Squad (known colloquially as the Vice Squad or the "Dirty Squad") of the Metropolitan Police. The Vice Squad devoted to maintaining the existing cultural standards as a guideline to enforce social control within both Soho and mainstream English society (Bleakley, 2019). They paid particular attentions to gay materials homologous with more than half of the population concerned gay activity as a wrongful conduct (British Social Attitudes, 2013; Cusack, 2017: 243). In sum, any acts might corrupt the normative sexual values could face prosecutions by the Vice Squad (Cocks, 2016). During the raids between 1987 and 1988, they interviewed dozens of gay men and seized more than 400 videotapes (Metropolitan Police, 2018). Their examination showed no murders occurred in this case, it was a consensual sadomasochistic practice recorded among a group of gay men. Yet, in September 1989, the Vice Squad upheld the "public morality" and prosecuted 16 men who showed "*scenes of unimaginable violence and perversion*" (Furlong, 1991: 1). They faced more than a hundred offences, ranged from assault occasioning actual bodily harm, unlawful wounding, to aiding and abetting assaults against themselves. These offences were victimless crimes, the police prosecuted these gay men without a victim complaint.

5.4 The Verdict: From the trial at the Old Bailey (1990) to the Spanner Case (*R v Brown*, 1993)

These men faced charges against them before Camberwell Magistrates' Court, remanded to re-appear at Lambeth Magistrates' Court and eventually brought to a higher authority, the Old Bailey Crown Court (The Central Criminal Court). This is because their charges included conspiracy charges, the Old Bailey is the only judicature in the British court system to hear indictable-only offences and capable to establish a judicial precedent of a guilty verdict.

In December 1990, 16 gay men pleaded guilty at the Old Bailey before Judge James Rant. Their defence was based on the fact that all activities they engaged were consensual. Judge Rant held that the argument of consent was null and void, since their activities fell outside the exceptions to the law of assault by commenting that "*people, must sometimes be protected from themselves*" (Peterson, 2020). The court decision referenced on two previous court cases: *R v Coney* (1882), bare-knuckle boxing in public is unlawful, despite the consent of the individuals involved; *R v Donovan* (1934), when a person acts intentionally to produce bodily harm, the consent of the victim does not make unlawful conduct lawful. Five of the defendants appealed their convictions and sentences to the Court of Appeal in February 1992 which upheld the earlier judgment. Yet, the court granted these men to appeal to the House of Lords, the supreme court of appeal in that time.

In March 1992, the five defendants appealed to the panel elected by the House of Lords, the case is also known as the Spanner case (*R v Brown*, 1993). The appellants proposed that sadomasochistic acts should be exempted from the operation of statutory provisions of inflicting bodily harm since they were consented to the acts for sexual gratification. The jurisdiction focused mainly on whether consent can form a valid defence to assault in sexual activities. Concerning the absence of precedent of sadomasochism, the panel applied three senior indirectly analogous biding cases (*R. v. Coney*, 1882; *R v Donovan*, 1934; *Attorney General's Reference*, 1981) and others as the reasoning. House of Lords reaffirmed the negative decision towards the argument of consent by a 3-2 majority of the Lords, the convictions of the appellant remained the same. The 5 gay men involved more than 10 years in heavy sadomasochistic play, pleaded guilty for their consensual practices. The decision ruled that consensual sadomasochism provides no exception to a count of unlawful and malicious wounding and assault occasioning actual bodily harm or causing grievous bodily harm (*Offences against the Person Act* 1861). Lord Lowry described that sadomasochist activities are "*perverted and depraved sexual desire*" which "*cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society*" (*R v Brown*, 1993: 30). Lord Templeman regarded sadomasochism as a "*cult of violence*", "*uncivilised cruelty*" and "*the society is entitled and bound to protect itself against it*" (10). These discourses could have easily appeared in the 19th century ruling against

sodomy, crossdressing and homosexual practices in relation to the hostility towards homosexuality under normative sexual culture (see Harvey, 1978).

5.5 The Final Appeal: *Laskey, Jaggad, and Brown v The United Kingdom* (1997)

Following the legal controversy in the House of Lords (e.g. Bibbings & Alldridgem 1993; Thompson, 1994; Moran, 1995), those men appealed to the European Commission of Human Right (Strasbourg Court) (*Laskey, Jaggad, and Brown v The United Kingdom,* 1997). This appeal is also the first international court case regarding sadomasochism. The appellants believed that the decision by the House of Lords violated Article 8 of the *European Convention on Human Rights* given the compelling evidence and arguments that they involved in private sexual practices not violent abusive behaviours. They believed that the acts they engaged in were *volenti non fit injuria*, their practices should be lawful exceptions. The EU court held an unanimous decision and ruled the UK authorities did not violate the article. The court commented that the prosecution and conviction of the appellants were "*essential to protect public health in a democratic society*" (14). The court accused sadomasochistic activities as "*involved a significant degree of injury or wounding which could not be characterised as trifling or transient*" (12). The jurisprudence was with legitimate aim of protecting "*public health or morals*" (10).

5.6 Long Lasting Influence: Legacy of *R v Brown* (1993) -

Previous social movements have advocated for the rights to sexual consent, activists nowadays are turning their eyes on the limits of sexual consent. "We Can't Consent to This", a women's rights pressure group in the UK is calling for limitations on the rights to consent. They pointed out that women are victims of the "consensual violent behaviours" since male defendants can use the "rough sex gone wrong" as an excuse to get rid of charges or even prosecution (We Can't Consent to This, 2020). For example, some women have been killed but the perpetrators escaped a murder charge (charged with manslaughter, etc.) and some of them were not charged with anything at all. Even though life-changing injuries appeared in some cases (e.g. *R v Meachen*, 2006; *R v Lock*, 2013), prosecutors tend to decline to pursue charges since they believe "*it is not in the public interest to pursue this charge*" (Urwin, 2020). As a result, "We Can't Consent to This" suggests the UK parliament to make the

verdict in *R v Brown* (1993) to a new statute that prevents perpetrators of violence using consent as a functional defence.

In line with the reform proposal by *We Can't consent to This* (2020), the parliament has initiated the *Domestic Abuse Bill 2020* which seeks to change the present law by covering sadomasochistic practices. Under this amendment, consent to serious bodily injuries for sexual gratification cannot be functional evidence, sadomasochistic practices are defined as domestic violence and perpetrators of these behaviours are subject to imprisonment. They believe that turning the verdict *R v Brown* (1993) into a new statute can prevent sexual violence towards women and eliminate the "rough sex gone wrong" defence in sexual violence allegations.

These people perceive a decades-ago criminal court case as a model to combat sexual violence. But what if the verdict is partial and subjective? Following a prejudiced ruling can (re-)produce social inequalities. Jurisprudence can be biased, moralistic views of judges can shape the judicial outcome (Gilligan, 1982; Singer, 1984; MacKinnon, 1989; Segall, 1993; Minda; 1995; Lacey, 1998). Thus, this thesis aims to dissect the jurisprudence in the case *R v Brown* (1993).

5.7 Summary

The descriptions above indicate that judicial decisions on sadomasochistic behaviours were value-laden. Their comments like "*perverted and depraved sexual desire*" and "*uncivilised cruelty*" signify certain cultural cognitions that some sexual behaviours are right and acceptable and the others are wrong. The ideologies behind are important to dissect since it affects not only minority sexual rights but also the implementation of social justice. Hence, this thesis aims to investigate how those cultural cognition of sex affect the ruling of the Spanner case and manipulate sexual ideologies.

The following chapter dissects the extent to which legal institutions stand *in loco parentis* and impose normative sexual values. Through a socio-cognitive approach to critical discourse analysis, this study investigates how does normative sexual cognition shape the politics and jurisprudence of sexual consent in the verdict *R v Brown* (1993). The analysis looks into how the Lords set out cognitive limits on sexual consent by referencing normative cognitions of sex.

Research Questions:

(1) How does normative cognition of sex shape the politics and jurisprudence of sexual consent?

(2) How do cognitive limits on sexual consent affect the implementation of social justice?

Chapter 6: The Clash of Sexual Cultures: *R v Brown* (1993)

6.1 Introduction

This chapter approaches the verdict *R v Brown* (1993) via a socio-cognitive approach on sexual culture. References to normative sexual culture appear in the discussions on sexual practices. The underlying cultural cognition of sex shapes the application of sexual consent and affects the implementation of social justice. The discursive constructions manifested in the verdicts are described via quoted examples.

The chapter first introduces the cultural background of the social realities of people practising non-normative sexual behaviours in that era. The description focuses on the media depictions on sadomasochism. Next, the analysis adopts a socio-cognitive approach to critical discourse analysis to examine how does normative cultural cognition of sex shape the politics and jurisprudence of sexual consent. This part has two sections, it first demonstrates how sexual consent can function as a tool to manipulate sexual ideologies by focusing on the reasoning of three Lords. The next section examines how sexual consent can be a tool to protect sexually minoritised practices through the reasoning of the other two Lords. This chapter attempts to answer two questions: (1) how does normative normative cognition of sex shape the politics and jurisprudence of sexual consent; and (2) how do cognitive limits on sexual consent affect the devilry of social justice.

6.2. Cultural Background: The Cultural Conflict of Sexual Behaviours

The following statements are quoted from various newspaper articles, they demonstrate not only the cultural cognitions towards sadomasochism but also the fear towards the conduct.

> "*These fantasies [Torture, Bondage, and Sadomasochism] are particularly likely to corrupt abnormal people and incite them to behave like beasts.*"
>
> "*This is not love. Some fantasies should never see the light of day.*"
>
> "*The videos that made a court sick.*"
>
> "*Nationwide torture ring beasts are caged.*"
>
> "*Sadistic sex freaks' catalogue of shame.*"
>
> "*… sentence 15 men for their involvement in the biggest and most horrific pornographic ring ever.*"

"*This was appalling for its sheer controlled violence; cold-blooded, slow and ritualised.*"

Lasting Marks (Lyne, 2019), a documentary of the Spanner case revealed the stigmatised social atmosphere towards sadomasochism by gathering numbers of news articles in that era commenting on the Spanner case. The descriptions and titles mentioned above are quoted from various newspapers, their use of language framed sadomasochistic practices as "appalling", "horrific", and "cold-blooded", practitioners are "abnormal", "beasts", and "sex freaks". Those reporters have compared sadomasochistic behaviours with the normative cognition of sex and made these value-laden statements to show how socially unacceptable these behaviours were. Berkowitz and Liu (2014) have suggested that news is established from the cultural meanings of society. Thus, these news articles also represent the normative sexual culture, they portrayed deviant sexual behaviours like sadomasochistic conduct are socially unacceptable and "*should never see the light of day*". The cultural cognition of sex aligned with the prosecutions in the Spanner case, since the role of the Vice Squad is to uphold "public morality" (Furlong, 1991; Cocks, 2016). Non-normative sexual behaviours like sadomasochistic conduct are "*likely to corrupt people*" and pose dangers to "public morality". Consequently, in order to maintain the normative sexual culture, the Vice Squad prosecuted those BDSM practitioners in line with the social stigma towards BDSM sexual culture.

The defendants challenged the "public morality" not barely due to their BDSM practices, but also their sexual orientation. There was a strong homophobic social atmosphere in that period especially in the Manchester area (Rayside, 1992; Lyne, 2019). Male-homosexual practices were socially unacceptable, the normative sexual culture was heteronormative. Those defendants were subject to intersectional discrimination due to their deviant sexual orientation and also deviant sexual practices. The Vice Squad desired this case as an example to eliminate the "pervert" thing, the gay leather culture (Lyne, 2019).

The defendants faced a great number of charges including aiding and abetting assaults on themselves. Based on normative cognition of sex, a reciprocal sadomasochistic relationship was interpreted as an offence of aiding and abetting assaults on the defendants themselves. However, the interpretation might be a cultural misinterpretation based on different cognitions on sex. For example, in the comment that "*Mr Kelly (one of the*

defendants) started as a slave victim and rose to take a master's role" (Lyne, 2019), the reporter from the Guardian could not understand why there were such changes. Role fluidity (Switches) is one of the common practices in BDSM culture (Martinez, 2018), yet, not parallel to the normative cognition of sex. There are significant differences between normative sexual culture and BDSM culture. Using the normative sexual criteria to judge non-normative practices is likely to result in misinterpretation.

However, if legal institutions attempt to achieve social justice by imposing normative sexual values, the act will not bring social justice but cultural persecution. The following section analyses how the Lords in the case *R v Brown* (1993) impose normative sexual values by initiating cognitive limits on sexual consent. Cognitive limits on sexual consent function as an ideological manipulation on sexual behaviours and consequently produce cultural persecution on sadomasochistic practitioners

6.3 Verdict of *R v Brown* (1993): Conflicts between Sexual Cultures

> "*Society is entitled and bound to protect itself against a cult of violence [Sadomasochism]. Pleasure derived from the infliction of pain [sadomasochism] is an evil thing. Cruelty is uncivilised*." Lord Templeman (*R v Brown*, 1993: 10).

The comment by Lord Templeman outlined the two central considerations for the convictions, the concern for society and morality. Lord Jauncey of Tullichettle and Lord Lowry shared the same perspective that they believe sadomasochistic conduct against the cultural cognition of sex and might "corrupt" other young men to follow these practices if they do not criminalise it. In the verdict, their use of language underlined the structure of sex in normative sexual culture. They adopted value-laden terms like "cult", "barbarity", "perverted", and "dangerous" to establish the argument that sadomasochistic conduct poses threats to society. On the other hand, they referenced normative cognition of sex to define what sexual activity should be like, for example, sex should be "*conducive to the enhancement or enjoyment of family life or conducive to the welfare of society*" (30). These three Lords attempted to bring social justice by imposing normative sexual values. On this account, they discursively defined sexual activity from the normative cognition of sex and explained how sadomasochistic conduct goes against the cognition.

On the contrary, Lord Mustill and Lord Slynn of Hadley did not follow the normative cognition of sex in their rulings. They adopted a sex-positive perspective and regarded that there are variations of sexual practices. It is worth noting that they both perceived the defendants' conduct were "repugnance" and "morally wrong" but they also suggested that negative moral perception is not a sufficient reason for criminalisation. This thesis regards this perspective as sex-positive cognition of sex. Aligned with a sex-positive approach (Dixon, 2008; Kaplan, 2014; Williams et al., 2015), this research respects sexual diversity and rejects the assumptions of sex from normative sexual culture.

The following analysis has two parts. The first part focuses on the normative cultural cognition of sex shared by Lord Templeman, Lord Jauncey of Tullichettle and Lord Lowry, and investigate how normative cognition of sex shapes the jurisprudence of sexual consent as a tool for sexual manipulation. The next part focuses on the sex-positive cognition of sex utilised by Lord Mustill and Lord Slynn of Hadley.

6.4 Normative Cultural Cognition of Sex: The Discourse of Violence

Normative cognition of sex not only provides social standards of sexual behaviours, but also categorises BDSM practices into a deviant inferior position. Sexual consent is no longer a revocable agreement on sexual practice when legal authorities impose cognitive limits on it. Sexual consent will be a political tool for sexual manipulation. This section conducts a critical discourse analysis on the descriptive vocabularies and phrases about sex. By means of a socio-cognitive approach, the following two sub-sections demonstrate how normative cognition of sex shapes the discursive construction of sexual consent. This first sub-section illustrates how the Lords reference to normative cognition of sex and classify sadomasochistic conduct as a form of violence. After that, it analyses how does normative sexual cognition affect the jurisprudence of sexual consent and as a result, generate cultural persecution.

6.4.1 The Cognitive Standards of Sex vs. The Reputation of Violence

Lord Lowry stated that "*sadomasochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society*" (30). On this account, sexual activity should be able to contribute to better family life

or even to a larger extent beneficial to the welfare of society. This cognition of sex assumes sexual behaviour should be conducive corresponds to the heteronormative culture that places heterosexual reproductive sex as the standard and practices that fall outside this standard are morally deviant and socially abominable (Rubin, 1993; Goodman & Gorski, 2014: 28). The normative sexual culture creates a hierarchy of sex that graduates the level of benefits of sexual behaviours, it places reproductive and heterosexual sex at the top of the hierarchy. Lord Templeman made a similar comment regarding the relations between sex and family that sadomasochistic conduct is not a part of "*private and family life*" (10). Even though they acknowledged the sexual motivations of the appellants' conduct (10; 11; 30), they did not see anything worthwhile in sadomasochistic practices from their normative cognition of sex. Just like the cultural illiteracies in the development of the UK obscenity law saw nothing worthwhile in sexual representations (Smith, 2018). Lord Lowry specifically concerned with masculinity that the appellants' homosexual sadomasochistic conduct can cause "manly diversion" if it spreads to society (30).

Outside of gender and reproductive benefits, the Lords set out other standards that signify the revulsion of sadomasochistic conduct. Sex was defined as a private and family matter by the Lords. Lord Jauncey of Tullichettle highlighted that the appellants were "*taking of video recordings of such activities*" (19) and "*If the only purpose of the activity is the sexual gratification of one or both of the participants what then is the need of a video recording?*" (20). As a result, "*secrecy [of the appellants' sexual behaviours] may not be as strict as the appellants claimed to your Lordships*" (20). This reasoning further distinguished that video recordings should not appear in sexual activity since it does not fit the cognition of sex that it should be done in private and with secrecy. Also, Lord Templeman suggested that "*sex is no excuse for violence*" (10). Infliction of bodily harms is not an acceptable behaviour in sexual activity, hence sadomasochistic behaviours do not fit the normative criteria of sex.

These discursive constructions of sex made by the Lords revealed not only the standards of sex in normative sexual culture, but it also signified why sadomasochistic behaviours are not sexual conduct according to the normative cognition. By separating the appellants' acts from sexual activity, the Lords discursively structured the representation of violence in BDSM practices.

The victims [defendants] were degraded and humiliated sometimes beaten, sometimes wounded with instruments and sometimes branded. Bloodletting and the smearing of human blood produced excitement." Lord Templeman (9)

Genital torture, violence to the buttocks, anus, penis, testicles and nipples, the appellants' behaviours were commonly highlighted by the Lords. The Lords signified the representation of violence in BDSM practices, meanwhile strategically diminished the significance of the appellants' sexual gratification. Lord Templeman also suggested that "*In my opinion sadomasochism is not only concerned with sex. Sadomasochism is also concerned with violence*" (8). Their cognitions on sex defined sadomasochistic behaviours as a representation of violence considering the presence of bodily harm (9; 20; 27) and possibilities of serious physical damage if the practices get out of hand (9; 30). The Lords pointed out that violent behaviours should not appear in sexual activity, sadomasochistic behaviours are not sexual acts but assaults. On the other hand, they underlined the injurious nature of BDSM that goes against normative cognition of sex. For example, Lord Jauncey of Tullichettle stated that "*the nailing by A of B's foreskin or scrotum to a board or the insertion of hot wax into C's urethra followed by the burning of his penis with a candle or the incising of D's scrotum with a scalpel to the effusion of blood are injurious*" (20). Similarly, Lord Lowry suggested that "*those who will inflict and those who will suffer the injury wish to satisfy a perverted and depraved sexual desire*" (30). These discourses indicate that the concern was sadomasochistic conduct violate the normative cognition of sex, these practices generated moral concerns.

Their use of language highlighted the presumed cognition on sex, it is a form of "*metal model*" (van Dijk, 2012). Based on the knowledge, beliefs, and attitudes from the cultural cognition of sex, the Lords discursively constructed what sexual activity ought to be. As shown above, the Lords imposed the normative cognition of sex to classify BDSM practices as a representation of violence rather than a socially acceptable sexual activity. The recognition of sex is important in this case since it affects the jurisprudence of sexual consent. The following sub-section focuses on how normative cognition of sex shapes the politics and jurisprudence of sexual consent and how sexual consent can be a tool to manipulate sexual ideologies by the Lords.

6.4.2 Politics and Jurisprudence of Consent: The Tool to Manipulate Sexual Ideologies

Despite the contemporary conception about sexual consent indicates that it is a revocable agreement to engage in sexual activity**,** legal institutions can impose cognitive limits on sexual consent for the purpose of sexual manipulation. The previous sub-section explains how normative sexual values lead to the cognitive distinction between sexual activity and sadomasochistic conduct. This part further examines how normative cognition of sex shape the discursive structure of sexual consent.

> "*Everyone agrees that consent remains a complete defence to a charge of common assault and nearly everyone agrees that consent of the victim is not a defence to a charge of inflicting really serious personal injury* (or "*grievous bodily harm*")" Lord Lowry (21)

Sexual consent commonly exclusively connects with sexual assaults, sexual activity without the presence of consent is rape or sexual violence (Beres, 2007; Muehlenhard et al., 2016). Similarly, consent can operate as a functional defence to non-fatal behaviours causing bodily harm (Anderson, 2014). Lord Templeman also asserted this perceptive that certain consensual injurious acts "*have been accepted as lawful notwithstanding that they involve actual bodily harm or may cause serious bodily harm*" (3). For example, tattooing, ear-piercing, surgical operation, and combat sports, these behaviours are with "*a reasonable degree of force being used*" (54) and the injury is not "*transient or trifling*" (17). However, Lord Templeman believed that "*sadomasochistic participants have no way of foretelling the degree of bodily harm which will result from their encounters*". In Lord Templeman's cognition, sadomasochistic conduct are unpredictably dangerous, these behaviours are "*barbarous*" (8), "*uncivilised cruelty*" (10) and sadomasochism is "*a cult of violence*" (10). Notwithstanding they acknowledged that the appellants have established a safe-word system in the prevention of excessive harm or pain (9; 11), they "*amounted to acts of gross indecency*" (18). In these assertions, sadomasochism should be unlawful not because of the presence of bodily harm, but the moral cognition of this indecent existence. Their reasoning devoted to guide people on what to do (Aarnio, 1987; Alexy, 1988; Atienza & Ruiz Manero, 1998) and defend for normative sexual values (Wiedmer et al., 2012).

The Lords drew a particular concern on the presence of blood in the appellants' conduct. Lord Templeman recognised that the appellants engaged in "*bloodletting and the*

smearing of human blood" for sexual excitement, however, there are possibilities of infection (9). Lord Lowry commented that the presence of blood in their conduct is with "*inevitable threat of AIDS*", the parliament legalised sodomy and "*[male-homosexual behaviour is] now a well-known vehicle for the transmission of AIDS*" (*R v Brown*, 1993: 30). Aligned with the cultural homophobic atmosphere that AIDS is the "gay plague" caused by gay men in that era (Lee, 2021), Lord Lowry believed that approving these gay men's appeal will legalise another instrument of spreading AIDS. From the cognitions of AIDS transmitted through gay men and the presence of blood in BDSM practices will be a vehicle to transmit AIDS, the Lords imposed cognitive limits on sexual consent to prohibit BDSM conduct in the prevention of "societal harm".

Cognitive limits on consent became a discursive tool to manipulate sexual ideologies. Different to feminist jurisprudence, the limits set out not only a hierarchically gendered structure of law (Lacey, 1998), but also a hierarchy of sexual practices. Cognitive limits on consent function as a self-contained and self-reproducing system to impose normative sexual values (Smart, 1989), the Lords adopted an epistemological assertion of cognition which is being framed as the "objectivity" to interpret the text of the law (MacKinnon, 1989). For example, Lord Lowry commented that "*[appellants'] consent is immaterial, there are prima facie offences … there is no good reason to add sadomasochistic acts to the list of exceptions [in actual bodily harm]*" (30). Sadomasochistic behaviours were regarded as "*perverted and depraved sexual desire*" and "*malum in se*" that people should not be able to give consent to. This discourse indicates that based on the first impression (*prima facie*), sadomasochistic conduct is morally wrong (*malum in se*) in their Lord Lowry's cognition of sex. Thus, Lord Lowry imposed cognitive limits on consent that people cannot consent to sadomasochistic conduct. Similarly, Lord Jauncey of Tullichettle suggested that "*it would not be in public interest*" if people can give consent to "*infliction of actual bodily harm during the course of homosexual sadomasochistic activities*" (20). A border socio-cultural consideration was given to elucidate that cognitive limits can protect the best interest of normative sexual culture (public interest). As a result, the appellants' consents were "*dubious or worthless*" (8), "*society is entitled and bound to protect itself against a cult of violence [sadomasochism]*" (10). The Lords stood *in loco parentis* by imposing cognitive limits on consent to prohibit

non-normative sexual behaviours and deliberating that normative sex is in the best interest of everyone in the society.

From their epistemological assertions of the cultural cognition of sex, sexual consent was a discursive tool to create and maintain a hierarchy of sexual behaviours. The assertion encompasses what sexual activity is beneficial to a family or the welfare of society and also what practices are unacceptable. By decrypting the Lords' "*mental representation of language*", the results suggest that they perceived sadomasochistic conduct is nothing worthwhile but a form of violence that carries damages to the cognitive standards of sex. They cognitions shaped the discursive structure of sexual consent, consent is only applicable to normative sexual behaviours. As a result, sexual consent function as a tool to manipulate sexual ideologies, people cannot consent to non-normative sexual practices. Deviant sexual ideologies like sadomasochism should be ruled unlawful even if it is conducted privately and without a victim complaint. In sum, the Lords attempted to uphold the cultural cognition of sex by initiating cognitive limits on sexual consent, consequently, it produces cultural persecution on deviant sexual cultures.

6.5 Sex-Positive Cognition of Sex: Deviant But Not Criminal

Changes in sexual cognition can make changes in the implementation of social justice. Coercive abusive behaviours are undoubtedly violent assaults, but it does not mean every infliction of pain is an assault or violence such as sadomasochistic conduct. Lord Mustill and Lord Slynn of Hadley adopted a sex-positive cognition of sex and attempted to bring social justice by acknowledging the importance of consent in the appellants' conduct. In their reasoning, sexual consent is a tool to achieve social equality by respecting the differences between sexual cultures.

> "*If asked whether the appellants' conduct was wrong, would reply "Yes, repulsively wrong", I would at the same time assert that this does not in itself mean that the prosecution of the appellants under sections 20 and 47 of the Offences against the Person Act 1861 is well founded.*" Lord Mustill (50)

Both Lord Mustill and Lord Slynn of Hadley asserted that sadomasochistic practices are morally "wrong". However, they also made clear that repugnance and moral objection are not sufficient grounds for prosecution or creating a new crime covering these acts (50; 59).

Lord Mustill commented that people might not necessarily follow the "general interest" but "special interests", and they together "*comprise the populace at large*" (50). Under this discourse, the appellants engaged in non-normative sexual practices, even though their acts are "repugnant" and "morally wrong" from the normative cognition of sex, there is no need to criminalise it. On top of that, their acts were conducted in private space, it is irrelevant to the public (57) and their conduct "*involved no animosity, no aggression, no personal rancour on the part of the person inflicting the hurt towards the recipient and no protest by the recipient. In fact, quite the reverse*" (33). Thus, although sadomasochistic conducts go against the normative cognition of sex, these behaviours are just atypical sexual activities. The core reason for why the appeal should be approved is the presence of well-negotiated consent.

> "*… when one comes to map out the spectrum of ordinary consensual physical harm, to which the special situations form exceptions, it is found that the task is almost impossible, since people do not ordinarily consent to the infliction of harm*" Lord Mustill (34)

Almost all instances of consensual bodily harm are special since people do not usually consent to inflictions of harm on themselves. Despite the presence of injuries, the appellants negotiated their limits and developed safety codes beforehand. The negotiation of consent and personal limits can "*at the same time enhanced their excitement and minimised the risk that the infliction of injury would go too far*" (50). The appellants not only established consent thoughtfully, they also "*positively wanted*" the reciprocal sadomasochistic relationship (58). Thus, Lord Mustill and Lord Slynn of Hadley asserted that consent can be a functional defence for the appellants since the injury was transient.

Lord Slynn of Hadley drew particular attention to the fact that the appellants were aware of what they were doing and they have been conducting these acts for many years, they were bought to the House because the Vice Squad "coincidentally" raided the venue (58). The Lord doubted that if these behaviours were conducted *mutatis mutandis* in a heterosexual context, the practitioners would not face these offences. On the other hand, Lord Mustill asserted that with the presence of sexual consent and absence of victim complaint, criminalising the appellants' conduct "*against the interests of individual freedom*" (51). They shared a sex-positive cognition of sex that people should respect non-normative sexual behaviours even it seems "morally wrong" from the normative cognition. Engaging in

atypical sexual behaviours is individual freedom, it is an invasion of privacy to rule these private acts as unlawful (59).

Sex-positive reasoning also led to a critical approach to the claim that sadomasochistic behaviours can get out of hand with grave results. Serious injury is not homogenous, there are different levels of seriousness and there should be a line between really serious ones and less serious injuries. Lord Slynn of Hadley asserted that people should be able to consent to serious bodily injury except for maiming or death, since the rationale for revoking consent has gone when these non-reversible outcomes appear (57). However, even if these life-changing juries happen in sadomasochistic conduct, same as ordinary sexual activities, there are existing laws covering these offences. Thus, both Lord Mustill and Lord Slynn of Hadley concluded that there is no need to make a new statute that specifically criminalises sadomasochistic practices, private consensual sexual activity did not result in grievous bodily harm and thus it should not be unlawful. It the ruling set the criminal precedent on BDSM conduct, "*all members of the community share about the apparent increase of cruel and senseless crimes against the defenceless*" (51). As a result, criminalising sadomasochistic behaviours will lead to cultural persecution.

It is worthwhile to mention that these two Lords expressed their moral objections to sadomasochistic conduct, however, they asserted that BDSM practices are atypical sexual behaviours not conduct of violence. They did not impose the normative cognition of sex but respect sexual diversity and believed that normative sexual behaviours are not the only form of sexual activity. Their discourses aligned with a sex-positive approach that there are unique benefits of each sexual practices and the key element is to respect sexual diversity and reject assumptions from the dominant sexual culture (Kaplan, 2014). As a result, a sex-positive ruling on sexual minoritised practices like BDSM, sexual consent can be a tool to protect minority sexual rights.

6.6 Summary

This chapter has attempted to answer the research questions: (1) how does normative cognition of sex shape the politics and jurisprudence of sexual consent?, and (2) how do cognitive limits on sexual consent affect the implementation of social injustice? The analysis

aimed to examine the underlying social and moral ideologies in the construction of sexual consent.

The result from a socio-cognitive approach in critical discourse analysis suggested that normative cognition of sex appears in the Lords' reasoning and shapes the structure of sexual consent. Despite all the Lords expressed moral objection to the appellants' sadomasochistic conduct, whether they believe normative sexual practices are the only form of sexual activity determines the politics and jurisprudence of sexual consent.

The reasoning by Lord Templeman, Lord Jauncey of Tullichettle, and Lord Lowry demonstrates that cognitive limits on consent can be functional evidence to prohibit deviant sexual practices. The Lords adopted an epistemological assertion based on the cultural cognition of sex to interpret the text of laws (MacKinnon, 1989). Cultural cognition of sex functions as a self-contained and self-reproducing system in their rulings and shapes the application of sexual consent. Cognitive limits on consent operate as a tool for the Lords to manipulate sexual ideologies, people can only consent to sexual activity that fulfils the cultural cognition of sex. Sexual dominance and inequality are enacted and reproduced by the Lords' discursive constructions on sex and sexual consent. Combine with the unlawful decision (3-2), it produces cultural persecution on deviant sexual behaviours and as a result (re-)produce social injustice.

On the other hand, Lord Mustill and Lord Slynn of Hadley adopted a sex-positive cognition of sex and sexual consent can function as a tool to protect sexually minoritised practices. They asserted their moral objection to sadomasochistic conduct based on their cognitions of sex but also acknowledged that these acts are just special sexual interests. Sexual consent operates as a functional defence to distinguish consensual infliction of injury from the offence of assault. Changes in "*mental models*" led to the changes of the implementation of social justice.

Chapter 7: Concluding Discussions: Decades-old case and the Politics Today

7.1 Introduction

This chapter first presents a brief summary of the critical background of legal studies (Chapter 2) in relation to the importance of a critical perspective on sexual consent. Then, it lays out why cognitive limits on consent relate to social justice. Afterwards, a section will be devoted to demonstrate that why this decades-ago court case about sadomasochism still relevant to contemporary politics through the legal amendment bill by "*We Can't Consent to This*". The next section provides suggestions for future studies. Lastly, this chapter ends with the implication and application of this thesis.

7.2 A Critical Perspective on the Politics of Sexual Consent

Critical legal studies seek to achieve social justice by challenging and overturning presumed values in both legal theories and practices (Singer, 1984; MacKinnon, 1989; Smart, 1989; Segall, 1993; Lacey, 1998; Lucarello, 2012). In response to the scholarly discussion on the distinction between "sex" and "violence" in law (Moran, 1995; Bix, 1997; Hanna, 2001; Pa, 2001; Cowan, 2011), this study suggests that the distinction derives from cultural cognition. From the case *R v Brown* (1993), this study demonstrates that normative cognition of sex tends to define sadomasochistic conduct as "violence" and sexual consent functions as a self-contained and self-producing tool to impose normative sexual values. A sex-positive approach can challenge and overturn the presumed normative sexual values, sexual consent can be a tool to protect sexually minoritised practices. Cognitions of sex affect the implementation of social justice.

This study draws particular concern on the politics of sexual consent, it reflects the normalisation of asymmetrical sexual culture. The vernacular definition structures sexual consent as a revocable agreement to participate in sexual activity, sexual consent operates to maximise sexual gratification and minimise the risk of unpleasant behaviours. When there are concerns of violation, people can seek legal support to resolve disputes. However, sexual consent can be conceptualised differently at the legal level. Judges' or jurors' decisions making can be swayed by their cognition of sex, potentially prejudicial beliefs that involve asymmetrical power relations. For example, sadomasochistic conduct was commonly defined

as “morally wrong” in *R v Brown* (1993). As a result, their moralistic cognitions can drive them to look for signs of “not-so-sound” evidence to support their beliefs (Dhar, 2020).

Sexual consent distinguishes sexual practices from violence, sex without any signs or signals of consent and force to conduct sexual acts is rape and sexual violence. However, there are prescriptive beliefs about rape that function to deny or justify gender-based sexual violence (Gerger et al., 2007: 423). Leverick (2020) has discovered that jurors commonly share the “rape myths” in sexual violence cases even though they are not aware that they held such false beliefs. They look for the causes, context, interactions between the victims and perpetrators, and also the outcomes but resistant to indicate whether the victim gives consent (273). As a result, rape allegations are commonly being unfounded through their “rape myths” reasoning, consent is immaterial. These prescriptive beliefs bring limitations to sexual consent, “evidence” can be made based on the victim’s clothing, occupation, personal histories, or even the venue. The cultural cognition of “appropriateness” downplays the significance of sexual consent. It (re-)produces social injustice by re-affirming asymmetrical sexual values. The politics of sexual consent determines not only sexual willingness but also social justice.

7.3 *R v Brown* (1993) and “*We Can’t Consent to This*” (2020)

Even though *R v Brown* (1993) happened nearly 3 decades ago, “*We Can’t Consent to This*” (2020) is pushing to turn the verdict into a new statute that prohibits people to give consent to inflictions of bodily injuries for sexual gratification. In parallel with the proposal, the parliament has initiated the *Domestic Abuse Bill 2020* that seeks to change the present domestic abuse law by covering sadomasochistic conduct such as wounding, strangulations, and erotic asphyxiation (GOV.UK, 2020). They believe that criminalising sadomasochistic behaviours can prevent sexual violence and eliminate the “rough sex gone wrong” defence in sexual violence allegations. There were 60 homicides cases of women in the UK and some of the male defendants plead not guilty by claiming the violence were consensual, the consensual acts “gone wrong” and resulted in life-changing injuries or even death (e.g. *R v Meachen*, 2006; *R v Lock*, 2013) (*We Can’t Consent to This*, 2020: 3.1.1.2 - .1.3). Even though the amendment aims to protect women from sexual violence, it is unlikely to provide substantial differences from ordinary offences such as manslaughter, assault, and sexual

offences, the judges have significant discretion to treat certain violent or sadomasochistic acts as aggravated (Cowlam & Hardsstaff, 2020)

> "*… if these acts were done mutatis mutandis by a man and a woman, or between two men and a woman, or a man and two women, where the activity was entirely heterosexual, consent would prevent there being an offence.*" Lord Slynn of Hadley (*R v Brown*, 1993: 58)

Like what Lord Slynn of Hadley has suggested nearly 30 years ago, violent behaviours in normative sex is less likely to be an offence in a heteronormative culture. Normative cognition of sex comes together with its asymmetrical power relations. Sexual consent can be used as a tool to maximise the benefits for those who are at the top of the sex hierarchy, at the very least, consent can be their functional defence to get rid of violence conviction. For example, evidence of consent can be distilled down to the causes, context, outcomes, and the interactions under the rape culture. There are prejudices entrenched in normative cognition of sex, if it is applied to legal reasoning, it inevitably (re-)produces biased ruling and thus social injustice. Criminalising atypical sexual behaviours since it might get out of hand and results in grievous injuries is less likely to change the asymmetrical gender relations but produce cultural persecution. As what Lord Mustill has suggested, "*all members of the community share about the apparent increase of cruel and senseless crimes against the defenceless*" (*R v Brown*, 1993: 51).

Lacey (1998: 7) has suggested that the project of feminism is to replace the patriarchal values in law that lead to biased reasoning or ruling. This thesis advocates replacing the normative cognition of sex with sex-positivism (Dixon, 2008; Kaplan, 2014; Williams et al., 2015). On the one hand, it respects sexual diversity by acknowledging the benefits and strengths of sexually minoritised practices. On the other hand, a sex-positive approach can provide a more complex consideration of sexual consent. This approach rejects sexual presumptions from normative cognition, the complexity of consent requires an inter- or even multi-disciplinary approach to dissect how human subjectivity shapes the conceptualisations of consent (Vashist, 2020: 278). The conceptualisation and application of sexual consent determine the implementation of social justice since it connects with the rights to sexual autonomy.

7.4 Suggestions for Future Research

This thesis has focused solely on the relationship between cognitive limits on consent and normative sexual culture in the verdict *R v Brown* (1993). Through a socio-cognitive approach to critical discourse analysis, this research examined how normative cognition of sex influences the politics and jurisprudence on sadomasochistic conduct. This research points out that there are potential differences in ruling between homosexual and heterosexual non-normative sexual conduct. Future research can investigate more on the intersectional discrimination that alternative sexuality practitioners are facing.

Another suggestion is to conduct comparative studies on professional sadomasochism practitioners cases with cases of sexual violence. The author draws particular attention to the cases reported by *We Can't Consent to This* (2020), especially some non-consensual behaviours and sexual violence perpetrators were ruled not guilty. A comparative research on how sexual consent is evidenced and operationalised in these verdicts can potentially shed light on sexual inequalities at the legal level.

7.5 Implications and Applications

This thesis re-conceptualises the legal discussion between "sex" and "violence" (.g. Moran, 1995; Bix, 1997; Hanna, 2001; Pa, 2001; Cowan, 2011) as a cultural conflict between normative cognition of sex and alternative sexual behaviours. Consensual sadomasochistic acts commonly involve a reciprocal relationship in inflictions of injuries, but it is not necessarily a form of violence. Using a sex-positive approach to interpret sadomasochism can avoid normative presumptions on sex and consequently prevent cultural misinterpretation.

This research also brings contributions to the theory of consent. This study analyses how sexual consent is evidenced and operationalised at the legal level. Legal authorities have shown distinct conceptualisations of sexual consent compared to the everyday practices. This thesis focuses on cognitive limits on sexual consent and suggests that sexual consent can be a tool to manipulate sexual ideologies by uplifting what people can consent to or downplaying the meaning of non-normative sexual practices and so people cannot consent to. Cognitive limits on consent can be a tool to investigate the manipulation of sexual ideologies at the legal level, it can analyse how legal authorities construct a hierarchy of sex and the power relations within the hierarchical structure.

This thesis advocates for minority sexual rights by dissecting how sexual consent is evidenced and operationalised in a criminal court case. Organisations like *We Can't Consent to This* are pushing for a new statute covering specifically sadomasochistic acts to protect women's safety, the findings from this study suggest that the concerns of women's rights derive from the cultural cognition of sex, not sadomasochism. There are asymmetrical power relations entrenched in normative cognition of sex, both women and non-normative sexuality practitioners can be the victim of the unequal power structure. When existing laws are covering those violent abusive behaviours, purposive criminalisation on sadomasochistic conduct might not able to foster women's rights but persecute BDSM practitioners. This thesis problematise how normative cognition of sex operates at the legal level, the cognition leads to biased reasoning and affects the implementation of social justice. This research can potentially de-stigmatise sadomasochistic conduct by analysing the controversial legal precedent on sadomasochism. Perhaps this research can also contribute to a disapproval of the *Domestic Abuse Bill 2020* and improvement of the lives and rights of sexual minorities.

Last but not least, rape culture thrives in contemporary society, a well-negotiated culture of consent can potentially combat the false beliefs from rape culture. From a sex-positive approach, there are substantial benefits in non-normative sexual cultures that can contribute to a more comprehensive establishment of sexual consent. This study suggests that the operation of sexual consent in BDSM is nearly a model of sexual ethics that everyone can learn from. From the emphasis of the rights to give and retract consent to the transparent negotiation and establishment of safewords, these elements can strengthen the importance of consent in sexual activity. By indicating the operation of sexual consent in BDSM cultures, this thesis carries out reflections on the everyday practices of sexual consent. A more thoughtful establishment of sexual consent can serve to maximise sexual gratification and minimise the risk of unpleasant behaviours. On the border level, constructing sexual consent comprehensively can also combat the rape culture and prevent someone from claiming "*I thought that was a signal of consent*". Rape culture is a deeply problematic phenomenon entrenched in asymmetrical gender relations, building a thoughtful culture in establishing sexual consent can raise the awareness of personal boundaries (or interests) and sexual autonomy to against the rape culture.

7.6 Summary of the Conclusion

This research combines critical studies, feminist studies, and a sex-positive approach to analyse the politics of sexual consent. Although the analysis focuses on a British criminal court case in the 90s, the politics of sexual consent is still relevant today. How sexual consent is evidenced and operationalised in the court affect not only sexual rights, but also the practices of consent in everyday situations. If a normative sexual culture includes asymmetrical power relations and legal authorities make judgements based on the normative presumptions, it can (re-)produce social injustice. The findings also suggest that a sex-positive cognition of sex can contribute to sexual autonomy and sexual diversity. On this account, sexual consent operates to ensure sexual autonomy and also the rights of alternative sexual practices. It is individual freedom to engage in consensual sexual conduct, as long as it does not involve or produce life-changing or fatal injuries since the rationale of negating consent has disappeared when these injuries occur.

Despite this study focuses on the politics of sexual consent in the case of sadomasochism, it relates to sexual rights under the threats of rape culture. Under rape culture, sexual violence is normalised even at the legal level. Sexual consent can be distilled down to different unrelated contextual elements, the protocol of consent is downplayed under the normalisation of rape culture. Developing a well-negotiated culture on sexual consent like BDSM practices can change the normative cognition on sex and also address the appropriate role of consent in sexual activity and non-consent in rape litigation.

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