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Prostitution Law Reform in Germany

The Oldest Profession: At Last to be Treated as a Profession?

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Prostitution is often referred to as one of the oldest professions and yet in most jurisdictions it has been treated far from a normal profession. The question of how to appropriately deal with prostitution surfaces in most countries and time periods and the legal responses differ greatly from regulation to varying degrees of criminalisation. In Germany there has been much recent debate on the need for reform of the laws on prostitution and whether prostitution should be treated in the same way as any other occupation. The result of such discussion was the passing in 2001 of the 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, detailing the law regarding prostitution as it stood in Germany and exploring why there was a need for reform. Against this background there will an examination and evaluation of the changes made to the legal regulation of prostitution.

Background

It is estimated that in Germany around 400,000 people, mostly women, work as prostitutes, that around 1.2 million men use the services of prostitutes every day and that the turnover in this industry is approximately 12.5 billion Marks per year (approx. 10.9 billion
These figures clearly show that prostitution is a major factor in society and in the economy, yet this occupation has been subjected to a startling degree of discrimination in its legal treatment and a legal position littered with contradictions.

The legal approach to prostitution in Germany was fundamentally coloured by the judicial pronouncement that prostitution is immoral (sittenwidrig) and socially damaging (gemeinschaftsschädlich). Although not illegal, on the 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). This attitude towards prostitution had 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 and is measured against the “feeling of decency of all fair and just thinking persons” (Anstandsgefühl aller billig und gerecht Denkenden). Accordingly a legal transaction is regarded as immoral if it “is not compatible with the feeling of decency of all fair and just thinking persons”. This formula was used to deem the contract between a prostitute and client immoral and 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. Naturally then the prostitute needed to seek other non-legal ways of enforcing payment and this determination of immorality has been recognised as reinforcing the pimp culture associated with this occupation.
Social insurance

Based on the formula discussed above 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. Working as a prostitute was not then legally recognised as an occupation or an employment situation and 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. This meant that for cover the prostitute needed to seek private health and age care insurance, however, private providers often refused to insure prostitutes or charged a higher premium to cover the perceived additional risks associated with prostitution. If such cover was too expensive the only options were for prostitutes to keep their occupation secret or pay their 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

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 income derived from prostitution was classified as “other income” (sonstige Einkünfte) because the activity “does not represent participation in the general economic exchange”. This had the advantage for the state that tax could be
claimed without the apparent contradiction of recognising prostitution 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. The peculiarities did not end there, for despite being classified as not taking part in the general economic exchange Goods and Service Tax was payable by prostitutes because for the purposes of this tax they were deemed to be entrepreneurs.11

Criminal law

Selling sexual service was not an offence in Germany, nor was seeking the services of a prostitute. However, the offences specifically concerned with prostitution reveal the fundamental belief that people needed protecting from working in this way. As the title of this chapter of the Criminal Code suggests these offences were designed to protect the freedom of sexual autonomy.12 In doing so, those who encouraged persons to practice prostitution, discouraged them from leaving this occupation or exploited those working as prostitutes were liable to punishment. Prior to reform the relevant offences were: Promoting Prostitution (Förderung der Prostitution, § 180a), Human Trafficking (Menschenhandel, § 180b), Serious Human Trafficking (Schwere Menschenhandel, § 181) and Pimping (Zuhälterei, § 181a).

§ 180a Promoting Prostitution13

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. Likewise 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 commit 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 significant 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 significant 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, or 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
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another person by arranging sexual intercourse and in this regard
maintains a relationship with the person, 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 reform discussion. The effect of
§ 180a was 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.¹⁴ 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 because they would not be encouraging a person to
continue prostitution. This reveals the contradictory nature of the
laws regarding prostitution, which in aiming to protect sexual
autonomy actually fostered a worse environment for prostitutes.
Similarly, § 181a was thought to be problematic because it did 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.¹⁵

A criminal law consequence of the civil law deeming of the
provision of sexual services to be immoral and the contract between
a prostitute and the client as void was in relation to the offence of
fraud. It did not amount to fraud (§ 263 Strafgesetzbuch, ‘StGB’
(Criminal Code)) for a customer to receive services and then refuse
to pay, even if the customer had from the outset no intention of
paying.¹⁶ § 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 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.

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 (its perceived immorality) has fallen away. The majority opinion of German people is no longer that prostitution is immoral. 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. This public sentiment was reflected by an increasingly number of legal academics and lower courts. If then society had moved on and the majority no longer feel that prostitution should be regarded as immoral the question arises of whose moral values were being enforced? The answer according to Ursula Nelles, the president of the German Association of Female Lawyers (Vorsitzende des Deutschen Juristinnenbundes), is the morals of the Federal Supreme Court, which refused to move from earlier judgments classifying prostitution as immoral.
The failure of the Federal Supreme Court to re-evaluate the question of the morality of prostitution in the light of changed societal values led the Partei des Demokratischen Sozialismus ‘PDS’ (Party of Democratic Socialism)\textsuperscript{21} to lay an Entwurf eines Gesetzes zur beruflichen Gleichstellung von Prostituierten und anderer sexuell Dienstleistender (Draft of an Act for the Professional Equal Treatment of Prostitutes and other Sexual Service Providers)\textsuperscript{22} before the Bundestag (Federal Parliament). In its aims of ending the discriminatory treatment of the occupation of sexual service providers 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. It further proposed 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. Indeed, 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 to be 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 would not be permitted to attach sanctions to such refusal.

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 adequate protection.\textsuperscript{23} 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. In line with its aims of treating prostitution as any other occupation the PDS argued that there was no place for such industry specific provisions.
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). 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), which also aimed to improve the position of prostitutes but was not as far reaching as the Bill of the PDS.

This Bill provided that a claim to the fees agreed upon for the service could be enforced after the service had been rendered. The effect would be that the agreement would no longer be deemed to offend good morals and would no longer be void. In only providing for 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 on the basis of the service being poorly or insufficiently provided. 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 § 180a (1), 2 was standing in the way of a good working environment for prostitutes as those providing anything more than accommodation risked prosecution. This had the further 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. Abolishing this provision was therefore seen as essential to allow prostitutes to freely enter a legally secure employment relationship and allowing them access to social insurance schemes.

Further changes to the criminal law to improve the situation of prostitutes were not thought necessary. Unlike the earlier PDS Bill
there was no recommendation to repeal § 180a (1), 1 of the Criminal Code, which deals with keeping a person in personal or economic dependency, because it was argued that, read correctly, it only criminalises a one-sided “keeping” of a person in such dependency against their free will. Similarly, it was thought necessary to retain § 181a, which criminalises the determination of the conditions of the practice of prostitution. Again this provision only concerns one-sided determination of such conditions and so would not cover cases where prostitutes freely enter into agreement about the time and place of carrying out their work.

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) and the Christlich-Soziale Union, ‘CSU’ (Christian Social Union), 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 this 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 associated crime. 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”. Because of this belief the CDU/CSU did not want to end the classification of this occupation as immoral. They did, however, want to end the double morals of prostitutes being regarded as immoral while clients were 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.”

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 and Bündnis 90/Die Grünen. It recommended that
parliament accept the Bill of the latter parties with minor amendments and reject the Bill of the PDS. Specifically, while accepting the provision regarding the enforcement of contracts only by the prostitute an amendment was made to make clear that the limitation on the authority of an employer of a prostitute to give instructions, which would be normal in other employment situations, did not stand in the way of recognising this as an employment relationship.\textsuperscript{33} The changes to §180a were also essentially accepted, although, it was thought necessary to reword § 181a to clarify that a person pimping will only be liable to punishment if they hinder the personal or economic freedom of the prostitute.\textsuperscript{34}

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 goes beyond a single case.

On the basis of the report of this Committee the German Federal Parliament passed the Bill on 19\textsuperscript{th} October 2001 with the support of the governing parties, the PDS and the Freie Demokratische Partei ‘FDP’ (Free Democratic Party)\textsuperscript{35} 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.

\section*{Effects of Reform}

\subsection*{Legal transactions}

It is now clear that a prostitute can take action to recover unpaid fees for services rendered. Obviously this was a reform step that was overdue. Aside from the deeming of the transaction as immoral there was no reason why a person should not be able to recover an agreed upon fee when they have provided a service. However, the fact that the enforceability of this contract is one-sided means that contracts
made in this occupation are not treated in the same way as those made in other occupations. Nonetheless, this does not appear inappropriate when considering the nature of the services offered and it is in line with the special protection afforded people providing other personal services. Sexual services are highly personal and intimate and clearly it would not be suitable to allow a client to enforce a contract of this nature, especially considering that 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 if subsequently no service was provided it would not be appropriate considering the nature of the service to allow a client to claim that the service was poorly or inadequately provided. The Act makes clear that there can be no action for poorly provided service and as such 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 intercourse to their satisfaction would appear to be without foundation.

These reforms to the enforceability of the contract do go some way to redressing the existing factual power imbalance by providing the prostitute with greater legal protection. 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 a prostitute’s contractual promise to work will not be legally enforceable if they decide leave the employment situation. The
ability to enter secure contracts of employment should then provide a degree of protection from exploitation and the will of the employer.

Social insurance

The reform measures make clear that a prostitute in an employment situation is to be included in the social insurance schemes and so end the unfair discrimination of people working as prostitutes. It gives the prostitute the security of knowing that in case of unemployment 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 facilitating job offers from brothels to prostitutes.

Prostitutes will also have the security of knowing that they are paying into a pension fund and are covered by health insurance at 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’ in cases of unemployment or retirement. These changes redress the imbalance of being obliged to pay tax while barring access to social insurance schemes. There is, of course, the danger that with the obligation to pay contributions some prostitutes may continue to work illegally to avoid payment. This is a concern, but it is also an issue arising in other fields of employment where workers may 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 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 increase revenue to the state as prior to the reforms although there was a duty to pay tax many prostitutes and brothel owners 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 type of work. While it is undoubtedly true that many people are involuntarily involved in this activity for a variety of reasons and that this is a disturbing factor which must be adequately addressed, this is not the same issue as how to regulate the occupation for those freely engaging in prostitution. The previous state of the law testified to the effects of legislation designed to discourage all people engaged in this line of work – whether they freely chose prostitution or not.

The fear that the reforms will further encourage dependency because they advantage pimps and brothel owners does not seem valid. The position has now been clarified that simply arranging sexual relations is not an offence unless a person is kept against their will in personal or economic dependence. Therefore the new law removes the threat of punishment from those who merely provide a service beyond accommodation to the prostitutes, allowing brothels and pimps to operate whose services are a benefit to the prostitute and improve the work environment. The provisions penalising the exploitation of prostitutes do remain in force and brothel owners cannot force fulfillment of the contract of employment, thus guaranteeing that prostitutes can leave at any time. The emphasis of the new Act is clearly on fostering the exercise of free will of prostitutes, strengthening their choices, while protecting them from those who overbear their will. It was a twisted form of legal paternalism that criminalised any service which improved the life of a prostitute based on the belief that such services may act as a disincentive to leaving the occupation.
Of the criminal law reforms the CDU/CSU particularly objected to the amendment of the offence of pimping as they felt it would lead to distinguishing between good and bad pimps. Such concern seems to be based on the belief that all pimps are bad because they are fostering an immoral activity. However, according to Regine Lasser of the prostitute association ‘Hydra’, the reforms to the laws on pimping would not be playing into the hands of pimps. “On the contrary, they [pimps] would become superfluous, because we [prostitutes] could at last take action to recover our fee. The women could open their own operations and help themselves.”

More correctly it seems that the legal regulations before reform were more likely to reinforce exploitation and dependency, as prostitutes working together risked prosecution and so left management in the hands of pimps. Further such conditions could have meant a person was forced to stay in the occupation because the mechanisms were not in place to help them to leave, such as access to unemployment benefit or job-retraining. Finally, focussing on cases of exploitation will mean that police resources can be better directed and not wasted on those who are freely doing their chosen job. More focussed police intervention may also lead to greater willingness to cooperate with police on crimes of exploitation.

Other reforms

Other reforms called for, which were not enacted, were an amendment to § 120 of the Gesetz über Ordnungswidrigkeiten (Regulatory Offences Act), to remove the ban on advertising prostitution, a repeal of § 46 Nr 3 of the Ausländergesetz (Foreigner’s Act), which allows rescission of residency status for practising prostitution, and a repeal of Article 297 of the Einführungsgesetz zum Strafgesetzbuch (Introductory Act to the Criminal Code), which allows the creation of “exclusion zones” (Sperrgebiete). The latter provision empowers state governments, either directly or by delegation to local authorities, to specify areas in which, for the purposes of protecting the young or public decency, prostitution cannot be carried out. This exclusion zone then applies to
all forms of prostitution (not just street walking) but should not ghettoise prostitution. Indeed, it is expressly provided that it is not permitted to designate limited streets or blocks where prostitution may be carried out (Article 297 (3) Introductory Act to the Criminal Code). Such industry specific regulations are not in line with equalising the treatment of this occupation with other occupations. As a result the PDS opined that the reforms contained in the Prostitution Act were the smallest possible step towards equal treatment of this occupation.\textsuperscript{41} Similarly, the FDP felt that it was not correct to remove the label of immorality from this activity and then to leave some of it in a grey area.\textsuperscript{42} It criticised that although the new Act went some way to ending the discrimination of prostitution it had not created a whole new approach.

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 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 principles of morality. It is symptomatic of the ambiguousness of “morality” that the courts deemed this activity immoral when large sections of society no longer viewed 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. In fact using this criterion it could be argued that it was immoral to withhold the legal protection from prostitution that other occupations enjoy.

The decision of the legislator to declare the claims of prostitutes legally enforceable has by implication ended the classification of this activity as immoral and in doing so it should foster prostitutes’ self-confidence in the work they are doing. It also signals that society does not find it acceptable to refuse payment or use threats, pressure

or violence against prostitutes. The enforceability of contracts only by prostitutes has been a pronounced step towards redressing the imbalance of power in their favour. In only providing for one-sided enforceability of contracts, the reforms do stop 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 opponents of these reforms were concerned with the effect on society of treating this oldest profession like any other and sought to preserve the former approach of containing prostitution by labeling it immoral. However, the experience in Germany shows that legal discrimination against prostitution often has the counterproductive effect of only harming those involved in this line of work. Prostitution is a social reality which cannot be eliminated. The new Act goes some way to ending 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. It strengthens the position of prostitutes and provides greater opportunities for them to determine their work environment without adding to the powers of others over prostitutes. In fostering the workers’ choices it is hoped that such reform measures will reduce dependency and crime associated with prostitution while allowing those fighting crime to focus on the serious offences of exploitation and human trafficking. These reforms are in the interests of prostitutes and society and bring the regulation of prostitution into line with current social values.

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2 The topic featured in many television current affairs and political commentary programmes, for instance Plus Minus, “Prostitution: Was bringt das neue Gesetz”, shown on WDR 28.08.2001; Sabine Christiansen, “Prostitution wird legal! Wo bleiben Sitte und Moral”, shown on ARD 13.05.2001; “Prostitution – Das älteste
Gewerbe der Welt soll legalisiert werden", shown on n-tv 11 may 2001. It should be noted that prostitution organizations enjoy a respected public profile in Germany and are generally represented on media panels discussing prostitution related issues.


4 Entscheidungen des Bundesverwaltungsgerichts (Decisions of the Federal Administrative Court), BVerwGE 22, 286 at 289 (1965).

5 The Constitution guarantees under Article 12 I 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).

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

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

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

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


11 Entscheidungen des Bundesfinanzhofs (Decisions of the Federal Court of Finance), BFHE 150, 192.

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

13 These extracts were translated by the author of this article.
See for instance the decision of the Bundesgerichtshof (Federal Supreme Court) in *Neue Juristische Wochenschrift* [1986] 596.

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

*Entscheidungen des Bundesgerichtshof in Strafsachen* (Decisions of the Federal Supreme Court in Criminal Matters) BGHSt 4, 373 (decision from 1953).

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


*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.


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

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

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

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.

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

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


The CDU/CSU compare roughly to the Liberal Party/National Party.
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29 Drucksache des Deutschen Bundestages (Parliamentary Papers) 14/6781, p. 3.

30 Ibid at p. 2.


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

33 Ibid at p. 7

34 Ibid.

35 A liberal middle ground political party.

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

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

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

39 It should be noted that German prostitutes prefer to call themselves ‘whores’ (Huren).

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


41 Ibid at p. 9.

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