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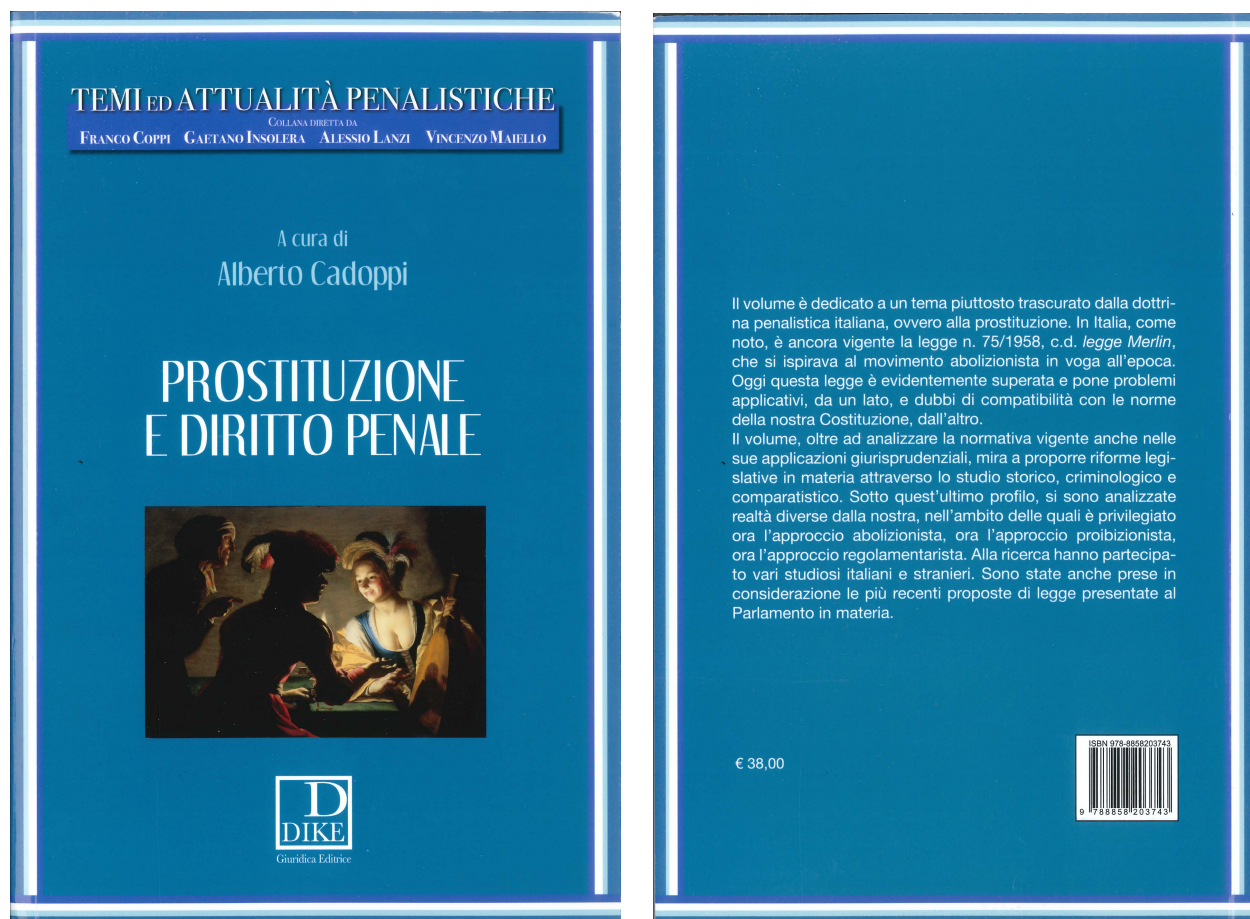
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*PROHIBITION IN SWEDISH LAW  
OF THE PURCHASE OF SEXUAL SERVICE*

Christoffer Wong\*

SOMMARIO: 1. Introduction – 2. The Legal Context and the Travaux Préliminaires Leading to the Criminalization of the Purchase of Sexual Service – 3. The Substantive Content of the Provision – 4. The suivi of the prohibition of purchase of sexual service

La prostituzione non è mai stata oggetto di penalizzazione nel diritto svedese. Tuttavia, l'acquisto di prestazioni sessuali è sanzionato penalmente. È quindi il cliente che commette un reato, mentre la prostituta non è punita come concorrente. La disciplina non fa differenze di genere e rende punibile anche il tentativo. La pena massima per tale reato è (dal 2011) di un anno di reclusione. Inoltre, a completare il quadro giuridico, il presente contributo si sofferma sul contesto della legislazione svedese, analizzando il dibattito relativo all'evoluzione giuridica e commentando alcune statistiche sull'efficacia della disciplina.

Prostitution has never been a criminal offence under Swedish law. However, the purchase of sexual service was criminalized. It is thus the customer who commits a criminal offence; the prostitute is not punishable as an accomplice. The legislation is gender-neutral. Attempt to commit the offence is also punishable. The maximum penalty for this offence is (from 2011) one year's imprisonment. In addition to describing the content of the law, the present paper provides the background to the Swedish legislation, analyses the debate in connection with the legislative process and comments on some statistics on the effect of the law.

## 1. Introduction

The purchase of sexual service has, since 1 January 1999, been a criminal offence in Sweden<sup>1</sup>. This may come as a surprise for some, as Sweden has – deservedly or undeservedly – traditionally had the reputation of being a sexually liberal country, where prostitution would be expected to be a part

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<sup>1</sup> Pursuant to Act (1998:408) on the prohibition of the purchase of sexual services, which entered into force on 1 January 1999 but is now replaced by another statutory provision.

of the policy of sexual *laissez faire*. However, the prohibition of prostitution through criminal law is, as such, really not that remarkable. Such prohibitions did – and still do – exist in various forms in many jurisdictions. The Swedish legislation was nevertheless regarded at the time as being quite unique in an international perspective, because the criminalization undertaken in Sweden pertained solely and exclusively to the demand side of prostitution, *i.e.* to the ‘purchase of sexual services’, using the morally neutral language of the legislator<sup>2</sup>. Although it was not apparent from the wording of the statute, the supply side of prostitution remained unpunished, which meant that a prostitute<sup>3</sup> providing the sexual service was exempt from criminal responsibility, even though he or she could be regarded as an accomplice to or instigator of the crime of buying sex.

In the present overview, the arguments for criminalizing the purchase of sexual service will be presented before an analysis is given of the substantive content of the criminal provision. This will be followed by some brief remarks on the consequences and practical enforcement of the prohibition of sexual service.

It should be mentioned at the outset that other criminal provisions<sup>4</sup> exist in Swedish law that may be applicable in a prostitution setting. The present paper will however focus on the offence ‘purchase of sexual service’; the other offences will only be touched upon in passing.

## 2. The Legal Context and the Travaux Préliminaires Leading to the Criminalization of the Purchase of Sexual Service

Prostitution as such has never been a criminal offence under Swedish law. During the 19<sup>th</sup> and the first decades of the 20<sup>th</sup> century, prostitution in towns and cities was controlled under a reglementary system of registration and supervision, thought to be inspired by the ideas of the French physician Alexandre Jean-Baptiste Parent du Châtelet<sup>5</sup>. The control of prostitution was mainly motivated by concerns over health and hygiene – in particular the

<sup>2</sup> In many jurisdictions where prostitution is criminalized, it would be the seller of sex rather than the customer that is the offender. The customer may be punished in special cases, *e.g.* when a minor is involved.

<sup>3</sup> In this paper, the term ‘prostitute’ is used to denote any person providing a sexual service in exchange for payment. It is not considered necessary to use more ‘politically correct’ terms – such as ‘sex workers’ – preferred by some writers.

<sup>4</sup> Most notably ‘trafficking in human beings’, ‘purchase of a sexual act by a child’ and ‘procurement of sexual service’.

<sup>5</sup> Author of *De la prostitution de la ville de Paris, considérée sous le rapport de l’hygiène publique, de la morale et de l’administration*, first published in 1836, and with a 3<sup>rd</sup> ed. 1857.

prevention of venereal diseases; but sometimes arguments based on public order or on moral grounds had also been adduced for the maintenance of a system of public control<sup>6</sup>. It may be argued, however, that in the more distant past prostitution could be punished as a criminal offence, as it was possible to apply the general rules prohibiting extramarital sexual conducts<sup>7</sup> – *e.g.* provisions in Chapters 54-56 in the Book on Criminal Offences (*missgärningsbalk*) of the Statute of 1734 – to situations in a prostitution setting. According to the provisions of the Statute of 1734, both parties involved in the act of prostitution could be subject to punishment<sup>8</sup>. Other than these and similar provisions related to the special status of marriage and the family, Swedish criminal law has not, by and large, concerned itself with non-coercive sex between adults. Thus, prostitution was not a criminal offence under the Penal Code of 1864 (which succeeded the Statute of 1734)<sup>9</sup>, nor was this the case under the Penal Code of 1962 (the current penal code).

Although prostitution *per se* was not punishable, the facilitation of prostitution – or the ‘procurement of sexual services’ according to current legal terminology – has had a long history as a criminal offence<sup>10</sup>. In the current penal code the offence ‘procurement of sexual service’ (*koppleri*) is found in Chapter 6 of the Code dealing with sexual offences<sup>11</sup>. This illustrates

<sup>6</sup> For an overview of the status of prostitution in the Nordic countries in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, see *Sedligt, renligt, lagligt – Prostitution i Norden 1880–1940*, A. Jansdotter & Y. Svanström (ed.), Makadam, Göteborg & Stockholm 2007.

<sup>7</sup> The offences of this category are known, in Swedish, as ‘horbrott’, *i.e.* ‘adulterous offences’. Etymologically, the Swedish word *hor* has the same root as the English word ‘whore’.

<sup>8</sup> The penalties for such crimes varied, depending on whether the sexual act was perpetrated by a married or unmarried man with a married or unmarried woman. It may not come as a surprise that only sex between a man and a woman was envisaged in the Statute of 1734.

<sup>9</sup> The Penal Code of 1864 retained however some provisions with roots in the Statute of 1734 against adultery (Chapter 17). The 1864 Code also contained a chapter on vice offences (Sw. ‘*sedlighetsbrott*’) (Chapter 18), which covered a motley collection of conducts contrary to the ethical and/or sexual more of the time, *inter alia* various incestuous offences, certain forms of sexual exploitation, ‘offences against nature’, distribution of pornography and illicit gambling.

<sup>10</sup> See, for example, Chapter 57 in the above-mentioned Book on Criminal Offences of the Statute of 1734 and Chapter 18, Section 11, of the Penal Code of 1864.

<sup>11</sup> The offence has changed its character since the entry-into-force of the current Penal Code in 1965. The original provision had a wider area of application covering the promotion of all vicious or depraved ways of life. It contained a special provision prohibiting gains from the facilitation or promotion of casual sexual liaison between different persons (without the requirement that the sexual liaison was being paid for). Under the current legislation, Chapter 6 Section 12, a person (*A*) commits the offence *both* in a case where *A* promotes prostitution *and* in case where *A* improperly exploits another person, who acts as a prostitute. The maintenance

that while the legislator has early on accepted the criminalization of *facilitation/promotion* of prostitution as a proper legal response to the problem of prostitution, *criminalization of prostitution itself* has not been seen as an appropriate means to tackle the phenomenon.

Against this background, it was a novelty when serious proposals were made to criminalize prostitution. The debate that eventually led to the criminalization of the purchase of sexual services can be said to have started already in 1977 when a commission of public inquiry was set up to study prostitution as a social phenomenon. In its report, presented in 1981, the commission made, *inter alia*, a proposal to criminalize the purchase of casual sexual services provided by a person addicted to drugs<sup>12</sup>. It is clear that the rationale behind this proposal was the desire to protect the most vulnerable from exploitation. This part of the commission's proposal was however never put forward by the Government to Parliament. At about the same time, the question of prostitution was touched upon by another commission set up also in 1977 (the commission of public inquiry on sexual offences), albeit that prostitution was not the main concern of this latter inquiry. In the final report of the commission on sexual offences, proposals were made on the amendment of the provisions in the Penal Code dealing with procurement of sexual service (which were later adopted by Parliament), but there was no proposal to legislate on prostitution as such<sup>13</sup>.

The debate intensified when, a decade after the publication of the two reports mentioned above, a new commission of public inquiry was set up in 1993. It was an express task of the commission to "investigate, without prejudice, whether the criminalization of prostitution would be an appropriate measure to strengthen society's effort in the fight against prostitution"<sup>14</sup>. The tone for this inquiry was clearly set by the Government – already from the very beginning – in the remit given to the commission: "prostitution is incompatible with the individual's potentials to develop as a human being, prostitution is a phenomenon that society finds despicable and prostitution is associated with so much negative consequences for society that it must be combated vigorously"<sup>15</sup>.

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of a brothel may constitute an offence under this section. The standard level of this offence is punishable by imprisonment up to four years while an aggravated offence (*e.g.* when human trafficking is involved) is punishable by imprisonment for a minimum of two years and up to a maximum of eight years.

<sup>12</sup> SOU 1981:71 *Prostitution i Sverige, bakgrund och åtgärder* [Prostitution in Sweden: background and remedial measures].

<sup>13</sup> SOU 1982:61 *Våldtäkt och andra sexuella övergrepp* [Rape and other sexual assault].

<sup>14</sup> Dir. 1993:31 (The Government's instructions setting up the commission of public inquiry, my translation into English.)

<sup>15</sup> *Ibid.*

The 1993 commission on prostitution presented its finding in 1995. The title chosen for the final report was deliberately provocative: *Sex Trade*<sup>16</sup>. 'Sex trade' (or 'trading in sex') was also meant to be used as the label for the proposed offence of prostitution, to be defined as follows:<sup>17</sup>

A person who exploits another for casual sexual liaison in return for economic or similar compensation shall be sentenced for the offence of *sex trade* to fines or imprisonment for a maximum of six months.

The same shall apply to a person who makes himself/herself available for such sexual liaison described in the paragraph above.

If the crime is gross, the offender shall be sentenced to imprisonment for a maximum of four years. When determining whether the crime is gross, special consideration shall be given to the abuse of a person's youth, lack of judgment, vulnerability or dependent position.

The proposed criminalization was thus meant to include both the customer and the supplier in the sex trade. Both were considered culpable because both participated in the trade in sex. The gross variant of the offence also provided for a maximum sentence that was rather severe by Swedish standard. The term 'casual sexual liaison' was not defined but it was meant to include "not only the purchase of sexual intercourse and other sexual acts but also sexual services of a kind not involving direct genital contact, *e.g.* private posing"<sup>18</sup>.

As a general justification for criminalization, the commission stated the following:<sup>19</sup>

A penal provision would serve a normative purpose and make it clear that prostitution is not socially acceptable. For many clients, the risk of discovery, police investigation and legal proceedings would be a powerful deterrent. Criminalisation would also have a restraining effect on many of the women. Above all, it would be an effective means of preventing women from entering prostitution. Women would also obtain a stronger position for resisting pressure in favour of prostitution if they could argue that the activity was criminal.

And in a separate chapter in the report – containing a single paragraph (cited below) – entitled 'The Proposal from the Point of View of Gender Equality', the gender perspective of the proposal was given a prominent place:<sup>20</sup>

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<sup>16</sup> SOU 1995:15 *Könshandeln* [Sex Trade]. The report contains a summary in English (pp. 21–31).

<sup>17</sup> (My translation into English.) The new offence was meant to be included in Chapter 6 of the Penal Code on sexual offences.

<sup>18</sup> SOU 1995:15, p. 31 and p. 237.

<sup>19</sup> SOU 1995:15, p. 30.

<sup>20</sup> SOU 1995:15, p. 235 (my translation into English.).

The fact that a person can purchase access to another person's sexual sphere for the purpose of satisfying one's own sexual needs is contrary to the idea that all human beings are of equal worth and that each has the right to respect and integrity. Nor is the fact that women are seen as objects for male sexuality compatible with the view of women and men in an equal society. Increased efforts for achieving gender equality constitute an important means for the prevention of prostitution. The proposals that are put forward here [in the commission's final report] are aimed, *inter alia*, at the attainment of greater gender equality.

The proposal of the commission did not, however, lead immediately to an independent legislative initiative by the Government. The criminalization of prostitution<sup>21</sup> was tied instead to another legislative project of the time known by the title 'women's peace'<sup>22</sup>, best known for the introduction of the gender-specific offence 'gross violation of women's peace' (*grov kvinnofridskränkning*)<sup>23</sup>, as a measure against domestic violence and similar maltreatment of women in a close relationship. In this way, the problem of prostitution became identified with the greater problem of 'men's violence against women' (one of the *parole alla moda* of the feminist discourse at the time). As observed by Träskman, "for reasons of ideology, which is openly based on a feministic understanding of reality, one chooses to explicitly characterize prostitution as a crime of violence against women"<sup>24</sup>. Put in this context, it would be unthinkable to accept the criminalization of the supply of sexual service.

In the end, the Government decided to introduce a Bill to Parliament with a proposal to criminalize the purchase – but not the supply – of sexual service. The substantive content of the provision will be discussed in section 3 below. It suffices to mention here that sanctions for the offence – to

<sup>21</sup> The provocative term 'sex trade' never cottoned to the subsequent criminalization discourse.

<sup>22</sup> See report of the commission of public inquiry SOU 1995:60 *Kvinnofrid* [Women's Peace] and the Government Bill prop. 1997/98:55 *Kvinnofrid*. The commission also proposed amendments to the rape provision in the Penal Code, amendment of the legislation on the punishment of female circumcision (including a change in the labelling of the offence to 'female genital mutilation') as well as other measures not of a criminal law character, e.g. labour law provisions on sexual harassment.

<sup>23</sup> Chapter 6, Section 4a, of the Penal Code. Through subsequent amendments the provision has now a slightly different structure and area of application; it is now also applicable to mistreatment of males.

<sup>24</sup> PER OLE TRÄSKMAN, '«Den som betalar för sex är en brottsling». Om den svenska kriminaliseringen av sexköp som ett medel för att motverka prostitutionen' ['The one who pays for sex is a criminal' On the Swedish criminalization of purchase of sexual service as an instrument to combat prostitution], *Nordisk Tidsskrift för Kriminalvetenskap* 2005 pp. 73–92, at p. 75 (my translation into English).

be labelled 'purchase of sexual services' – were to be fines or imprisonment for a maximum of six months. The Government decided not to take up the commission's recommendation to criminalize the sale of sexual service and to create a gross variant of the offence. It may also be mentioned that the offence was created in a separate statute outside the Penal Code.

The legislative package 'women's peace' was adopted by Parliament in 1998. The criminal provisions prohibiting the purchase of sexual services were enacted in accordance with the Government Bill. The criminal provision is to be found in the short Act (1998:408) on the prohibition of purchase of sexual services, which reads as follows (my translation into English).

A person who obtains casual sexual liaison for payment, if the conduct is not punishable pursuant to the Penal Code, shall be sentenced for *purchase of sexual services* to fines or imprisonment up to six months.

Attempt to commit 'purchase of sexual services' is punishable in accordance with the provisions in Chapter 23 of the Penal Code.

However, the legislation was adopted subject to much fierce criticism, some of which stemming from influential bodies during the consultation process, *inter alia* the Social Welfare Board (*Socialstyrelsen*), the National Police Board (*Rikspolisstyrelsen*), the National Court Administration (*Domstolsverket*), the Chancellor of Justice (*Justitiekanslern*) and the Prosecutor-General (*Riksåklagaren*)<sup>25</sup>. Besides criticisms based on differences in ideological outlooks, questions were also raised on the assumptions and empirical data of the arguments for criminalization, the assessment of likely benefit and costs of criminalization, the proportionality of the measure against the background of the principle of *ultima ratio*, and above all the rationality of the argument as a whole<sup>26</sup>. It was however clear that pushing through the legislation was given a high priority in some quarters of the Government, to the extent that the Government Bill was prepared within the Ministry of Employment<sup>27</sup> rather than the Ministry of Justice, the ministry normally responsible for criminal legislation, purportedly as a result of the reluctance of civil servants at the Ministry of Justice to draft legislation on

<sup>25</sup> See TRÄSKMAN (2005) (note 390 above), p. 76.

<sup>26</sup> For an analysis of the protected interests of the legislation, and criticism of various grounds in favour of criminalization, see TRÄSKMAN (2005) (note 390 above), pp. 77 ff. See also PER OLE TRÄSKMAN, 'Purchase of a Sexual Service – A Lawful Private Delight or an Offence? A Study of Criminal Legislation in the Nordic Countries', 54 *Scandinavian Studies in Law* (2009) pp. 289–303.

<sup>27</sup> One of the key figures associated with 'women's peace' was Margareta Winberg, who was the Minister for Labour 1996–1998. Subsequently, she also held the position of the Minister for Gender Equality (1998–2003) in parallel with her position as Minister for Agriculture (1998–2002) and Deputy Prime Minister (2002–2003).



the criminalization of the purchase of sexual service<sup>28</sup>. To sum up, Sweden has moved from a traditionally liberal position where criminalization is not considered to be an appropriate response to the problems associated with prostitution to become one of the first jurisdictions to make the purchase of sexual services – and not prostitution as such – a criminal offence. The legislation in Sweden is politically motivated by a feminist agenda where prostitution is viewed as a wider problem of male violence against women (even though the legislation is itself cast in gender-neutral terms). To avoid misunderstanding, it should be mentioned that critics of the legislation were by no means *pro* prostitution in the sense that they viewed prostitution as something positive; the criticisms were concerned only with the question of the use of *criminalization* as a means to solve the problems associated with prostitution.

### 3. The Substantive Content of the Provision

The current provision on the prohibition of the purchase of sexual service is found in Chapter 6, Section 11, of the Penal Code, which reads as follows (my translation):

A person who – in cases other than those previously provided for in this Chapter – obtains casual sexual liaison for payment shall be sentenced for *purchase of sexual service* to fines or imprisonment up to one year.

The provision in paragraph one is also applicable when the payment is promised or given by someone other than the perpetrator.

The provision is entirely gender-neutral, so that both males and females can be a buyer as well as a seller of sexual service. There is no requirement that the seller works professionally as a prostitute. A single isolated instance suffices for both a buyer and a seller to be held responsible under this provision. Attempt to commit the offence is, pursuant to Chapter 6, Section 15, punishable in accordance with the provisions in Chapter 23 of the Penal Code<sup>29</sup>. The basic definition of the offence has remained unchanged since the original criminalization through Act 1998:408 mentioned in section 2 above. What has happened in the meantime is that the provision was transplanted from the special statute to Chapter 6, Section 11, of the Penal Code in connection with a major revision of the chapter in the Penal Code

<sup>28</sup> See TRÅSKMAN (2005) (note 390 above), p. 78 note 13.

<sup>29</sup> In Swedish law, attempt is punishable only when it is prescribed specifically. The maximum penalty for attempts is the same as that for the completed crimes. Note, however, that the instigation or the aiding and abetting of any crime in the Penal Code that has in fact occurred are punishable even without a specific provision.

dealing with sexual offences<sup>30</sup>. As a part of the amendment, a second paragraph was added to the provision in order to clarify that it would be a criminal offence even if payment for the sexual service was given or promised by someone other than the perpetrator. However, this was a mere clarification; the law was taken to have been applicable to the situations described even without the amendment. The latest change to the provision was made in 2011, when the maximum penalty was raised from six months' to one year's imprisonment<sup>31</sup>.

The provision on the prohibition of purchase of sexual service is subsidiary in the sense that it is applicable only if no other (primary) provision described in Chapter 6, Sections 1–10a, of the Penal Code is applicable<sup>32</sup>. Thus, for instance, where coercion or exploitation is involved, the conduct would be prosecuted under the other offence. For the purpose of the analysis of the substantive content of the criminal provision, one may assume that the conducts of both the buyer and provider of sex are voluntary<sup>33</sup>.

The first comment that must be made concerning Chapter 6, Section 11, of the Penal Code, is that the label 'purchase of sexual service' is misleading. What is punished pursuant to this provision is not the *purchase* as such of a sexual service. The crime consists rather in the *obtaining* of sex ('casual sexual liaison') in exchange for payment. One may say that the obtaining constitutes the conduct element of the offence, while the fact that sex is provided in exchange for payment is a contextual or circumstantial element. Both elements must be fulfilled for there to be a completed crime; the purchase – most appropriately identified with the conclusion of a binding contract – alone does not amount to the offence.

The language of Chapter 6, Section 11, of the Penal Code is rather vague, and almost every word in the definition of the offence is capable of being interpreted in a number of ways. In some cases, statements made in the *travaux préparatoires* may assist interpretation; but such statements do not

<sup>30</sup> Through Act (2005:90) on amendments to the Penal Code.

<sup>31</sup> Through Act (2011:517) on amendments to the Penal Code.

<sup>32</sup> The primary provisions define the following offences: 'rape', 'gross rape', 'sexual coercion', 'gross sexual coercion', 'sexual exploitation of a person in a dependent position', 'gross sexual exploitation of a person in a dependent position', 'rape of a child', 'gross rape of a child', 'sexual abuse of a child', 'gross sexual abuse of a child', 'sexual intercourse with a descendent', 'sexual intercourse with a sibling', 'exploitation of a child for sexual posing', 'gross exploitation of a child for sexual posing', 'purchase of a sexual act by a child', 'sexual harassment/molestation' and 'contact with a child for a sexual purpose (grooming)'.

<sup>33</sup> Even with this assumption, the criminal provision in Chapter 6, Section 11, of the Penal Code is associated with a great number of problems of interpretation/application. There is no need to complicate the matter further in the present context by discussing the voluntariness aspect in being a prostitute.

exist on some central concepts of the offence definition. There is also an absence of authoritative case law to guide the courts in their application of the provision. The only fully-reported decision<sup>34</sup> of the Supreme Court is concerned with sentencing and not the substantive provision. There exist, however, a number of decisions from the courts of appeals, from which one may draw some inspiration for the interpretation of the statute. They key concepts in the offence will be described in turn.

The central element of the offence can be said to be the ‘sexual liaison’ (Sw. *sexuell förbindelse*), which, according to the *travaux préparatoires*, means “primarily sexual intercourse but also other sexual relations”<sup>35</sup>. Some physical contact between the buyer and the prostitute is required, which is compatible with the statement given in the *travaux préparatoires* that ‘naked posing’ ought not be regarded as sexual liaison<sup>36</sup>. In the case law, various decisions from the district courts have found that ‘strip-tease’ does not amount to ‘sexual liaison’<sup>37</sup>. This will be the case even if the buyer pays for a ‘life show’ having an overtly sexual – pornographic even – character, so long as no touching by the buyer is involved. Due to the way that the provision is formulated, there is no sexual liaison between the buyer and the seller either, if *A* pays *B* and *C* to have sex with one another while *A* watches the sexual act<sup>38</sup>. On the other hand, not all physical contacts constitute ‘sexual liaison’; the contact must have a sexual character. The case law does not show us where the line between sexual and non-sexual is to be drawn in relation to the ‘purchase of sexual service’. It is unclear, for example, whether practices like ‘spanking’ or some other (in the practitioner’s perspective) sexual fetishes should be deemed to be sexual touching, if they deviate too greatly from an ‘objective’ view of ‘mainstream’ sex/sexuality. It is not entirely unproblematic either simply to borrow from the concept of ‘sexual’ as developed in sexual offence provisions such as in ‘sexual assault’ due to the (at least superficially) voluntary character of prostitution. In practice, in some judgments no details of the ‘service’ are mentioned at all in the court’s rea-

<sup>34</sup> Judgment of the Supreme Court of 9 July 2007 in Case B 3947-00, reported in NJA 2007 s. 527.

<sup>35</sup> Prop. 1997/98:55 *Kvinnofrid* [Women’s peace] at p. 136. In colloquial English one would simply speak of ‘sex’ or ‘sexual act’. In the following the term ‘sexual liaison’ will be used in the technical sense at the cost of being awkward from a stylistic point of view.

<sup>36</sup> Prop. 1997/98:55 (note 401 above) at pp. 136-7. The Government was thus of a view different from that of the commission on prostitution as reported in SOU 1995:15 (note 384 above).

<sup>37</sup> See, e.g., judgment of Stockholm District Court of 27 July 2006 in Case B 3158-05, judgment of Huddinge District Court of 23 December 2005 in Case B 1666-05 and judgment of Stockholm District Court of 22 September 2003 in Case B 3470-03.

<sup>38</sup> See further examples in TRÄSKMAN (2009) (note 392 above) at p. 301.

soning; it is simply stated that the prosecution has proved beyond reasonable doubt that sexual liaison has taken place.

The sexual liaison must furthermore be ‘casual’ (Sw. *tillfällig*). This means that payment in exchange for sex within marriage or a stable cohabitation relationship does not render the conduct ‘purchase of sexual service’. On the other hand, the fact that the buyer visits the same prostitute regularly does not mean that the sexual liaison loses its character as being ‘casual’; the law views the regular returning customer as serial buyer of ‘casual sexual liaison’. The quality of ‘casual’ is most visible in a clear buyer-seller constellation but may become blurred if other social relationships exist in parallel. The *travaux préparatoires* are not particularly illuminative on this point.

The element ‘to obtain’ (Sw. *att skaffa sig*) means that the perpetrator must actually have achieved sexual liaison with the prostitute, i.e. some form of sexual touching, in order for there to be a completed crime. As mentioned above, it is not sufficient to have reached a binding agreement to have sex. However, an attempt to commit ‘purchase of sexual service’ is a criminal offence, a buyer who has not yet obtained the sexual liaison but is on his/her way to do so may be held responsible for the attempted offence. The problems of attempts will be discussed shortly in the following.

The element ‘for payment’ (Sw. *mot ersättning*) sets out the context in which the sexual liaison is carried out, viz. in exchange for payment. It suffices that a payment is promised, even if the buyer then refuses to pay. Obviously cash is payment, and so are items having money’s worth, at least if they can easily be converted into money. Narcotic drugs and alcohol have been mentioned in the *travaux préparatoires* as other forms of payment<sup>39</sup>. There is no mention of more immaterial benefits such as a job offer, a certain grade in examination or refraining from pressing charges in exchange for sex. It is however good practice to adhere to the principle of strict interpretation of criminal statutes and not to extend the category of ‘payments’ further than what has been stated in the statutory text and the *travaux préparatoires*.

There must furthermore be a link between the sexual liaison and the payment (or promise thereof). A relevant link certainly exists if payment or promise of payment is a condition for the sexual liaison; it is not necessary that it be the only reason – a *conditio sine qua non*. The payment or promise of payment must constitute a reason for action, which means that the payment or expectation of payment must precede the sexual liaison. A promise of payment may even be implicit if the purchaser understands that there is an expectation of payment in exchange for the sexual service. This creates a particularly precarious situation when the payment or promise of payment is

<sup>39</sup> Prop. 1997/98:55 (note 401 above) at p. 136.

made by a third person – the case law appears to require that a person must always be alert to the possibility that the person with whom one is having a sexual liaison does just that in exchange for payment<sup>40</sup>. Logically a reward given *after* a sexual liaison engaged into for other reasons is not a payment for sexual service for the purpose of the criminal provision.

As mentioned earlier, attempts to purchase sexual service are punishable. The question of attempt arises in cases where the sexual liaison does not take place according to plan. According to the general doctrine on attempts, a perpetrator attempts a crime first when he or she takes a concrete step to commence the performance of an act element of the offence. However, given the definition of ‘sexual liaison’ described above, the crime will be completed simultaneously as the taking of a concrete step encompassed by the act description of the offence. The general part of the criminal law provides however that the attempt may be considered as having commenced at an earlier point in time, *viz.* when the perpetrator has taken a proximate step – a ‘last act’ – that is meant to be followed immediately by the relevant prohibited act<sup>41</sup>. In the present context, this earliest moment for an attempt to obtain sexual service must reasonably be placed at the point when the parties are about to begin the sexual act. The agreement to have sex alone is clearly not sufficient, there must be some further acts that must be taken before it can be said that the parties are about to begin the sexual act. There is a margin of appreciation when determining where the point ‘about to begin’ is to be placed. In a decision of the Court of Appeal for Skåne and Blekinge, the accused was sentenced for attempted purchase of sexual service when he and the prostitute were on the way to the prostitute’s flat, having made an agreement somewhere else and travelling by car to the address of the prostitute<sup>42</sup>. The Court justified its guilty verdict by arguing that there is no reasonable explanation that speaks against the hypothesis that the parties would have carried through their plan if they had not been interrupted

<sup>40</sup> See judgment of Svea Court of Appeals of 10 January 2011 in Case B 8277-10. In this case the Court takes the legal question as follows: “whether [the accused] realized or was conscious of the fact that there was a risk that the girls were prostitutes who provides sexual services in exchange for payment, that someone had paid for their company and services and that [the accused], in spite of this insight, took a conscious risk and carried out sexual intercourse with N.N.” (p. 15 of the judgment, my translation). On the matter of fact whether the accused had the relevant insight, the Court took into consideration circumstances “such as the girls’ provocative make-up and clothing, and the fact that that they spoke English with a strong accent” and concluded that “it must be obvious for [the accused], or in any case it must have appeared possible, that the girls were paid escorts” (p. 16 of the judgment, my translation). The reasoning of the Court can be criticized.

<sup>41</sup> The classical example is the case of break-in to houses, where the thief is sentenced for ‘attempted theft’ even before he or she has laid hands on the intended object of theft.

<sup>42</sup> Judgment of the Court of 6 March 2002 in Case B 1041-01, reported in RH 2002:16.

by the police on the street. It should be pointed out, however, that this line of reasoning deviates from the general principles on the criminal responsibility for attempts<sup>43</sup>. It is possible that an exception from the general principles must be made for prostitution cases, but this issue has not been examined by the Supreme Court.

Another exception from the principle of the general part of criminal law is that the prostitute is not held responsible for instigation even if it is the prostitute who has actively initiated the transaction by offering the sexual service. Nor is the prostitute held responsible as an accomplice. It should be noted that the doctrine of *concursum necessarium* cannot explain the exemption of the prostitute’s criminal responsibility since the offence of purchase of sexual service is not considered to be an offence committed against the prostitute. The exception from responsibility as instigator or accomplice has not been stated explicitly in the statute; that this is the legislative intent is, however, clear from statements in the *travaux préparatoires*.

A separate but important question concerning the substantive content of the prohibition of purchase of sexual service concerns the territorial scope of application of the criminal provision, as opposed to the question of whether Swedish jurisdiction exists for prosecution of crimes committed outside Sweden. There is no clear answer to the primary question whether the Swedish provision prohibits the purchase of sexual service provided outside Sweden. There is no explicit restriction on the territorial ambit of the prohibition, but implicit restriction may exist. As a rule of thumb, whereas offences whose protected interests are the personal well-being of individuals (*e.g.* homicide, assault, rape and other sexual offences) constitute crimes according to Swedish law no matter where they are committed<sup>44</sup>, offences whose protected interest is related to public order constitute crimes against Swedish law only when they are committed on Swedish territory. It is therefore relevant to inquire whether the prohibition of purchase of sexual service is intended to protect the individual or the public order. The fact is that there are elements of both and arguments based on both types of protected interests can be identified in the debate leading to the criminalization. Träskman has argued for<sup>45</sup> and confirmed<sup>46</sup> the position that the Swedish criminal provision prohibiting purchase of sexual service applies only to services provided in

<sup>43</sup> If this argument is applied to a person caught outside a building with burglary tools, that person would be held responsible for attempted theft. This, however, is not the position in Swedish law.

<sup>44</sup> It is a totally different matter, regulated under Chapter 2 of the Penal Code, whether Swedish courts also have jurisdiction to try such cases.

<sup>45</sup> TRÄSKMAN (2005) (note 390 above), at pp. 85 ff.

<sup>46</sup> TRÄSKMAN (2005) (note 392 above), at p. 301.



Sweden. The Government is, however, of the opposite opinion, maintaining that the provision has universal applicability, *i.e.* that it is a crime against Swedish law no matter where the crime is committed<sup>47</sup>. In the case law, all of the cases being prosecuted have dealt with crimes perpetrated in Sweden<sup>48</sup>, so the courts have not had the occasion to examine this issue. The question of territorial scope is, however, perhaps only an ‘academic’ question because even if the conduct constitutes a crime against Swedish law, the Swedish court must also have jurisdiction over the case. For crimes committed abroad, the most important ground of jurisdiction is based on the principle of active personality, *i.e.* Sweden will have jurisdiction over Swedish citizens and residents for their crimes committed abroad. This jurisdiction can however be exercised only if the requirement of double criminality is fulfilled, *i.e.* the conduct is also punishable according to the law of the country in which the sexual service is obtained. However, since the purchase of sexual service is not a criminal offence in most countries, the Swedish courts will seldom have jurisdiction for this offence when it is committed abroad. In particular, Sweden will lack jurisdiction with respect to offences committed in countries that are typical target destinations for ‘sex tourism’.

To complete the presentation of the substantive content of the law, it should be reiterated that Chapter 6, Section 11, paragraph 2, of the Penal Code provides that criminal responsibility attaches also to the person who obtains a sexual service for payment, even in the case that the payment is given or promised by a third party. The main purpose behind this provision is to deal with cases where prostitutes are provided for clients *etc.* in business contexts. In such cases the person who in fact has the sexual liaison will be the perpetrator, while the ones who have paid for the service will be responsible as an instigator or an accomplice depending on the circumstances of the case.

#### 4. The *suivi* of the prohibition of purchase of sexual service

An assessment of the criminalization was carried out by a commission of public inquiry set up in 2008. This commission published its final report in 2010, which provides *inter alia* a survey of different statistical studies on matters related to prostitution, accounts of the practical application of

<sup>47</sup> Prop. 2010/11:77 *Skärpt straff för köp av sexuell tjänst* [Increased penalty for purchase of sexual service], at p. 13. This is however given only as an incidental comment on a part of the recommendations by the commission of public inquiry that the Government did not take up in its own Bill to the Parliament. It is therefore questionable what value can be put on this statement in the *travaux préparatoires*.

<sup>48</sup> There was one known case when a preliminary investigation has been opened concerning a Swedish soldier alleged to have purchased sexual service while on duty during a peace-keeping mission abroad. However, no prosecution was brought in the end.

the law by the police, the prosecution authority and the courts as well as a legislative proposal to increase the maximum penalty for purchase of sexual service from six months’ to one year’s imprisonment<sup>49</sup>.

If the purpose of legislation is to induce a change in the attitude of the people, then there is some dramatic evidence showing that the criminalization of the purchase of sexual service is a total success<sup>50</sup>. A survey from 1996, *i.e.* during the years immediately prior to the criminalization, 67 % of those interviewed were *against* the criminalization of prostitution. This should be contrasted with a study from 1999, *i.e.* immediately after the entry-into-force of the criminal provision prohibiting purchase of sexual service, which shows that 76 % of those interviewed were *for* criminalization. This complete U-turn in public opinion may appear incredible, but later studies have shown that support for criminalization has remained high: 76 % in 2002 and 71 % in 2008. It seems that it may perhaps be the statistics from the 1996 study that should be called into question. But whatever the exact magnitude, it is clear that there has been a change in public perception regarding the criminalization issue and that there is now a high degree of acceptance of the criminal prohibition of purchase of sexual service. Some non-quantitative indicators seem to confirm the high level of non-acceptance of prostitution, *e.g.* that being convicted for the purchase of sexual service may constitute a just ground for dismissal from employment. The statistics cannot tell us, however, whether it is the criminalization that has caused the change in attitude.

Whether the criminalization has produced the effect of reducing prostitution is unclear<sup>51</sup>. What can be measured empirically and be verified is visible street prostitution. After an initial drop in 1999, when the prohibition of purchase of sexual service entered into force, the number of persons selling sex in street prostitution has remained stable. What is clear is that there has been a significant movement to prostitution in indoor premises, including massage parlours and night clubs. The Internet has also, since 1999, become established as the medium for advertisement of sexual services (not only under the more traditional categories such as masseurs/masseuses or escorts, but also under new disguises, *e.g.* secretarial service). Methods like the measurement of the number of advertisement on the Internet *etc.* show that supply of sexual services do exist but such methods do not tend to give any

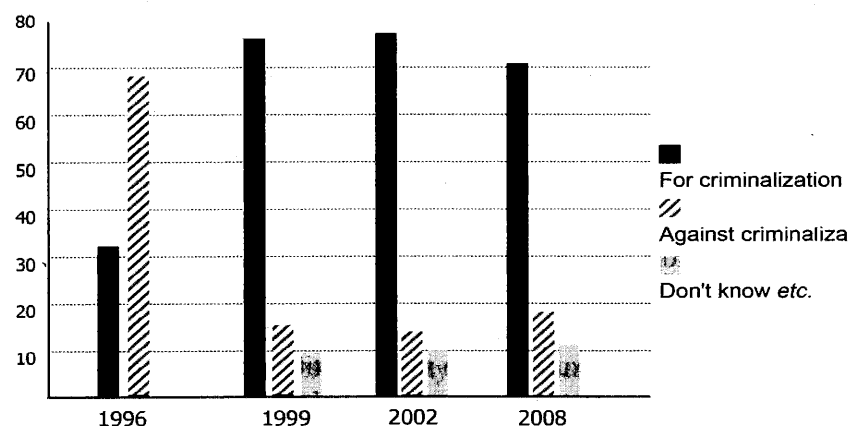
<sup>49</sup> SOU 2010:49 *Förbud mot köp av sexuell tjänst – En utvärdering 1999–2008* [Prohibition of purchase of sexual service – An evaluation 1999–2008]. There is a summary in English of the report (at pp. 29–44).

<sup>50</sup> The statistics referred to in this paragraph are taken from SOU 2010:49 (note 415 above, at pp. 123–126). For a graphic representation see figure 1 below.

<sup>51</sup> The statistical conclusions referred to in this paragraph are derived from SOU 2010:49 (note 415 above, at pp. 146–164).

reliable and verifiable results concerning the actual extent of prostitution. Thus, in general, there is little actual empirical support showing whether prostitution has decreased – or actually has increased – during the period when the prohibition of purchase of sexual service has been in force.

**Figure 1: Attitudes towards the criminalization of purchase of sexual service 1996–2008 from four quantitative studies with samples of the Swedish population. Amount in per cent.**



Source: Figures mentioned in SOU 2010:49, at p. 124 (referring to Månsson, 1996, SIFO 1999, SIFO 2002 och Kousmanen, 2008 – see SOU 2010:49 for details).

As far as law enforcement is concerned, there has been a steady increase in the number of reported crimes<sup>52</sup>. As the parties engaged in prostitution typically do not report their crimes to the police, the reported crimes are almost exclusively the results of police investigations. The number of reported crimes fluctuates rather significantly. While the low frequencies in the early years can be explained by a lack of knowledge and routine on the new legislation, the sudden increase in some years is attributed to the seizure on a single occasion of a large number of client records from an organized prostitution ring. In any case, the variation in the number of reported crimes has more to do with the priorities and available resources of the law enforcement authority rather than the actual number of crimes being committed.

<sup>52</sup> See figure 2 below. The statistic does not distinguish between a completed crime and an attempt. The statistics for purchase of a sexual act of a child and for trafficking in human beings for sexual purposes have been included for the purpose of comparison.

**Figure 2: Number of crimes reported 1999-2011**

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Purchase of sexual service	94	92	86	110	300	156	460	163	189	187	352	1,277	765
Purchase of a sexual act of a child	19	21	30	56	22	38	60	46	67	46	150	233	131
Trafficking in human beings (for sexual purposes)	–	–	–	–	22	29	44	27	15	15	31	32	35

Source: data taken from Brå statistical database.

Of the individuals being charged for the offence, there is also a steady increase in the number of persons actually being convicted<sup>53</sup>. The conviction rate is rather high due to the fact that the vast majority of suspects caught would confess and accept a penal order. Moreover, as many police reports are the results of the suspect being caught *in flagrante*, the evidence tends to be sufficient for a conviction.

**Figure 3: Number of persons convicted 1999-2011**

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Purchase of sexual service	10	29	38	37	72	48	94	108	85	69	107	336	450
Purchase of a sexual act of a child	0	4	1	1	1	5	0	1	6	4	6	9	7
Trafficking in human beings (for sexual purposes)	–	–	–	–	1	0	7	11	2	0	4	6	2

Source: data taken from Brå statistical database.

<sup>53</sup> See figure 3 below. The statistic does not distinguish between a completed crime and an attempt. Note that while figure 2 shows the number of *crimes* reported, figure 3 shows the number of *persons* convicted of the offence. The statistics for purchase of a sexual act of a child and for trafficking in human beings for sexual purposes have been included for the purpose of comparison.

As mentioned above, the overwhelming majority of cases are dealt with by penal orders. Although the maximum sentence for the offence is one year's imprisonment (six month's imprisonment for offences committed before 1 July 2011), it is extremely rare that a prison sentence is imposed. In 2011, the confirmed cases are disposed of as follows:

**Figure 4: Disposition of confirmed cases 2011**

Imprisonment <i>fängelse</i>	1
Probation <i>villkorlig dom</i>	1
Fines <i>böter</i>	130
Penal order <i>strafföreläggande</i>	301
Decision not to prosecute <i>åtalsunderlåtelse</i>	14

*Source:* data taken from Brå statistical database.

Against the background of the findings of empirical studies and records of law enforcement, one may say that there is no clear evidence that the criminal provision has any effect on the extent of prostitution. However, the law may still count as a success as it is shown that a change in the attitude of the general public – from *against* to *for* criminalization of purchase of sexual service – has been achieved, even though one may argue about the magnitude of this change. Prostitution is less acceptable now than it was before criminalization<sup>54</sup>. But this does not entail that the law has had a strong deterrent effect; the law has not had the effect of making a potential buyer refrain from purchasing sexual service even though he or she accepts that it is wrong. The proposal of the commission on prostitution was based very much on prostitution as a structural and systematic problem of society. Notwithstanding this structural perspective where focus is put on the 'career' of prostitution, the actual text of the provision in Chapter 6, Section 11, criminalizes all kinds of sexual liaison in exchange for payment; in other words the provision over-criminalizes, it has a much greater reach than the problem that criminalization is meant to address. However, the practical experience from law enforcement shows that only the purchase of sexual

<sup>54</sup> Although the statistics collected have been based on questions concerning the interviewed persons' opinion on purchase of sexual service as a criminal offence, it is submitted that the question may easily be misunderstood as one concerning the wrongfulness of prostitution. The statistic may therefore not show whether the general public also considers criminalization is a necessary instrument to combat the problems of prostitution.

service from professional prostitutes has in fact been prosecuted. Finally, despite the openly feminist rhetoric used during the criminalization debate, there is no evidence that prostitution is, after all these years, now generally perceived as an expression of 'male violence against women'. There appears to be no difference in the treatment of male prostitutes and female prostitutes in reported cases. A recent study indicates that young males are in fact more susceptible to offer sexual service for payment<sup>55</sup>. The effect of the criminal provision is on many points not what it is intended to be. Yet, the maximum penalty for the offence was raised from six months' to one year's imprisonment as recently as 2011. There is thus a continued trust – on the part of the legislator – in the criminal law as an instrument to combat the problem of prostitution. The reason given for the increase in maximum penalty was the need to differentiate the punishment of lenient and serious cases, and that a greater range will enable the courts to hand down more nuanced sentences<sup>56</sup>. A general increase in the level of punishment is another manifestation of the problem of over-criminalization mentioned above. It is submitted that a better way to address the problem of serious cases of prostitution where exploitation is a characteristic element would be to create a separate variant of the offence with an appropriate penalty. The arguments against criminalization are still valid, especially with respect to less serious cases. There is however politically no prospect of initiating a debate on decriminalization or partial decriminalization of purchase of sexual service. It is an accepted norm in Swedish public order that purchase of sexual service is a criminal offence.

<sup>55</sup> *Utsatt? Unga, sex och internet*, Ungdomsstyrelsen, Stockholm 2012 (Report of the National Board for Youth Affairs in Sweden on sexual vulnerability of young person.) In this study carried out in 2009 on the attitudes and experiences in sexual matters among young persons in their final year of secondary education (normally 18-19 years of age), it is shown that 1.5 % of the interviewed – 1.2 % for females and 1.7 % for males – have offered sex in return for some form of compensation.

<sup>56</sup> Prop. 2010/11:77 (note 413 above), at pp. 5-11.