

Pornography and the Feminist Perspective

By Shelly-Ann Seecharan*

Introduction:

A Definition of Feminist Jurisprudence:

Feminism came to prominence during the sexual revolution of the 1960s and 70s. This “second wave” of feminism¹ spawned Feminist jurisprudence, which in its simplest form can be described as the philosophy of law based on legal, economic, political and social equality between the sexes. This philosophy examines the politics of law and the ways in which it has been used as an instrument to consolidate and perpetuate patriarchal power. This area of study is based on the premise that men and women should be equal and although feminists may differ on what equality means and how best to attain it, most concur, that there is a distinction between sex and gender. Sex is determined at birth, (although that is no longer necessarily true) while gender is determined by the process of socialisation. Socialisation is the process through which young children become aware of society and how they are expected to behave.² Feminists challenge the idea that biological characteristics predetermine our gender roles in society, making men predisposed to certain tasks (usually those which carry great amounts of prestige and remuneration) and women to other tasks (those which tend to be least respected or rewarded). Therefore sex need not determine gender; one does not necessarily lead to the other.

Feminist Jurisprudence has targeted the law as a means of maintaining inequality between the sexes. It has identified law which, although seemingly “neutral” have inherent biases which are prejudicial to the interests of women. Other laws, such as those relating to marriage, sexual offences and employment have been carefully scrutinised and found to confer only formal not substantive equality between men and women. Feminists see the very

*3rd year LLB Student, Faculty of Law, Cave Hill

1 The “first wave”, led by women such as Pankhurst, occurred at the turn of the 20th Century.

2 Encarta Dictionary

language of the law as having a masculine character, because it has excluded the female experience and therefore what is male is considered to be the “norm” and anything which deviates from that is considered to be abnormal. Further, law which relate to punishing “harm” such as rape laws fail to take into consideration the women’s standard of harm, although such legislation is primarily directed at protecting women. Pornography is another area of contention, but not merely between men and women, but within the feminist community itself, with the different factions having completely differing and irreconcilable views. The controversy seems to have destroyed any semblance of unity within feminism.

A Definition of Pornography:

Pornography has been stated to be material which is sexually explicit³ whether such material consists of photographs, magazines, books, videos, movies, etc which had been published either in an electronic or print format. However, for feminists the issue is much more complex. Pornography can be defined using its root word, “porno” meaning “prostitution” in Greek or “referring to prostitutes” and “graphos” “meaning writing about or description.”⁴ The word can therefore be said to mean, writing about prostitutes. Some have maintained a distinction between pornography and “erotica” which stems from the Greek “eros” or love. Erotica is associated with love, free will, positive choice and the yearning for another person.⁵ It is seen as sex in the context of mutual respect and equality. If feminists are concerned merely with the banning of sexually explicit material, then erotica may certainly qualify under this heading, but there does seem to be a difference, if not in the content of the material, then at least in its portrayal. Erotica has been used as a method of sex therapy recommended by many therapists to assist couples having problems with sexual intimacy. Pornography primarily excludes emotional intimacy and restricts sex to a physical act. There are perhaps three feminist perspectives on this issue, which can be categorised as:

- 1) The Liberal Perspective,
- 2) Pro-Sex Perspective and the
- 3) The Radical Perspective.

3 Encarta Dictionary

4 Hilaire Barnett, Sourcebook on Feminist Jurisprudence, p. 434.

5 *Ibid.*

The Liberal Perspective:

The Liberal perspective has basically been “we don’t approve, but it’s your choice.” They theorize that the legal system can be retained and reformed to fit feminist demands. They see the law as flawed but salvageable, if the tools of that system can be used to construct a legal system, free from the inequalities which are perpetuated by the patriarchy. With respect to pornography, liberals combine their belief in free speech with their belief that a woman is completely free to make choices about her body. They place emphasis on the right to make the choice rather than the choice itself. Thus while many deplore the way in which women are objectified and reduced to a collection of body parts, they believe that the freedom of choice is paramount. This position seems to be based more on the idea that censorship in terms of prohibiting freedom of choice and speech is worse than pornography itself. They have in essence chosen the lesser of two evils. Both radical and pro-sex feminists have seen this as an avoidance of the issue, which is, whether or not pornography is degrading to women and should be banned to protect women.

The Pro-Sex Perspective:

A group of feminists have taken the “pro-sex” position that it is a woman’s choice to participate in and consume pornography. Clearly, some pro-sex and liberal beliefs overlap, but this branch of feminists has gone further to state that pornography is beneficial to women both individually and collectively. It is felt to be sexually edifying, in that it provides sexual information. Pornography:

- a) Informs women as to sexual possibilities, even with respect to masturbation.
- b) Allows women to experience sexual alternatives and satisfy their sexual curiosity.
- c) Provides a sense of how it would feel do a particular thing by providing emotional information, either vicariously or directly.⁶

As such women are more informed about the sexual act, rather than simply being aware of the logistics of intercourse and in this way they can

6 Wendy Mc Elroy “A Feminist Defence of Pornography” <http://www.secularhumanism.org/library/fi/mcelroy_17_4.html>

better recognise their sexual potential. Pornography is said to achieve this by encouraging women to embrace and enjoy their sexual urges. It is seen therefore as a form of sexual liberation and a means of dispelling ignorance. This branch of feminism is in direct contradiction to the radical position and arose specifically to combat the radical position that pornography should be banned.

The Radical Perspective:

Catherine Mackinnon has equated pornography with oppression. She has said "Pornography, in the (radical) feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality. In this perspective, pornography, with the rape and prostitution in which it participates, institutionalizes the sexuality of male supremacy, which fuses the eroticisation of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as whom they see women as being. Pornography constructs who that is."⁷ Many radical feminists agree with this statement, including Andrea Dworkin who has classified pornography as "hate literature."⁸ Such thinkers define pornography as the "sexually explicit subordination of women," to them there is an inextricable link between pornography and the exploitation and degradation of women. Almost undeniably a large percentage of pornographic material produced, bearing in mind the distinction between pornography and erotica, depicts women in dehumanising, submissive and degrading roles.

Women are portrayed as sluts and whores with insatiable sexual appetites. They are seen as willing to do anything for money or sexual gratification. Material of this type includes rape, incest, mutilation and sado-masochistic scenes. Women are seen eating excrement, being urinated on, forced to have sex with one man and usually more. Pornography is mostly consumed by men and has begun to cater to specific tastes for teenaged and young girls, as well as fetishes. Radicals certainly do not consider this to be the edifying, uplifting experience that pro-sex feminists speak of and feel that despite liberal reservations about freedom of speech, this type of

7 Towards a Feminist Theory of the State, p. 197.

8 Unknown.

activity is harmful to women and needs to be prohibited.

Much of the pornography being marketed today, by its very nature speaks, against the arguments of the pro-sex feminists, but the radical position in juxtaposition with liberal views is more problematic and bears closer examination.

The International Position on Pornography:

There has been a substantial increase in the production and consumption of pornography on the world market since the 1960s and the industry is now estimated to generate untold billions of US dollars per year. However, there seems to have been little attempt to regulate pornography, despite the content of the relevant material. There are no anti-pornography, but rather only, obscenity laws.

In the United Kingdom the law is concerned ore with obscene materials rather than with pornography itself. The Obscene Publications Act 1959 states that an article is obscene if “its effect is such as to tend to *deprave and corrupt*⁹ persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.”¹⁰ The Act further states that a person is guilty of publishing such material if he “distributes, circulates, sells, lets on hire, gives or lends it” and also in the cases of images if he “shows, plays or projects it.”¹¹ A person convicted under this Act can be sentenced for up to three years¹² if he cannot prove that the relevant material was in the public good.¹³

In the UK, as in all Commonwealth countries, there is the common law offence of “conspiracy to corrupt public morals.” This existence of this offence was reaffirmed in *Shaw v. DPP*¹⁴ where Shaw had published a

9 This has been stated to be the statutory test of obscenity, but was originally propounded in *R v. Hicklin* 1868 QB 360. In that case the test was said to be “material which tends to deprave or corrupt those whose minds are open to such immoral influences.”

10 s 1(1).

11 s 1(3).

12 s (1) (b).

13 Under s 4 (1) in order for the material to be for the public good it must promote the interests of science, literature, art or learning.

14 [1961]AC 220

directory of prostitutes. The House of Lords held that courts have a residual power to enforce the supreme and fundamental purpose of the law, which is to conserve not only the safety and order, but also the moral welfare of the state. The ruling in *Shaw* was upheld in *Kneller Ltd v. DPP*¹⁵ where the appellants had published advertisements encouraging persons to meet for homosexual purposes. The House found that the ads were *contra bonos mores*. At the common law, courts still to have some power as the *custos mores* of the state.

In the United States obscene materials is “material which deals with sex in a manner appealing to prurient interest” where the material has “a tendency to excite lustful thoughts, [or as a] shameful and morbid interest in sex.” The material must also be without any redeeming social importance.¹⁶ In *Miller v. California*¹⁷ the same test was applied, but it was stated that in determining what was obscene it is the judgment of the “average person”, applying “contemporary standards” which must be taken into account, in respect of the entire work. Radical feminists have argued that the idea of a gender neutral average person does not exist and that further what a man conceives of as obscene will completely differ from a woman conceives of as obscene. Since most feminists have agreed that the law as a whole has failed to take into consideration the experience of women, certainly in determining the opinion of the average person, it is the opinion of the average man, rather than the average woman which will be more valued. If that is the case, how then can the harm which is being done to women through the publication of pornography be remedied?

The state that has perhaps had the most success in curbing pornography is Canada. Under the Canadian Criminal Code “any publication, the dominant character of which is the undue exploitation of sex or of sex and any more of the following subjects namely: crime, horror, cruelty and violence shall be deemed to be obscene.”¹⁸ The wording of this provision is clearly different from that of many others since it has shifted the focus of the law from what is considered to be merely immoral to what is exploitation.

15 [1973] AC 435

16 *Roth v. United States* 354 US 476

17 413 US 25

18 s 163 (8)

Here what is obscene is not just what is dirty or sexually explicit but what actively promotes the exploitation of human beings, which can certainly be interpreted as an attempt to prevent harm from being done to persons who are exposed to crime, horror, cruelty and violence in a sexual context. In 1992 the Canadian Supreme Court, in *R v. Butler*¹⁹ unequivocally banned degrading and dehumanising pornography in response to feminist agitation.

The Commonwealth Caribbean Position on Pornography:

Caribbean countries have traditionally been more and continue to be more sexually conservative than developed nations, however, with the emergence of the internet, cable and access to global trends and news the sexual innocence of the Caribbean is becoming corrupted. This is clear not only from the greater numbers of Caribbean people looking at pornography but also from the growing numbers of persons *making* pornography, both amateur and professional. In the last few years there has been a steady increase in the production of “local porn” using Caribbean actors, locations, producers, etc. How has the law in our countries succeeded in combating pornography? The answer is: not very well.

In the Trinidadian case of *Boos v. Charles*²⁰ the appellant was brought before a magistrate under s 103 (1) (a) of the Summary Offences Act under which a magistrate may issue a warrant to search for obscene publications if a complainant has reason to believe that a person has in his/her possession obscene material for distribution. Under this section, the obscene material will be destroyed if the occupier cannot show that the materials were not meant for the purposed proscribed in the provision, namely for sale, lending or other distribution for the purpose of gain. The Court of Appeal determined that the material the appellant had in his possession would certainly qualify as obscene, but that the material must be restored to its owner because proper procedure had not been followed. However, s 46 (g) of the Summary Offences Act a person who offers for sale or distributes any obscene material is liable to be deemed a rogue and can be imprisoned for two months. Also s 5 of the Criminal Offences Act provides that anyone found

¹⁹ Citation unknown

²⁰ (1997) 52 WIR 502

guilty of publishing obscene material is liable to a fine and imprisonment of up to two years. Nowhere in the Act is there a definition of what constitutes “obscenity” and as such we can only presume that the common law test stated in *Shaw* will be applicable.

The Bermudan Obscene Publication Act 1973, which was amended in 1995 states “an article shall be deemed to be obscene for the purposes of this Act if its effect, taken as a whole, is to outrage *contemporary standards of decency or humanity* accepted by the public at large in Bermuda.”²¹ The Act make a person convicted liable to six months imprisonment under a summary conviction and liable to two years imprisonment under a conviction on indictment. The Bermudan Act seems to follow the lines of the American test stated in *Miller*, and to the extent that it has established a “public good” defence²² it has followed both UK and U.S. law.

However, as with UK and U.S. legislation the primary focus appears constantly to be on the prevention of the publication of what is considered to be obscene according to contemporary standards. At both international and regional levels obscenity has been criminalised so long as it can be shown that the relevant material serves no public good. However, pornography is not the same as obscenity. Obscenity is a specific legal concept which is applied to forms of pornography that is considered to be harmful to sexual morality. The practical result of this is that only “hard-core” pornographic depictions are restricted under obscenity laws. Thus pornography is only prohibited if it is judged to fit the definition of obscenity.

An Examination of the Desirability and Feasibility of Implementing Anti-Pornography Laws:

1. Is Pornography Degrading to Women:

Most liberals agree that pornography is far from flattering to women, but feel that the adult women who participate in the making of pornography have a right to do so, as do those who may consume it. Therefore although they may disapprove of pornography, and may even agree that it contributes

21 s 2 (1)

22 s 7

to the exploitation of women they are reluctant to endorse any legislation which might infringe on freedom of speech.

Bearing in mind the distinction between pornography and what can be considered erotica radical feminists have consistently and persuasively argued that pornographic material is degrading of women, reducing them to a conglomeration of individual sexual body parts. Andrea Dworkin has said that pornography allows men to “have” women and equates all women with whores, giving the impression that women are sexually available to men.²³ Also since, a significant portion of the pornography now produced depicts women in submissive sexual postures simply acquiescing to a man’s sexual domination of her. Some of it even gives the impression that where a woman struggles she still wants sex. This simply reinforces the fallacy that women say “no” when they really mean “yes.” Women are seen as sexually insatiable and uncaring of whom or how many men sexually use them.

Catherine Mackinnon wholeheartedly agrees with this perception of the image of women that pornography projects to men. She applies her “dominance theory” and comes to the conclusion that pornography is but another instance of women’s powerlessness in a patriarchal society, the only difference is that it glorifies that sexual subordination under the guise of “sexual liberation” for which these women are secretly despised. Through pornography acts of rape, incest, battery, sexual harassment, sexual abuse and prostitution become acts of sexual equality. “Women are desirous of being taken and possessed.”²⁴ In other words, the sexual slave wants to be owned. Although there has been a reluctant alliance between feminists and conservatives in order to stamp out the scourge of pornography they examine the issue from two different perspectives.

To conservatives the issue is one of corruption of moral virtue and the social order. To them sex belongs in a committed relationship and pornography is a social evil because it encourages recreational sex and impersonal desire. Feminists who seek to prohibit pornography reject any moral or religious grounds. For them the issue is one of the inequality and eroticisation of sexual domination. For Mackinnon and Dworkin

23 *Pornography: Men Possessing Women*. Women’s Press, 1981.

24 *Feminism Unmodified: Discourses on Life and Law*. Harvard University Press, 1987.

pornography promotes the idea of women as sexual objects and should be banned on the basis that it exacerbates the substantive inequalities between the sexes which already pervades the legal system, while pretending to be based on sexual equality between men and women.

On that basis the Canadian legislation with respect to pornography has been the most progressive since it recognises not merely that such material corrupts morality, but that it exploits a particular group of persons, specifically women. However, it must be noted that Canadian laws do not specifically refer to pornography as such but rather prohibits certain types of it which can be deemed to be obscene. It seems almost incontrovertible that pornography, unlike what has been claimed by pro-sex feminists does contribute to the exploitation of women.

2. Is There a Link Between Pornography and Sexual Crime:

There have been numerous studies on the subject of whether there is a connection between the increase in sexual crime and pornography. First, we must admit that sexual crime has always been pervasive, but society has always been anxious to cover its prevalence, but in the last few decades there has been a steady rise in this type of criminal activity. Is this linked to the preponderance of men watching pornography?

In the United States two different commissions came to drastically differing conclusions. In 1970, the first commission²⁵ could find no conclusive evidence that there was a connection between pornography and crime. The second commission²⁶ delivered a very different report in 1986 a mere 16 years later, but in that space of time pornography had become more available to the wider public. The Commission stated that pornography is a violation of women's civil rights and was able to state that there is a connection between violent and degrading pornography, which showed the "degradation, domination and subjugation of women" and violence and discrimination against women. However, the Commission's report has been widely criticised among liberal feminists and none of the recommendations put forward have been implemented.

25 The Commission on Obscenity and Pornography, 1968

26 The Meese Commission, 1985.

There have been several other studies which have found a link between pornography and violence. In one study 86 % of convicted rapists confessed to regular use of pornography, with 57% admitting that they had tried to re-enact a pornographic scene during the rape.²⁷ The same study revealed that 87% of molesters of girls and 77% of molesters of boys regularly used hard-core pornography. These figures seem unsurprising given that much of the pornography now available depicts scenes of rape, domination and child molestation. Those which portray child sexual abuse may either use actors dressed as children, making the viewer believe that they are real, since very often they are marketed as “reality.” Internet pornography may use computer generated images of children. These two types of pornography involving actors dressed as children and “virtual children” have been banned in Canada and Germany.

Another study indicated that 51% of students exposed to violent pornography had intimated a likelihood of raping a woman if they thought that they could get away with it.²⁸ However, studies have disagreed as to whether there really is a connection. For instance, Thelma McCormick prepared a report for the Metropolitan Task Force on Violence Against Women in 1983 and could not find a pattern to link pornography and sex crimes. Information on such a connection has been widely varied and often contradictory and the only conclusion seems to be that there, as yet, can be no objective answer to this question.

Anti-pornography feminists have been unable to conclusively prove that the consumption of pornography leads to anti-social behaviour and have suffered a major blow to their argument since the criminal law cannot and should not criminalise any behaviour that has a specific harm attached, despite its negative characteristics.

3. Is Current Legislation Sufficient:

Mackinnon believes, that pornography should be censored, not only for the fact that it paints women in a negative light but because women are humiliated, mutilated, tortured, violated and even killed during its

27 Against Pornography, by Diana Russell pg, 147

28 Pornography: A Human Tragedy. Ed: Tom Minnery, pg. 39.

making. However, there has been little real evidence of such abuses and it is submitted that where such abuses do occur women are sufficiently protected under current legislation. There are laws which more than adequately cover any physical harm which may be inflicted on women in the making of pornography, including: assault and battery, sexual offences, etc.

With respect to the banning of pornography that depicts the violation and domination of women as sexually stimulating, the obscenity laws of most states would sufficiently, with perhaps a few minor modifications, be sufficient to prohibit the sale and distribution of “hard-core” pornography.

4. Is Anti-Pornography Legislation a Violation of Constitutional Rights:

John Stuart Mill proposed that freedom of speech was integral to the proper functioning of any democratic society. The censorship proposed by the radical feminists has been vehemently opposed by the liberals who, while they see merit in some of the arguments of the radicals cannot accept such wide ranging control on our freedom of speech. Although the wording may differ, freedom of expression is guaranteed by all Caribbean Constitutions, as is freedom of movement, choice and liberty. Can the making and viewing of pornography where no one has been forced to participate be construed as an unnecessary restriction of our right to free expression? Liberals have answered “yes.”

Pornography can and does offend a women’s self-respect by equating all women will sexually insatiable whores who have a predilection for being forced to perform humiliating acts, but this alone, in the light of insufficient evidence linking pornography and sexual crime, is not enough to justify censorship. There is no real evidence of harm done to women *specifically* because of the consumption of pornographic material.

Mackinnon has said that freedom of speech is not effective since women have been and continue to be the victims of a culture which do not recognise women’s voices. Ours continues to be a culture of silence. This argument is extremely difficult to believe since it requires looking at women as not only have been the victim of male domination but looking at them as still being victims. She says that although freedom of expression is important

it is not as important as protecting women.

However, we must ask, from whom are we protecting women? The answer can only be from themselves. Mackinnon believes, that pornography should be censored, not only for the fact that it paints women in a negative light but because women are humiliated, mutilated, tortured, violated and even killed during its making. However, there has been little real evidence of such abuses and it is submitted that where such abuses do occur women are sufficiently protected under current legislation. If we are to accept restrictions on pornography, it would mean accepting restrictions, not only on free expression but also on freedom of choice. There is almost no evidence of coercion used in making pornography and where it does exist the current law is capable of redressing these wrongs.

Mill has said "the only purpose for which power can be rightfully exercised over any member of a civilized community is to prevent harm to others"²⁹ therefore, if the person is only harming or degrading himself (or herself) then there are no grounds for the intervention of law. While it can be argued that seatbelt laws regulate conduct that is not harmful to others, we must appreciate that Mills' conception of harm is based on direct harm to others, which in respect of pornography studies have failed to prove. Although many rapists look at pornography, that does not conversely mean that many pornography viewers are necessarily rapists since the material is viewed, by a large cross-section of society.

Also, as *all* feminists argue, a woman is completely free to do as she will with her own body. Should laws be passed which impose on that freedom of choice? The feminist movement's main goal was to attain that freedom of choice for women. Now that it has been attained it would be hypocritical to try to dictate what that choice should be. Liberals have quite rightly stated that the struggle for equality was based on the fact of choice rather than its content and that we cannot tolerate any restriction of choice, whether from men or women in whatever guise, even that of protection.

Many liberal feminists argue that it would be extremely difficult to

29 On Liberty. Indiana: Hackett Publishing Company, Inc., 1978.

draw the line if we decide not to respect the individual's freedom of choice. How would we draw the line? It seems that despite its negative connotations pornography cannot be restricted in the ways envisaged by Mackinnon since it would mean deliberately infringing a woman's right to whatever she pleases with her body.

Legislative Reform:

What legislative measures then, if any, should be taken? That question is difficult and the answer would certainly depend on the particular country and how much value the citizens place on individual freedoms. Canadian obscenity laws are perhaps more harsh than elsewhere because their legal system has traditionally place relatively little importance on freedom of speech.³⁰ Whereas in Germany the government is constitutionally bound to protect youths' and individuals' personal honour against the dangers associated with certain forms of speech,³¹ there are therefore restrictions on both violent and obscene materials.

Although it may be desirable to implement anti-pornography laws we must balance several factors to achieve the best results. Anti-pornography laws would be an undue restriction of constitutionally guaranteed freedoms and the State would be imposing itself on the private lives of citizens to an unacceptable degree.

In the Commonwealth Caribbean freedom of speech has been enshrined as a sacred right in our Constitutions. First, governments should consider implementing legislation similar to that of Canada's whereby pornography which is of a particular character is prohibited. This seems more practical and reasonable than completely prohibiting the production and use of pornography. Such laws would perhaps be the best compromise because while protecting the dignity of women not merely as women, but as human beings, such laws would involve the least infringement of our freedom of speech, which is so integral to our democratic states.

30 The Canadian Constitution only formally protected freedom of speech in s 2 (a) of the Constitution Act 1982

31 Article 5 (2).

Given the growing amount of locally produced pornography the best course would seem to be to next regulate the production itself, requiring producers to obtain proper licenses and submit a copy of the material for prior approval and rating by the government before it is released, to ensure that it does not fall into the hands of minors and that the content and nature of the production is not dehumanizing. The benefits of such laws would be that the government would have regulatory, not prohibitory control over what is distributed to the public at large, so that women can be protected, but freedom maintained. Also, the law should require that in the production of such material actors should be as safe as possible so that condoms should be worn and regular testing for STDs should be conducted.

Conclusion:

Within the feminist community itself there has been and continues to be much debate on the issue of pornography and while it may be clear that pornography constitutes material that is degrading to women one cannot argue that the state should protect women from themselves in this context. It would be a gross violation of constitutional freedoms to dictate that women cannot do as they choose with their bodies where the only persons who would be affected are themselves.

Further anti-pornography laws would require the State to impose itself on the private lives of citizens which cannot be done given that there is no conclusive evidence of harm being done to women which cannot be addressed by current legislation. When it can be clearly established that there is a connection between pornography and sexual violence States will be required to pass legislation along the lines that Mackinnon and Dworkin have proposed, but that day has not yet arrived. Until that time the priority of the law rightly remains the protection of constitutional freedom.