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DLW: A Hesitant Court – A Comment on the Canadian Judiciary's Attitude Towards Bestiality

Generally, bestiality is a topic that one would normally avoid bringing up at dinner parties, in casual conversation or anywhere, really. Bestiality, which refers to a human engaging in sex with an animal, is a topic that is so unsavoury and so revolting, that even the mere mention of it normally elicits a look of horror from the most strong-stomached individual. With this in mind, it is no surprise that, historically, legislators, the judiciary, and the general public have not been particularly keen to address bestiality. Compared to certain "nicer", more palatable topics, bestiality is an area of the law that the judiciary and legislators have, in the twentieth and twenty-first century, been afraid to address head on. An exception to this was when, in 2019, legislators passed Bill C-84, which amended the section of the criminal code to expand the bestiality to non-penetrative acts. It is important to note; however, that such strong stances by legislators are quite rare in Canadian history and Bill C-84 was enacted in response to the controversial decision in *R v DLW*.[1]

The fact that legislators have had to act in such a reactionary fashion in regard to bestiality is odd, considering the origins of bestiality in the Canadian *Criminal Code,* but it is also concerning. The reactionary approach taken by legislators to bestiality is indicative of a hesitancy of the judiciary to address bestiality. Aside from the moral arguments, and arguments pertaining to harm to the animal involved in bestial offences, bestiality has been linked to a variety of interpersonal crimes. A hesitancy to address bestiality can be a hesitancy to address other, lesser known implications of bestial acts, such as how bestiality is often linked with patterns of interpersonal violence.

Research has suggested that there is a correlation between interpersonal crimes and bestiality. As social science research indicates, bestiality is often part of a pattern of sexual offending against children, young persons, and vulnerable persons. Research has found that among inmates, those who had engaged in sexual acts with animals were found to be more likely to have been convicted of a personal crime such as rape, sexual assault, assault or robbery. Animal sexual abuse and sexual offences against minors have also been linked, and this link is highly evidenced in bestiality jurisprudence. Furthermore, a higher correlation may exist between animal sexual abuse (as opposed to other forms of animal abuse) and sexual assault. Bestiality can also exist in the context of the domestic sphere. It has been found that bestiality may occur when someone coerces their partner to have sex with animals as a way to exert control over said partner or to demonstrate sexual dominance over a passive animal. It is clear that bestiality and interpersonal crimes have a significant correlation.[2]

Bestiality has also been a "sinful" act for much of history. The long-lasting nature of bestiality as a condemned act makes it all the stranger how legislators and the judiciary have treated the offence. The idea of bestiality as a reprehensible, morally unsound act goes all the way back to the Bible and throughout early Christian theology. Bestiality was considered one aspect of "sodomistic sin", the other aspect being same-sex sexuality. Sodomistic sin found its way into the Canadian *Criminal Code,* when in 1892 bestiality and anal sex were codified under the same offence. Eventually, in 1988, bestiality and anal sex were separated and became two separate offences. The

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[1] *R v DLW*, 2016 SCC 22 at para 5 [*DLW*].
[2] Richard Jochelson & James Gacek, *Sexual Regulation and the Law,* (Bradford, Ontario: Demeter Press, 2019) at 209-215.

separation of bestiality and anal sex into separate offences occurred during a time when attitudes towards same-sex sexuality were changing. Instead of viewing same-sex sexuality as a moral affront, attitudes began to shift towards viewing same-sex sexuality as a legitimate sexual orientation. While modern-day laws have reflected changing attitudes to same-sex sexuality, the mainstream has yet to similarly change its attitudes towards bestiality. To this day, bestiality is still viewed by the mainstream, legislators, and the judiciary as a fringe act and crime. This is particularly interesting because of the longevity of the condemnation of bestiality in Christian theology and considering that Canada has historically been a Judaeo-Christian society.[3]

The judiciary has evidenced its hesitancy to address bestiality in the jurisprudence, especially in instances where there are other charges in addition to the bestiality charge. As stated by Jochelson et al in *Sexual Regulation and the Law a Canadian Perspective* of the noteworthy case of *R v KDH* "…of note is how little the bestiality plea is analyzed, especially considering the detailed analysis dedicated to the other charges. Courts seem reluctant to discuss the details of bestiality charges when a constellation of other numerous sexual offences accompany it…" Jochelson et al further cite *R v LMR* and *R v JJBB* as examples of where courts appeared reluctant to discuss the details of bestiality charges. Despite this hesitancy to discuss the details of the offence, it is important to note that bestiality charges have been considered an aggravating factor in sentencing in relation to sexual interference charges and that bestiality has attracted significant penalties in the past.[4] Some would argue that by stating the general nature of the bestiality charge, that is enough; additional details would only serve to further sensationalize the charge unnecessarily. Furthermore, due to the unsavoury nature of the charge, why provide more details than necessary? This may be the view adopted by the judge in *R v Alton,* who all but refused to discuss any details of the bestial offence.[5] This reluctance is not evidenced in other offences; sexual offence charges are often analyzed in significant detail by the courts in order to arrive at the appropriate sentence. This hesitancy by the court to discuss bestiality charges minimizes the offence and disallows for adequate discussion of the charge and its relation to the other sexual offences that it is linked with

While bestiality may be an unsavoury topic, it is nonetheless one which courts should not shy away from. Courts should not be afraid to analyze the offence, as such analysis provides an important function in the administration of justice.

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[3] *Ibid* at 216-227.
[4] *Ibid* at 230.
[5] *R v Alton,* 2007 CanLII 54082 [*Alton*].