RIGHT TO PORNOGRAPHY: CRITIQUE OF DWORMIN

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Abstract:

The short article is an analysis of Ronald Dworkin’s article “Is there a Right to Pornography?” where he creates a critical environment for the limits on freedom imposed under the garb of utilitarianism. The first section of the article is an analysis of the right to moral independence introduced by Dworkin. The gaps in his reasoning have been highlighted. The second section is a detailed explanation on the concept of neutral utilitarianism introduced by Dworkin as a solution to utilitarianism. The third section is a critique of Dworkin’s position using the feminist school on pornography and how their claims are justified using the approach of Dworkin himself. This forms a major critique on his position on pornography.

Introduction

Liberal thinkers emphasize on the importance of the legal rights of individuals which need to be free from State restriction. Equality and liberty of the individuals are a paramount concern. However, liberal theorists are often confronted with the question as to what extent this freedom can be provided. Can this freedom be granted to the detriment to others? Can a speech inciting racial hatred still be protected despite the impact?

Ronald Dworkin in his piece “Is there a Right to Pornography?” tries to seek an answer to whether the government can legitimately restrict the people from publishing or viewing pornography and presents a detailed critique of the William Report which dealt with the

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restriction on pornography.\textsuperscript{4} Throughout the writings of Dworkin, the theme that ties his works together is a distinction between arguments of principle and arguments of policy which here refers to as the ‘rights based strategy’ and ‘goal based strategy’ respectively. The rights based strategy argues that policies must not curtail individual liberty while the goal based strategy argues that curtailing certain liberties will result in a \textit{slippery slope}.\textsuperscript{5}

The researcher has divided the paper into three parts. The first section will deal with the concept of moral independence while the second section will deal with neutral utilitarianism as introduced by Dworkin in his writing with reference to pornography. In the third section, an analysis of Dworkin’s stand regarding the impact of pornography on the standing of women in society will be taken into consideration. In conclusion, the researcher will establish how the moral independence and neutral utilitarianism argument will fall based on the impact pornography has on the position of women in society. The researcher attempts to answer the question as to whether the concept of moral independence and neutral utilitarianism still stands given that pornography causes subjugation of women in the society.

\section*{I. Right to Moral Independence}

Dworkin disagrees with the Williams report as far as it adopts a goal based strategy. According to the rights based strategy, nothing should violate the individual’s moral and political rights. This brings on the further question of to what extent can these rights be guaranteed. These moral and political rights should be extended to both the people who consume pornography and those who oppose it. Hence, the onus falls on the State to reconcile between the two opposing claims.\textsuperscript{6}

Dworkin introduces the concept of the ‘right to moral independence’ through which he justifies and encourages a permissive legal attitude towards consumption of pornography in private. According to this right, citizens must not suffer any form of disadvantage solely on the basis of the fact that other fellow citizens perceive their approach towards their right to be

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Dwokin illustrates this concept by giving an example of writings of Shakespeare and the Bible. It is legitimate if the State bans pornography because it causes violence and the other writings don’t. However, if both set of writings cause violence but only pornography is banned because the society thinks that the people who consume it are less worthy people, is according to Dworkin, a threat to moral independence of an individual. Under the right of moral independence, Dworkin asserts that in some contexts state favouritism for Shakespeare over pornography is permissible when the state decides that Shakespeare is of greater literary or cultural value, wholly apart from popular demand. On the basis of that reasoning, the right to moral independence is not being violated. A judgment of literary or cultural value is not an implication of an assumption that people consuming pornography have an “immoral character” in the eyes of the society.

According to Dworkin, when majority rights are taken into consideration, the right to moral independence of the minority should not be ignored. Dworkin explains that even if the State chooses to restrict and not prohibit pornography, the scheme of zoning (which requires pornographic material to be restricted and sold only in particular shops or particular places in shops) would lead to inconvenience, expense and embarrassment to the consumers of pornography. The right of moral independence is part of the same collection of rights as the right of political independence, justification has to be given as to why the rights of a few individuals should be given preference over the unrestricted defence of prohibitory laws against pornography in a society which remains largely conservative and opposes the mere consumption of pornography. Dworkin through his theory expects the State to not blindly follow the utilitarian principle in the process of law making for the restriction of individual liberty.

A justification of restricting pornography is that it does impact the society even when consumed privately. Dworkin explores the possibility of absenteeism from work being a possible effect of private consumption having some special effect on the economy however

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8 Ibid.
he largely disagrees with the fact that pornography causes any harm to the people at large.\textsuperscript{12} But as far as the views of the conservatives on the perversion of society’s morality is concerned, Lord Devlin in his writings on homosexuality explained how the society has the right to protect its own existence when public morality is at stake. The majority has the right to follow its own moral convictions in defending its social environment.\textsuperscript{13} This stand is adopted by those opposing pornography. However, Dworkin dismisses this view as it depends on taking a ‘moral position’ which may further be dependant of reasons varying from person to person. According to him, those who claim a consensus of moral conviction on pornography must provide evidence that it exists. As for Dworkin, he states that no harm has been caused by the consumption of pornography in private.\textsuperscript{14}

The adjudicatory bodies have also been confronted with the issue of restriction of pornography. In \textit{Roth v. United States}\textsuperscript{15}, the constitutional test laid down to determine whether a book was obscene and therefore not protected under the First Amendment was a three pronged one.

“Firstly, the dominant theme of the material taken as whole would appeal to a prurient interest in sex. Secondly, the material would be offensive because if affronts contemporary community standards relating to the description or representation of sexual matters. Thirdly, the material would be without redeeming social value.”\textsuperscript{16}

Advertising and distributing pornographic material was excluded from the purview of the First amendment in this case. However, later \textit{Stanley v. Georgia}\textsuperscript{17} limited the power of the government to restrict the private possession of obscenity. The majority opinion did not give weightage to social factors but emphasized on the importance of free acquisition of pornographic material and therefore defended the rights of the consumers of pornography. The court still put restriction on forms of pornography that create a negative impact (example child pornography) from being distributed or viewed in private.

\textsuperscript{13} Ronald Dworkin, \textit{Taking Rights Seriously}, 1\textsuperscript{st} ed. 2008, pp.140-158, p.145.
\textsuperscript{14} Ibid.
\textsuperscript{15} 354 US 476 (1957).
\textsuperscript{17} 349 US 557 (1969).
The implications of moral independence are that it is open to several interpretations by readers and does not provide a definite answer to the issue. This results in further ambiguity. The pornographers, users of pornography, feminists and conservatives have a right to moral independence but no answer is provided as to how the State is to reconcile between the competing claims of the people. What moral independence provides is a negative right to the consumers of pornography (i.e. the State can’t take away their right on the basis of the fact that people feel what they do is immoral).

II. Neutral Utilitarianism

Dworkin introduces a second concept with reference to his position for restricting pornography. According to him, utilitarianism acts as a veil behind which most political decisions are made. The mere fact that maximum people favour what a particular theory holds gives the State an opportunity to apply that theory irrespective of the weight that the theory holds. The government will act on the guidance of this ‘wrongful perception’ of the majority thus creating injustice. The fact that maximum people should be happy and not disappointed holds weightage and not the fact that whether a particular theory is logical and pragmatic. Hence, he comes up with the concept of neutral utilitarianism. The principle of neutral utilitarianism states that “no one is entitled to have any of his preferences fulfilled than anyone else is.”

The denial for fulfilment of an individual’s desire is based on the reasoning that more intense desires must be satisfied first. This principle is derived from the concept of justice and morality itself and opposes the rejection of the desires of the people solely on the basis of the fact that they are ‘wrong.’ What Dworkin tries to propose is a theory of justice as a full political constitution, not simply a theory about how to choose one. Hence, the demands of both the consumers of pornography and those in support of its prohibition should be catered to depending on which demand is more important than the other.

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Neutral utilitarianism accommodates within its scope the ambitions that people have for their own lives and gives importance to these ambitions during the distribution social resources and opportunities to others. What it does not approve of is weighing all preferences on an equal scale on the same basis. This is illustrated by Dworkin through an example of some peoples' conception of what sexual experience should be like are not inherently objectionable or degrading and therefore they are ignored. However, the sexual experience of the sexual minority should not be classified as degrading, therefore giving moral preferences to the sexual majority as it does not account for these minority groups including homosexuals, pornographers, etc. They should not be prohibited from the sexual experiences they want to have.  

III. Pornography as Subjugation of Women

The debate on pornography is essentially that between conservatives, feminists and liberalists. Feminists and conservatives are on the same side when the issue of restriction of pornography crops up. However, their approach to the issue remains different. Sexually explicit content of pornography, as conservatives perceive, is an outrage to the religious and family values inculcated in individuals and is also deeply offensive to a significant portion of citizens who hold these values. The moral fabric of the society is under threat of being ruptured considering the encouragement provided to deviant sexual practices and sexual promiscuity. The society would reach a stage of instability as behaviours and attitudes pose a threat to the family and religious traditions which have kept the society together. Therefore, conservatives regard consumption of pornography as intrinsically morally wrong.

Conservatives further emphasize on the impact of pornography on an individual’s personality preventing him/her from leading a constructive and productive life and therefore corrupting their moral character. Individual loses his/her opportunity to live a worthy life by indulging in a habitual consumption of porn. Even Dworkin, to an extent agrees which is reflected in his observation regarding absenteeism. The state can adopt the position of legal moralism and is justified in using its coercive power to uphold and enforce a community's moral convictions

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22 Ibid.
and to prevent citizens from engaging in activities that offend prevailing community standards of morality and decency.  

Feminism has a different way of approaching pornography. According to them, the advertising, consumption and distribution of pornography affect the position of women in the society. Dworkin in his writing does not go into the depths of the concerns raised by feminists. He dismisses their claims by merely stating that there has been no study to prove that there is a causal link between the consumption and distribution of pornography with the sexual violence against women. He, like other liberalists put the burden to prove on those who restrict the consumption and distribution of pornography. Pornography might not be correlated with the violence against women; however it does contribute towards subjugation of women.

Andrea Dworkin and Catherine MacKinnon defined pornography as graphic sexually explicit subordination of women through pictures and words. It involves women being presented in a dehumanized manner, as sexual objects, things, or commodities that are can be subjected to humiliation or pain and still enjoy it. Pornography through its content institutionalizes the sexuality of male supremacy. There is a position of dominance and submission established reinforcing social construction of the position of male and female in society.

This reinforcement of the patriarchal structure perpetuates a culture where sexual aggression by men towards women is justified and rational. Excluding the assumption that sexual violence is caused by consumption of pornography, the position of women in society is effected and a causal link can be established consumption of pornography and subjugation of women in society. Gender inequality is a result of several factors, one of them being pornography.

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25Ibid.
Rae Langton (one of the feminists who wrote on restriction of pornography) focuses on a claim similar to that of MacKinnon emphasizing porn’s impact on women’s speech acts. Langton claims that pornography silences women insofar as it disables the effectiveness of certain of women’s speech acts, thus limiting their capacity to function as equals in society. Pornography acts as a form of restriction of the individual liberty of women. Individual liberty being a major concern for liberalists should enable the liberalists to reconsider their stand on restriction of pornography.31

Feminists themselves base their argument on Dworkin’s rights based strategy and argue that the political and moral freedom of women is under threat due to pornography and hence State action is required. The claim of feminists is that pornography contributes to women's inequality and that it violates women's right to freedom of speech. Studies have shown that pornography helps to form and reinforce the view that women are sex objects, which manifests itself in how women are perceived and treated in society and so perpetuates women's inequality. Furthermore, sexual harassment can be a result of this inequality as men perceive women to be capable of being physically coerced. Women's credibility is undermined in certain contexts, which formulates a general expectation that women who say ‘no’ in sexual contexts often do not intend to refuse, and so on.32

According to Dworkin, the argument for anti-pornography legislation on the grounds that pornography subordinates women rests on the “frightening principle that considerations of equality require that some people not be free to express their tastes or convictions or preferences anywhere.”33 Accepting this principle would have “devastating consequences”: namely, that “government could forbid the graphic or visceral or emotionally charged expression of any opinion that might reasonably offend a disadvantaged group. It could outlaw performances of The Merchant of Venice, or films about professional women who neglect their children, or caricatures or parodies of homosexuals in nightclub routines.” Dworkin's concern is a slippery slope objection that that he takes to the views of feminists.

33 Ibid.
The worry is that the principle that underpins feminists would, if consistently applied, threaten many other forms of speech in clearly unacceptable ways.34

Sexual expression has seen to be confined to a private sphere across different cultures. Within the confined private sphere itself women are subject to sexist practices and discriminated against men. Due to this historical and cultural subjugation, women have been unable to voice their opinion in the public sphere. This inadequate representation of women in the public sphere has led to the State being given leverage to impose restriction on behaviour of women and forced them to conform to the expected standards of society and thus hindered the development of women's autonomy and self-expression. Pornography also contributes towards restricting growth of the position of women in society and takes the society back to the times when women were considered inferior to men.35

Like gender inequality itself, the erotic appeal of unequal relations between the sexes is not inevitable, regardless of whether it is natural. Rather, this particular form of sexual desire is fostered by various kinds of representations, from fashion magazines to high art.36

To conclude with, it is necessary to note that if a causal link is established between consumption of pornography and subjugation of women in society, the government has a legitimate reason to restrict it. It would no longer be justified on the basis of whether bulk of society thinks it to be consumed by people who are worse off hence the question of right to moral independence will not be taken into consideration as the state intervention is based on the impact it has on society or the possible harm it can cause.37

The claim of the feminists would become more important than the others and according to neutral utilitarianism, it would become a claim more important than the others. Hence, the government while making policies will have to keep the concerns raised by the feminists in mind. Thus, based on both the principles, if subjugation of women becomes an effect of consumption of pornography, the interests of women would trump over the interests of others

35Kate Ellis, Barbara O'Dair and Abby Tallmer, Feminism and Pornography, 1990, Feminist Review, Vol. 36, pp. 15-18
and hence the *slippery slope* argument would not hold good. Dworkin himself preferred the rights based strategy over gaol based strategy and emphasized on how individual liberty must not be curtailed by way of policy and law making. Therefore, Dworkin’s approach towards non-restriction of pornography itself can be used to contradict the conclusions made by him. Since subjugation of women in society is aggravated by the consumption of pornography, their right to moral independence trumps over the welfare of others in a society. However, this view can still be challenged by the liberalists as not sufficient study has been done on pornography and role of women in society. Despite Dworkin’s valuable contribution towards the issue (the concept of moral independence and neutral independence introduced by him), the ambiguity that Dworkin creates in terms pornography and role of women in society remains a major setback to his piece.

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