

Prostitution Law Reform in Germany

THE OLDEST PROFESSION ON ITS WAY TO BECOMING A PROFESSION

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Prostitution is often referred to as one of the oldest professions. It seems odd then that this oldest of professions has in most jurisdictions been treated far from a normal profession. The question of how to deal with prostitution surfaces in most countries and time periods and the legal responses differ greatly from regulation to varying degrees of criminalisation. In 2001, the German Federal Parliament (Bundestag) passed a new *Act for the Regulation of the Legal Situation of Prostitutes* (Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten) which came into effect in January 2002. In view of the ongoing debate about prostitution law reform in Western Australia this article aims to analyse the changes made to this area of law in Germany. It will detail the law regarding prostitution as it stood in Germany and explore why there was a need for reform. Following this there will be an examination and evaluation of the changes made to the legal regulation of prostitution.

BACKGROUND

It is estimated that in Germany around the same amount of people, mostly women, work as prostitutes as work as nurses (around 400,000). The turnover in this industry is estimated to be around 12.5 billion Marks per year (approx. 10.9 billion A\$) and around 1.2 million men are thought to use the services of prostitutes every day.² Prostitution and other sexual services are clearly major factors in society and in the economy, yet this occupation has been subjected to a startling degree of discrimination in its legal treatment. While it is not illegal to actually sell sexual services the activities of those involved in the provision of such services were not legally recognised and the legal treatment of this occupation was full of contradictions as will be seen in the following.

The attitude towards prostitution was fundamentally coloured by the judicial pronouncement that prostitution is immoral (*sittenwidrig*) and socially damaging (*gemeinschaftsschädlich*).³ On this basis of it being deemed immoral prostitution was denied recognition as a protected occupation according to Article 12 of the *Grundgesetz*, 'GG' (Basic Law or Constitution).⁴ This attitude towards prostitution had

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² See *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/4456, p. 5. Germany has a population of over 82 million and a Gross National Income of 2,054.57 billion Euro (approx. 3,427 billion A\$) in 2001, see the Federal Statistical Office Germany, <http://www.destatis.de/e_home.htm>.

³ *Entscheidungen des Bundesverwaltungsgerichts* (Decisions of the Federal Administrative Court), BVerwGE 22, 286 at 289.

⁴ The Constitution under Article 12 I *Grundgesetz* guarantees freedom in choice of occupation and freedom to choose the place of work. This has a positive aspect (a person cannot be stopped from entering a occupation) and a negative aspect (a person cannot be forced to enter a certain occupation).

far reaching effects and reflected itself in the ability to enter legal transactions, access to social insurance, taxation liability and criminal law.

Legal transactions

According to § 138 I of the *Bürgerliches Gesetzbuch*, 'BGB' (Civil Code) any legal transaction which is "against good morals" is void (ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig). The formula used for deciding what is immoral stems from a decision of the *Reichsgericht* (Imperial Court) from 1901. The measure of morality is thus the "feeling of decency of all fair and just thinking persons" (Anstandsgefühl aller billig und gerecht Denkenden).⁵ A legal transaction is regarded as immoral if it "is not compatible with the feeling of decency of all fair and just thinking persons".⁶ According to case law the contract between a prostitute and client - the most common contract entered into by prostitutes - was immoral in this sense and was therefore unenforceable. The effect of this was that were a client to refuse to pay for services rendered a prostitute could not take legal action to recover the unpaid fees. This legal attitude was thought to reinforce reinforced the pimp culture associated with this occupation, because prostitutes were forced to rely on other (extra-legal) means to protect themselves and ensure payment.⁷

Social insurance

Working as a prostitute was not legally recognised as an occupation or an employment situation. Any contract of employment that a prostitute entered into (e.g. with a brothel) was void and the factual employment situation was equally deemed not to give rise to claims to salary or paid leave, because of the immorality of the activity.⁸ As prostitutes could not enter legally binding employment relationships they were not included in the health and age care insurance schemes compulsory for most employees. Private health and age care insurance providers often refused to insure prostitutes or charged a higher premium to cover the additional risks associated with prostitution. If such cover was too expensive the only options were for prostitutes to keep their occupation secret or pay medical bills themselves. Further, prostitutes could neither receive unemployment benefit for periods of unemployment nor rely on the services of the Employment Office, if they wanted to leave this type of work and retrain for a different occupation. Similarly, prostitutes were not part of the public employees' pension scheme and thus did not receive any employer's contributions towards a pension.

Taxation

⁵ *Entscheidungen des Reichsgerichts in Zivilsachen* (Decisions of the Imperial Court in Civil Matters), RGZ 48, 114 at 124.

⁶ *Entscheidungen des Reichsgerichts in Zivilsachen* (Decisions of the Imperial Court in Civil Matters), RGZ 80, 219 at 221.

⁷ *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/5958, p. 4.

⁸ *Entscheidungen des Bundesarbeitsgerichts* (Decisions of the Federal Labour Court), BAGE 28, 83.

With the turnover in this industry estimated to be around 12.5 billion Marks per year, the state did not want to miss out on gathering tax from such lucrative activity. However, as the activity of prostitutes was not legally recognised as an employment situation in relation to social security benefits it was also not recognised in such a way in relation to taxation. Instead it was classified as “other income” (sonstige Einkünfte) because the activity “does not represent participation in the general economic exchange”.⁹ This had the advantage for the state that tax could be claimed without the apparent contradiction of recognising this as an occupation for taxation purposes. An added twist was that, as this was not regarded as income from a work relationship, no work related expenses could be set off against the taxable income – thus discriminating from other work-related income again to the disadvantage of prostitutes. Nonetheless, despite being classified as not taking part in general economic exchange Goods and Service Tax was payable by prostitutes, as in this connection they were deemed to be entrepreneurs.¹⁰

Criminal law

Selling sexual service was not an offence in Germany, nor was seeking the services of a prostitute. However, the fact that civil law deems the provision of sexual services to be immoral and the contract between a prostitute and the client void also had repercussions in criminal law. It did not amount to the offence of fraud (§ 263 *Strafgesetzbuch*, ‘StGB’ (Criminal Code)) for a customer to receive services and then refuse to pay, even if the customer had no intention of paying from the outset. § 263 StGB is designed to protect a person from monetary loss due to deception and requires that a person causes or perpetuates a mistake in order to obtain a pecuniary advantage. Applied to the client of a prostitute it meant that because there was no transfer of a monetary benefit (an immoral service has no legally recognised monetary value) the prostitute was not considered to have suffered a pecuniary disadvantage and thus there was no fraud.

The discriminatory effect of the judgment of this activity as immoral can clearly be seen here because a prostitute who was paid but did not provide the service and did not intend to from the outset could be guilty of fraud. This differential treatment of the intention not to pay (of the client) or not to provide services (of the prostitute) stems from the interpretation of monetary benefit: money clearly has a pecuniary value, however, sexual services were deemed to have no monetary value as the contract for payment could not be enforced.

Based on the attitude that prostitution was an immoral activity the criminal law reveals a fundamental belief that people needed protecting from working in this way. The aim of the offences regulating prostitution was thus to protect the freedom of sexual autonomy¹¹ and penalise those who encouraged persons to practice prostitution, discouraged them from leaving this occupation or who exploited those working as prostitutes. The actual

⁹ *Bundesfinanzgericht* (Federal Court of Finance), BFH in *Neue Juristische Wochenschrift* [1965] 79, based on § 22 Nr. 3 of the *Einkommenssteuergesetz* (Income Tax Act).

¹⁰ *Entscheidungen des Bundesfinanzhofs* (Decision of the Federal Court of Finance), BFHE 150, 192.

¹¹ The title of the 13th Chapter of the *Criminal Code* is “Offences against sexual autonomy” (Straftaten gegen die sexuelle Selbstbestimmung).

offences in this regard, before reform, were: Promoting Prostitution (Förderung der Prostitution, § 180a), Human Trafficking (Menschenhandel, § 180b), Serious Human Trafficking (Schwere Menschenhandel, § 181) and Pimping (Zuhälterei, § 181a).

§ 180a Promoting Prostitution

- (1) Whoever professionally has or controls an operation in which persons carry out prostitution and in which:
 1. they are held in personal or economic dependence; or
 2. the carrying out of prostitution is promoted through measures which go beyond the mere provision of dwelling, accommodation, or place to stay and the therewith commonly connected services, shall be punished with imprisonment of not more than three years or a fine.
- (2) Likewise shall be punished, whoever:
 1. provides a person under eighteen years of age with a dwelling for the carrying out of prostitution, or professionally provides accommodation or a place to stay for the carrying out of prostitution; or
 2. encourages another person whom they have provided with a dwelling for the carrying out of prostitution to engage in prostitution or exploits the person in regard to it.

§ 180b Human Trafficking

- (1) Whoever, for their own material gain and in knowledge of the coercive situation, exerts influence on another person to induce the person to take up or continue prostitution, shall be punished with imprisonment for not more than five years or a fine. Similarly punished shall be whoever, for their own material gain and in knowledge of the helplessness associated with the person's stay in a foreign country, exerts influence on another person, to get the person to engage in sexual acts, which they commits on or in front of a third person or allow to be committed on themselves by a third person.
- (2) Whoever exerts influence:
 1. on another person with knowledge of the helplessness associated with the person's stay in a foreign country; or
 2. on a person under twenty one years of age, to induce the person to take up or continue prostitution or to get the person to take up or continue prostitution, shall be punished with imprisonment from six months to ten years.
- (3) In cases under (2) an attempt shall be punishable.

§ 181 Serious Human Trafficking

- (1) Whoever:
 1. by force, threat of sufficient harm or trick induces another person to take up or continue prostitution, or;
 2. recruits another person by trick or abducts a person against the person's will by threat of sufficient harm or by trick, in knowledge of the helplessness associated with the person's stay in a foreign country, in order to get the person to commit sexual acts on or in front of a third person, to allow them to be committed on themselves by a third person; or
 3. professionally recruits another person, in knowledge of the helplessness associated with the person's stay in a foreign country, in order to induce the person to take up or continue prostitution, shall be punished with imprisonment from one year to ten years.
- (2) In less serious cases the punishment shall be imprisonment from six months to five years.

§ 181a Pimping

- (1) With imprisonment from six months to five years shall be punished, whoever:
 1. exploits another person who carries out prostitution; or
 2. for financial gain supervises the carrying out of prostitution or determines the place, time, extent or any other circumstance of the carrying out of prostitution or takes any other measures which hinder the person from giving up prostitution, and in this regard maintains a relationship with the person, which goes beyond a single case.

- (2) With imprisonment of not more than three years or a fine shall be punished whoever professionally promotes the practice of prostitution of another person by arranging sexual intercourse and in this regard maintains a relationship with them, which goes beyond a single case.
- (3) Pursuant to (1) and (2) shall also be punished, whoever performs against his spouse the actions listed in (1) Nr.1 and 2 or the in (2) described promotion.

Of these provisions § 180a (Promoting Prostitution) and § 181a (Pimping) were the main objects of discussion for reform. § 180a meant that any person who provided prostitutes with anything beyond accommodation, for instance condoms, could have been subjected to punishment. This is because brothels to the extent to which they provided the prostitutes with a clean and safe work environment could be deemed to be discouraging a person from leaving this type of work.¹² On the other hand a ‘hovel’ of a brothel doing nothing to improve the life of a prostitute did not run the risk of prosecution. This reveals the contradictory nature of the laws regarding prostitution, which in aiming to protect sexual autonomy actually caused a worse environment for prostitutes. Similarly, § 181a was thought to be problematic because it does not distinguish between those who exploit and those who manage prostitutes. As anyone giving directions to a prostitute could be regarded as inhibiting them from leaving the occupation, it was possible that a person could be subject to prosecution for management activities that are inconspicuous in other occupations, such as directing when and where to work.¹³

REFORM PROCESS

As seen above the deeming of prostitution as immoral by the courts had severe consequences for the legal and social situation of prostitutes. It seems, however, that over time the very basis for the discriminatory treatment of this occupation has been fallen away as it became no longer reflective of today’s majority values to regard prostitution as immoral and it no longer reflects the majority opinion of the German people.¹⁴ The influential weekly news magazine *Der Spiegel* conducted a survey in May 2001 asking the question: “Should in your opinion prostitution continue to be held immoral?” Of those questioned 68 % responded “no”, 27 % responded “yes” and 5 % gave no answer. The public sentiment was reflected by an increasingly number of legal academics¹⁵ and lower courts¹⁶ that considered prostitution to no be longer immoral. If then society had moved on and the majority no longer feels that prostitution should be regarded as immoral whose moral values were being enforced? The answer according to Ursula Nelles, the president of the German Association of Female Lawyers (*Vorsitzende des*

¹² See for instance the decision of the Bundesgerichtshof (Federal Supreme Court) in *Neue Juristische Wochenschrift* [1986] 596.

¹³ See the explanatory memorandum in *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/4456, p. 5.

¹⁴ *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/5958, p. 4.

¹⁵ See for instance, Manssen in v. Mangoldt, Klein, Stark, *Kommentar zum GG*, 4. Auflage, Artikel 12 I Rn. 39; Scholz in Maunz-Dürig, *Kommentar zum GG*, Artikel 12, Rn. 12.

¹⁶ *Verwaltungsgericht* (Administrative Court) Berlin, decision of 1st December 2000, 35 A 570.99 (unreported). Lower courts are generally not bound by decisions of higher courts.

Deutschen Juristinnenbundes) is the morals of the Federal Supreme Court,¹⁷ which refused to move from earlier judgments classifying prostitution as immoral.

The failure of the courts to re-evaluate the question of the morality of prostitution led the Partei des Demokratischen Sozialismus 'PDS' (Party of Democratic Socialism)¹⁸ to lay an *Entwurf eines Gesetzes zur beruflichen Gleichstellung von Prostituierten und anderer sexuell Dienstleister* (Draft of an Act for the Professional Equal Treatment of Prostitutes and other Sexual Service Providers)¹⁹ before the *Bundestag* (Federal Parliament). In its aims of ending the discriminatory treatment of the occupation of prostitution and provision of other sexual services this Bill contained many far-reaching provisions. The Bill would have changed the *Civil Code* to the effect that contracts between clients and prostitutes would no longer be regarded immoral and void and thus action could be taken to recover unpaid fees or to recover paid fees for unprovided services. It further provided that if a person suffered any harm through the provision of sexual services, damages would only be recoverable if the harm was inflicted intentionally or in gross negligence. To encourage the practice of safe sex in the industry the recovery of damages for transmission of a sexually transmitted disease would be excluded so far as safe sex was practiced. Furthermore, the legal situation for prostitutes in employment was improved by a provision in the Bill that a prostitute had the right to refuse any or all sexual services to particular clients and the employer was not permitted to link refusal to any sanction.

Regarding criminal law, the Bill aimed to completely abolish the offences of promoting prostitution (§ 180a) and pimping (§ 181a). It was felt that there was no need for such prostitution specific provisions to protect against violence and exploitation as the general criminal law provisions provide sufficient protection.²⁰ Other reforms aimed at normalising and ending the discriminatory treatment of this occupation were a lifting of the ban on advertisements for prostitution and a removal of the laws allowing local authorities to create exclusion zones (*Sperrgebiete*), in which prostitution cannot be carried out.

This Bill did not gain the support of the governing parties, the Sozialdemokratische Partei Deutschlands 'SPD' (Social-Democratic Party of Germany) and Bündnis 90/Die Grünen (Alliance 90/The Greens).²¹ Instead, these parties produced their own *Entwurf eines Gesetzes zur Verbesserung der rechtlichen und sozialen Situation der Prostituierten* (Draft of an Act for Improvement of the Legal and Social Situation of Prostitutes),²² which also aimed to improve the position of prostitutes but was not as far reaching as the Bill of the PDS.

¹⁷ Ursula Nelles, *Die Woche* 33/99, 13 August 1999.

¹⁸ The PDS is the successor of the Socialist Unity Party (Sozialistische Einheits Partei), the governing party of the former German Democratic Republic.

¹⁹ *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/4456.

²⁰ *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/7174, p. 9.

²¹ For clarification the SPD can roughly be compared to the Labor Party in Australia and Bündnis 90/Die Grünen is a party which came into existence by a fusion of the former East German Citizen's Rights Party and the former West German Green Party.

²² *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/4456.

The Bill provided that a claim for the fees agreed upon for the service could be enforced after the service had been rendered. This means in effect that the agreement is no longer deemed to offend good morals and is no longer void. In only providing the enforceability of a claim for unpaid fees by the prostitute this draft made clear that it was not the will of the legislator that prostitutes should be subjected to claims for poorly or insufficiently providing the service. Contracts of employment would also only be enforceable by the prostitute and they would not be required to give notice if leaving an employment situation, nor could their activities be dictated by a person running a brothel.

Regarding criminal law, it was recognised that § 180 a (1), 2 was standing in the way of providing prostitutes with a good working environment as those providing anything more than accommodation risked prosecution. Abolishing this provision was thought necessary to allow prostitutes the possibility of freely entering a legally secure employment relationship.²³ The repeal of this provision would also allow prostitutes access to social insurance schemes. Under the former law, running a brothel in conditions which amounted to an employment situation could make the brothel owner liable to prosecution under § 180a (1), 2. This had the consequence that an employer could not make contributions to the social security schemes (pension, health, age care and unemployment insurance) as registering the prostitute was tantamount to the brothel operator reporting themselves of violating § 180a.

Further changes to the criminal law were not thought necessary to improve the situation of prostitutes. § 180a (1), 1 of the *Criminal Code* which deals with personal or economic dependence was not repealed as it was felt that, read correctly, it only criminalises a one sided “keeping” of a person in such a dependency against their free will.²⁴ In this connection to avoid the exploitation of prostitutes it was not proposed that § 181a, concerning determining the conditions of the practice of prostitution, be repealed as proposed in the PDS Bill. This provision concerns one-sided determination of such conditions and as such would not cover cases where there is a freely entered into agreement about the time and place of carrying out prostitution which can be broken at any time.

As this Bill came from the governing parties forming the coalition government of Germany it was much more likely to become law. Prompted by this fear the main opposition parties, the Christlich-Demokratische Union ‘CDU’ (Christian Democratic Union)/Christlich-Soziale Union ‘CSU’ (Christian Social Union),²⁵ opposed the Bill even though they did agree that there was a need for the creation of possibilities for including prostitutes in social insurance schemes. However, they felt that the Bill would not achieve its stated aims and rather than improve the situation of prostitutes the partial decriminalisation would benefit brothel owners and pimps and push prostitutes further into situations of dependency while weakening the powers of the police to investigate

²³ *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/5958, p. 5.

²⁴ See for instance the commentary on the *Criminal Code* by Lenckner, in: Schönke-Schröder, *Kommentar zum Strafgesetzbuch*, 25 Auflage, § 180a, Rn. 8.

²⁵ The CDU/CSU compare roughly to the Liberal Party/National Party.

associated crime.²⁶ More fundamentally, they argued that the state could not support immoral acts and that “prostitution is the marketing of the human intimate sphere and as such it contradicts the view of human dignity of our Basic Law and the values held in this country”.²⁷ Because of this belief the CDU/CSU did not want to end the classification of this occupation as immoral. They did want, however, to end the double morals of prostitutes being regarded as immoral while clients are not. To do this it was felt that there is a “need for a social climate which regards both offer and demand as violating human dignity.”²⁸

In October 2001 the Parliamentary Committee for Families, Seniors, Women and Youth delivered its report on the Bills of the PDS and of the SPD, Bündnis 90/Die Grünen.²⁹ It recommended that parliament accept the Bill of the latter with minor amendments and reject the Bill of the PDS. The provision regarding the enforcement of contracts only by the prostitute was accepted. However, an amendment was made to make clear that the limitation on the authority of an employer of a prostitute to give directions, which would be normal in other employment situations, did not stand in the way of recognising this as an employment relationship.³⁰ The changes to §180a were also essentially accepted. Although, it was thought necessary to reword §181a to clarify that a person pimping would only be punished if they hinder the personal or economic freedom of the prostitute.³¹

With imprisonment of no more than three years or with a fine shall be punished whoever hinders the personal or economic freedom of another person by professionally promoting the carrying out of prostitution by this person through arranging sexual intercourse and in this regard maintains a relationship with this person which go beyond a single case.

On the basis of the report of this Committee the German Federal Parliament passed the Bill on 19th October 2001 with the support of the governing parties, the PDS and the *Freie Demokratische Partei* ‘FDP’ (Free Democratic Party)³² but without the support of the CDU/CSU. On 1 January 2002, the *Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten* (Act for the Regulation of the Legal Situation of Prostitutes) came into force.

EFFECTS OF REFORM

Legal transactions

²⁶ *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/6781, p. 3.

²⁷ *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/6781, p. 2.

²⁸ Maria Eichhorn, Member of Parliament for the CDU/CSU, president of the Workshop for Families, Seniors, Women and Youth, *Parliamentary Debates*, Deutscher Bundestag, 14. Wahlperiode, 196. Sitzung, 19.10.2001, p. 19197.

²⁹ *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/7174.

³⁰ *ibid* at p. 7

³¹ *Ibid*.

³² A liberal middle ground political party.

It is now clear that a prostitute can take action to recover unpaid fees for services rendered. This was clearly a reform step that was overdue. Aside from the deeming of the transaction as immoral there is no reason why a person should not be able to recover an agreed upon fee when they provided a service. The fact that the enforceability of this contract is one-sided means that the contracts made in this occupation are not treated in the same way as contracts made in other occupations. This does not, however, appear inappropriate when considering the nature of the services offered and it is in line with the special protection of people providing other personal services. The provision of sexual services is highly personal and intimate and clearly it would not be suitable to allow a client to enforce a contract of this nature, especially considering the primary remedy for breach of contract in Germany is specific performance, according to § 249 I *Civil Code*.

Equally, although a client may sue to recover for paid fees but non-provision of service it would not be correct nor appropriate considering the nature of the service to allow a client to claim that the service contracted was poorly provided. The fear of the CDU/CSU that creating such an enforceable contractual relationship would mean that there is a danger that a client could have a legally valid claim to performance of the sexual intercourse³³ seems to be without foundation.

These reforms to the enforceability of the contract do go some way to redress the existing factual power imbalance by providing the prostitute with greater legal power. It may also empower prostitutes in that they now have recourse to the law to enforce payment and no longer need to rely on the services of pimps for enforcement. If the expectations of the legislator are fulfilled and in practice the position of pimps is less dominant it could benefit both prostitutes and society. Prostitutes will no longer be subjected to passing over much of their income to pimps and on a societal level this could well bring about a reduction in the crime associated with prostitution.

The one-sided enforceability of the contract also guarantees that the prostitute will continue to not be legally forced to work and can leave the employment situation without being bound by any contract of service. The ability to enter secure contracts of employment may provide a degree of protection for prostitutes from exploitation and the will of the employer. Although it remains to be seen how willing employers will be to enter such one-sided contracts of employment.

Social insurance

The reform measures make clear that a prostitute in an employment situation is to be included in the social insurance scheme. This reform ends the unfair discrimination of people working as prostitutes. It gives the prostitute the security of knowing that should they become unemployed they will receive unemployment insurance payments. It also fosters the self-determination of prostitutes in that they now have access the job retraining programmes of the Employment Office and thus will be supported if they wish to change occupations. It was made clear, however, that the Employment Office will not be involved in passing on job offers from brothels to prostitutes.

³³ *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/6781, p. 3

Prostitutes will now also have the security of knowing that they are paying into a pension fund and are covered by health insurance at the normal rates. Socially, it has the benefit that prostitutes are also contributing to the insurance schemes and will not need to rely on state 'income support'³⁴ in cases of unemployment or retirement. These changes redress the imbalance of being obliged to pay tax but not being allowed access to social insurance. There is, of course the danger that with the obligation to pay contributions some prostitutes may continue to work illegally to avoid paying. This is a concern, but it is also an issue arising in other fields of employment where people seek to avoid paying contributions and thus are excluded from social insurance schemes. It also cannot serve as an argument for denying access to those who do wish for such cover.

Taxation

As the law now clearly states that an employment situation can be legally recognised it would seem to follow that the income of prostitutes will now be taxed as income from work rather than as other income. This will allow a more appropriate taxation of prostitutes. It is also expected that this will be an added benefit to the state as prior to the reforms although there was a duty to pay tax many prostitutes did not.

Criminal law

The criminal law as it stood appeared to be based on the premise that no one really would freely choose to be a prostitute and thus measures had to be in place to avoid anything which could hold a person in this occupation. While it is undoubtedly true that many people are involuntarily involved in this activity for a variety of reasons and that this is a very disturbing factor which must be adequately addressed dealt with, this is not the same issue as how to regulate the occupation for those freely engaging in prostitution. The previous state of law testified to the effects of legislation designed to discourage *all* people engaged in this line of work – whether they freely choose this type of work or not.

The fear that the reforms will further encourage dependency does not seem valid. The reforms undertaken do not advantage pimps and brothel owners. The brothel owner cannot force fulfillment of the contract of employment, thus guaranteeing that the prostitute can leave at any time and the provisions penalising the exploitation of prostitutes remain in force. However, the new law no longer penalises those who provide a service beyond accommodation to the prostitutes. This then allows brothels and pimps to operate whose services are a benefit to the prostitute and improve the work environment. The law now clarifies that simply arranging sexual relations will not be offence unless a person is kept against their will in personal or economic dependence. The emphasis of the new Act is clearly that people working as prostitute have their own mind and will and should be able to exercise this while being protected from those who overbear their will. It was a twisted form of legal paternalism which criminalised any

³⁴ This is not an insurance payment but a welfare payment provided when a person has no access to unemployment insurance or pension.

service which improved the life of a prostitute based on the belief that this may act as a disincentive to leave the occupation.

The basis of the opposition of the CDU/CSU to the reforms was that it would do nothing for those most vulnerable (foreign prostitutes and minors) and would increase the possibilities of exploitation by pimps and brothel owners, increase the dependency of prostitutes, while at the same time reducing the powers of the police to investigate crime.³⁵ They objected to the reform of the laws regarding pimping as it would lead to distinguishing between good and bad pimps.³⁶ This seems to be based on the belief that all pimps are bad because they are fostering an immoral activity.

According to Regine Lasser of the prostitute³⁷ association 'Hydra', the reforms to the laws on pimping would not be playing into the hands of pimps. "On the contrary, they would become superfluous, because we could at last take action to recover our fee. The women could open their own operations and help themselves."³⁸ Indeed, the situation before the reforms was more likely to mean that a person was forced to stay in the occupation, because the mechanisms were not there to help them to leave, such as access to unemployment benefit or job-retraining.

Finally, focussing on exploitation will mean that police resources can be better used and not wasted on those who are freely doing their chosen job. Lacking police intervention may also lead to more willingness to cooperate with police on more serious crimes.

Other reforms

Other reforms called for which were not enacted were a removal of the ban on advertising prostitution, a removal of the law regarding prostitution exclusion zones (Sperrgebiete) and changes to immigration laws. The FDP felt that it was not correct to remove the label immorality from this activity and then to leave it in a grey area where other associated activities are treated as if immoral.³⁹ The PDS opined that these reforms were the smallest possible step on the way to ending the discrimination of prostitution.⁴⁰

CONCLUSION

The discussion above indicates that prior to reform the basic tenet that the work of prostitutes was immoral but not illegal led to a legal situation full of contradictions and discrimination when compared with other occupations. The reform process threw up some fundamental questions about the relationship of law and society and the degree to which the law should be involved in protecting moral views or can itself be based on

³⁵ *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/6781, p. 3.

³⁶ *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/7174, p. 8–9.

³⁷ Although it should be noted that German prostitutes prefer to call themselves 'whores' (Huren).

³⁸ Quoted in the news magazine *Stern*, see the on-line version:

<<http://www.stern.de/magazin/deutschland/1999/35/prostitution.html>>.

³⁹ *Drucksache des Deutschen Bundestages* (Parliamentary Papers) 14/7174, p. 8.

⁴⁰ *Ibid* at p. 9.

principles of morality. It is symptomatic of the ambiguousness of 'morality' that the courts deemed this activity to be immoral when large sections of society appear to no longer view prostitution in this way. On the basis of the courts' own formula of "the standards of all fair and just thinking persons" it was high time to end the classification of prostitution as immoral. Indeed, using this criterion it could be argued that, on the contrary, withholding the legal protection from prostitutes that is awarded to other occupations was immoral.

The decision of the legislator to deem the claims of prostitutes legally enforceable has by implication ended the classification of this activity as immoral. In doing so it allows prostitutes to feel more self-confidence in the work they are doing. The one-sided enforceability of prostitutes' claims has been a pronounced step towards redressing the imbalance of power in their favour. In this sense, the reforms stopped short of treating this occupation in the same way as others. However, clearly there is a degree to which prostitution is distinct from other occupations and it is not unjust to maintain some asymmetric protection for those providing such intimate services. The law now strengthens the position of prostitutes and gives them greater power to determine their work environment without adding to the powers of others over prostitutes. It is also a sign to others that it is not acceptable to use threats, pressure or violence against prostitutes. Such reform measures will now hopefully reduce associated crime and allow those fighting crime to focus on the serious offences of exploitation and human trafficking.

The opponents to these reforms were concerned with the effect on society of treating this oldest profession like almost any other and sought to preserve the former approach of containing prostitution by labeling it immoral. However, the experience in Germany shows that discrimination against prostitution only harms those involved in this line of work. Prostitution is a social reality, which cannot be eliminated. The new Act brings an end to the discriminatory treatment of prostitutes and provides the legal basis for a better and safer working environment, while supporting those who wish to leave this occupation. The reforms are in the interests of prostitutes and society and bring the regulation of prostitution into line with current social values.