CHAPTER SEVEN

SEX AS A PROFESSION

The ‘sex industry’, in a not too metaphorical a sense, sells human bodies: its services are of necessity provided personally. Even where the products, such as audiovisual items, are goods for sale their manufacture entails use being made of people’s bodies.¹

Regarding certain types of service, of which prostitution is the most typical, these are provided individually and thus require a direct relationship between supplier and user. But as we have seen there are many cases in which the service is organised in a way that implies an employer-employee type of relationship.²

What legal rules apply to the ‘sex workers’ required to carry out these activities? It is assumed for this part of the discussion that the end contract (purchase of a pornographic video, or a ticket to a strip- or lap dancing show, etc.) is legally valid. Does this necessarily imply that the labour relation entailed in the production is equally recognised as valid? It is here that the first problems arise.

a. Human dignity and the validity of acts of disposal of one’s body

Following the horrors of totalitarian regimes and of World War Two, modern European Constitutions have included among their cornerstones the principle of human dignity.

In particular those countries such as Germany and Italy, which had most suffered – and created suffering for – the violation of basic human rights, gave the principle special importance.

Article 1 of the German Grundgesetz states, under the heading “Protection of human dignity”, that “The dignity of man is inviolable. To respect and protect it is the duty of all state authority”. Article 41 of the Italian Constitution

¹ The topic of sex work is one of the most examined in legal writings, albeit from different angles. Among the many books and articles one can cite Kempadoo, Doezema (eds.), Global Sex Workers. Rights, Resistance, and Redefinition, New York, Routledge, 1998; Sanders, Sex work. A risky business, Willan Pub., Cullompton 2005 and, by the same author, Blinded by morality? Prostitution policy in the UK, in Capital & Class n° 86, p. 9 (2005), which is very critical of the report “Paying the price” (cited above at Ch. 2, fn 14); Campbell, O’Neill (eds.) Sex Work Now, Willan Pub., Cullompton 2006. See also the proceedings of the conference on “Economic Justice for Sex Workers” published in 10 Hastings Women’s L.J. 1–252 (1999).
makes violation of ‘human dignity’ a limiting factor on the exercise of economic freedom.

More recently the principle of the inviolability of ‘human dignity’ has been enshrined in Article 1 of the European Charter of Fundamental Rights.

The first question that must of course be posed concerns the validity of the legal act by which a person renounces his or her dignity. Prostitutes, actors in pornographic films, participants in live nude shows are undertaking activities which common morality, “a sense of decency”, deems to fall below a minimum level of dignity. Behind this lies the age-old argument about the balance between self-determination and protection of the basic conditions of existence, between the minimal and the paternalistic state.

One view of the problem is that the legal order cannot admit such a radical renunciation of one’s own dignity. And it is easy to trace a line of continuity between this position and support for prohibitions on physically disposing of one’s own body (selling organs, ‘renting out’ one’s womb, etc.). To a lesser degree it is sufficient to follow the debate on the admissibility of the practice of “dwarf tossing” which has prompted both legislative bans and administrative interventions.

The ban on “sex work” has therefore a solid ideological and legal basis, without even having to enter into thorny discussions about morals. The human body is seen as a whole and, as a whole, it merits protection. Shifting the debate on human dignity avoids the quagmires of prurient interests and of reciprocal accusations between “bigots” and “rakes”. Human dignity appears to be a common ground of understanding, which is at the foundations of a modern and civilized state.

Constitutional history – since the US Constitution – demonstrates that general principles are enacted through legislation and the courts. There is no reason why the human dignity principle should not follow the same course and be gradually applied to a variety of cases, including those involving the use of one’s body for the sexual gratification of someone else.

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3 See the Ontario Dwarf Tossing Ban Act, 2003.
4 See the November 21, 1991 circular of the French Minister of Interior suggesting that mayors should ban dwarf tossing within the municipal boundaries on the basis of Article 3 of the ECHR. The legitimacy of the circular was challenged by a dwarf who made his living in discos, but the request was declared irreceivable by the European Court of Human Rights (Petition n. 29961/96 Wackenheim v. France, rejected October 16, 1996). For a comment of this and other cases see Resta, La disponibilità dei diritti fondamentali e i limiti della dignità, in Rivista diritto civile 2002, II, 801. Previously see McGee, If Dwarf Tossing Is Outlawed, Only Outlaws Will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?, 38 Am. J. Juris. 335 (1993)
5 This raises the question of the admissibility of a free choice of a prostitute or a porn actor/actress: Cornell, At The Heart of Freedom. Feminism, Sex, & Equality, Princeton U.P., Princeton, 1998, at p. 47 “What kind of regulation, if any, is appropriate when a woman insists she is involved in the self-representation of her sexuate being by becoming a porn worker and/or a prostitute?”. And provides social motivation for her work? See Decker, Prostitution: Regulation and Control, Littleton, Co., Rothman, 1979 (“Their [the prostitutes'] feeling [is] that they are providing a needed service to society”, at p. 453).