



# Consistency and relevant considerations in the sentencing of criminal cases

**The Swedish National Council for Crime Prevention (Brå) -  
centre for knowledge about crime and crime prevention measures**

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This report is a summary of the Swedish report Enhetlighet och relevanta hänsyn i dömandet i brottmål 2021:16  
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urn:nbn:se:bra-1024

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# Consistency and relevant considerations in the sentencing of criminal cases

English summary of Brå report 2021:16

# Summary

On several previous occasions, Brå (the Swedish National Council for Crime Prevention) has studied the degree of consistency in the sentences imposed by district courts in criminal cases and found differences between Sweden's various district courts. On the basis of the principle that equivalent cases shall be assessed in the same way, there is reason to study the consistency of sentencing in criminal cases in more detail. In the present report, Brå continues with the study of the sentencing consistency, but also examines which factors are taken into consideration when sentencing, and how this varies between groups of judges and between groups of courts. This has been achieved by means of an experimental vignette study, in which judges were asked to assess the appropriate sentences for a number of fictitious cases. The study examines the following questions:

- 1 With regard to consistency in sentencing: Are there any differences between different groups of judges or between different courts with regard to: a) which penal value they assess the fictitious cases as having, b) the number of judges who choose imprisonment or alternative sanctions, respectively, or c) the length of the sentence chosen when a prison sanction is chosen?
- 2 With regard to sentences being determined on the basis of relevant considerations: What significance is given to: a) factors that should be of significance, such as the seriousness of the offence and various circumstances associated with the offence, and b) factors that should not be of significance, such as the defendant's gender, age or native/non-native background, at different stages of the sentencing process?

Brå's intention is to improve the existing knowledge base regarding factors that may have an impact on equality before the law by contributing to an improved knowledge of both the degree of consistency in judges' sentencing assessments and the factors that are taken into consideration at different stages of the sentencing process.

## The sentencing process in Sweden

When sentencing, the court decides the sanction that will be imposed in the case in question. Sentencing comprises two principal elements: the severity of the sentence, and the type of sanction. The severity of the sentence is primarily based on the penal value of the offence. The assessment of penal value should be based on factors relating to the actual criminal act itself, such as the type and circumstances of the offence. Once the penal value has been determined, other factors that may mitigate the sentence can be taken into

consideration, which then results in a determination of the severity of the sentence to be imposed.

Once the severity of the sentence has been established, the type of sanction is chosen. Sanctions are divided into punishments (which include imprisonment and fines) and other sanctions (which include conditional sentences and probation). When determining the choice of sanction, factors relating to both the criminal event and the defendant's personal circumstances can be taken into consideration. A statutory presumption against imprisonment means that the court should not impose a custodial sentence unless there are strong reasons to do so. However, a high penal value, the nature of the offence, and recidivism, can all serve to nullify the presumption against imprisonment. There may also be special reasons to impose a non-custodial sanction, for example if the defendant is deemed suitable for community service.

## Data and methods

The study consists of two parts: an experimental vignette study and an interview study.

### **The experimental vignette study**

In the experimental vignette study, judges from district courts and courts of appeal throughout Sweden have made an assessment of the penal value, sanction (prison or other sanction), and in the case of a prison term, also the length of the custodial sentence, in four fictitious cases (vignettes), which comprised one case of serious drink-driving, one theft, one assault and one narcotics offence.

The vignettes consisted of a description of a criminal act together with various combinations of factors that, based on the existing legislation, should be taken into consideration when sentencing (for example, the seriousness of the offence, and extenuating or aggravating circumstances). The vignettes also included factors that, based on the existing legislation, should not influence the sentencing process (for example, the defendant's gender or age), because research indicates that such factors may still influence judges' assessments.

The following factors were included in the vignettes: the type of crime, the degree of seriousness of the crime, the presence of aggravating circumstances, the presence of extenuating circumstances, the presence of what are in Sweden termed "equity factors"<sup>1</sup>, the defendant's previous criminal record, the defendant's social situation, the defendant's family situation, problems with substance abuse (and in such cases, the defendant's motivation to

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<sup>1</sup> The term refers to factors such as a defendant having voluntarily turned him- or herself in to the police, or the defendant being in poor health, which may be viewed as mitigating in relation to the sentence imposed.

receive support and treatment), the defendant's gender, the defendant's age and whether the defendant was of native or non-native background.

The presence of these different factors was systematically varied between the vignettes in such a way as to enable their relevance for the judges' sentencing assessments to be analysed statistically. The statistical analyses show whether there are any systematic differences between groups of judges or between groups of courts (question 1 above), but also which of the factors were taken into consideration in the assessments (question 2). The report does not analyse differences in the assessments of individual judges or courts; instead the focus is on the presence or absence of systematic differences in the assessments between different groups of judges and between different groups of courts.

#### **The respondents, and management of the low participation rate**

The study population consisted of all permanent judges and all non-permanent judges with the official titles acting assessor, acting judge or junior judge, at all of the country's district courts and courts of appeal. A total of 990 judges were contacted and asked to participate in the vignette study, of whom 209 judges agreed to take part (21 percent). The level of participation varied between different groups of judges, and was low among certain groups. The low participation rate and the uneven distribution of participating judges influenced decisions regarding which statistical analyses it was possible to conduct, and this should also be taken into consideration when interpreting the results, because a low level of participation makes it more difficult to produce statistically significant results in the analyses.

#### ***The low participation rate affects the results to a varying extent***

For methodological reasons, the low participation rate has greater significance for the reliability of the results regarding the first question examined by the study, i.e. the level of consistency in sentencing between different groups of judges and between different groups of courts, than for the second question, which focuses on the legal and non-legal factors that affect judges' sentencing decisions.

With regard to the first question, it is possible that more indications of inconsistency between different groups of judges and courts may have been detected if a larger number of judges had participated in the study.

With regard to the second question, the results showing that certain factors influence the judges' assessments can be regarded as reliable. At the same time, it is possible that additional factors may also influence the judges' assessments, but that a larger number of participants would be required for the effects of these factors to emerge as statistically significant.

### **Focus group interviews**

In the second part of the study, four focus group interviews were conducted with a total of 14 judges. The interviews included discussions of the grounds on which assessments were made in different cases, the different steps judges take when making sentencing decisions, and also the preliminary results from the vignette study. The interviews have been used in order to better understand and interpret the results of the vignette study.

## **Results and conclusions**

### **Sentencing largely consistent across judges and courts**

With regard to the question of sentencing consistency, the results of the vignette study show that the fictitious cases were assessed in a consistent manner in different areas of the country, with one exception. Judges operating in the jurisdiction of the court of appeal for Skåne and Blekinge assessed the fictitious cases as requiring imprisonment to a lesser extent than judges operating in the jurisdictions of other courts of appeal. No differences were otherwise detected between the groups of judges or courts with regard to their assessments of the penal value of the offences, the choice of sanction, or the length of custodial sentences. One conclusion in the report is therefore that the fictitious cases were largely assessed in a consistent manner.

### **Factors of significance for sentencing**

The factors that should influence judges in their sentencing assessments vary across the different stages of the sentencing process. The factors that have a significant influence on sentencing have therefore been analysed and presented separately for the judges' assessments of penal value, choice of sanction, and length of custodial sentences.

### **The assessment of the penal value of the fictitious cases**

According to the sentencing rules, the penal value should be based on factors that relate to the actual criminal act. Of the factors that are included in the vignettes, the seriousness of the offence, together with any aggravating or extenuating circumstances, should have significance for the assessment of the penal value of the fictitious cases, which the analyses also show to have been the case. The assessed penal value increased in line with increases in the seriousness of the offences, and with the presence of aggravating circumstances, while it decreased with the presence of extenuating circumstances. These factors have thus had the expected effects on the judges' assessments. In addition to these, however, the judges' assessments were also affected by the defendant's previous criminal record, the presence of substance abuse and motivation for support and treatment, and also by the defendant's gender. None of these factors should in fact affect judges' assessments of penal value.

### **The assessment of the choice of sanctions in the fictitious cases**

In the assessment of the choice between prison and other sanctions, all factors that relate to the offence or the defendant's personal situation may be taken into consideration. According to the analyses, all the relevant factors had an effect on the judges' assessments, with the exception of extenuating circumstances. The greater the seriousness of the offences, the greater the likelihood of a custodial sentence. The presence of aggravating circumstances also increased the likelihood of the imposition of a custodial sentence, while the presence of equity factors reduced the likelihood of a custodial sentence. The factor that had the greatest impact on the choice of sanction was the type of offence, with the fictitious narcotics offences resulting in custodial sanctions to a considerably greater extent than the other types of crime. This result might partly be explained by the nature and penal value of this crime type, and partly by factors that affect the opportunities to impose a probationary sanction for narcotics offences.

In cases where an offence may result in a sanction other than a fine, the court obtains a pre-sentencing report from the Swedish Prison and Probation Service. This report describes the personal circumstances of the defendant that are of relevance to the court's sentencing decisions. All of the factors studied that related to the information included in these pre-sentencing reports were also taken into consideration in the choice of sanctions. The likelihood of a custodial sentence increased if the defendant had a previous criminal record or was living in a disordered social situation, which here means that the person did not have a job and/or home. The likelihood of a custodial sentence decreased, however, if the defendant had a child. If the defendant had extensive substance abuse problems and was not motivated to change, the likelihood of a custodial sentence also increased, while it decreased if a defendant with substance abuse problems was motivated to change. These results are in the expected direction on the basis of existing sentencing rules.

### **The assessment of the length of the prison sentences**

In their assessment of the length of custodial sentences, judges should consider the seriousness of the offence, any aggravating or extenuating circumstances, and also any equity factors. Of these factors, the analyses showed that the seriousness of the offence and the presence of aggravating circumstances had an effect on the assessment of the length of custodial sentences, while the presence of extenuating circumstances or equity factors did not.

The analyses showed that the defendant's gender also had an effect on assessments of the length of custodial sentences. Those fictitious cases involving a female defendant resulted in a shorter custodial sentence than those involving a male defendant. Further analyses showed that the presence



of aggravating circumstances affected the judges' assessments of fictitious cases involving a male defendant, but not those involving a female defendant.

### **Discussion of the results of the statistical analyses**

When viewed together, the analyses regarding the considerations that affect sentencing decisions showed that most of the relevant factors had been taken into consideration when assessing the fictitious cases, and that the fictitious cases had thereby largely been assessed in accordance with the sentencing rules.

At the same time, certain patterns emerged that are worthy of further reflection. One such pattern is that factors that result in harsher penalties appeared to have had a greater effect on the judges' sentencing assessments than factors that result in lighter sentences. This could be because judges employ the minimum sentence as a point of departure for their sentencing assessments, and that this means that there is not as much room for extenuating factors to have an effect as there is for aggravating factors.

Another pattern in the statistical analyses is that irrelevant factors concerning the defendant's person had been taken into consideration in the judges' assessments of the fictitious cases. If the defendant had a previous criminal record or problems with substance abuse, these factors had also affected the judges' assessments of penal value, which would not be expected on the basis of the sentencing rules, and the defendant's gender had also affected the judges' assessments of both penal value and the length of custodial sentences.

### **Stereotypical perceptions may have a subconscious influence**

With regard to the significance of the defendant's gender, several explanations were discussed during the interviews with the judges, such as the fact that women do not usually commit the more serious offences, and that when men and women commit offences together, the man is often the dominant party. However, such explanations cannot directly explain the gender differences found in the statistical analyses, since these analyses were designed in a way to control for such factors.

The judges themselves stated that the image they have of a female defendant, compared with a male defendant, may have subconsciously influenced them. International research has also shown that men are judged on the basis of stereotypical perceptions of a perpetrator, while women are judged on the basis of stereotypically gender-related perceptions. This could perhaps also explain the results from the vignette study that showed that aggravating circumstances were taken into consideration when the defendant was a man, but not when the defendant was a woman. It cannot be ruled out that the significance attributed to other personal characteristics, such as the

defendant's previous criminal record or substance abuse, may be the result of similar subconscious processes.

According to the analyses, however, neither the defendant's age nor whether the defendant was of native or non-native background affected the judges' assessments of penal value, choice of sanction or the length of custodial sentences in the fictitious cases.

### **Several uncertainties regarding how different factors should be taken into consideration when sentencing**

In the interviews with the judges, discussions emerged concerning a lack of clarity in the sentencing process, which might conceivably influence their assessments of various factors that are to be taken into consideration when sentencing. One such uncertainty was that it was not entirely clear whether the lists of extenuating and aggravating circumstances stated in the legislation are to be regarded as exhaustive or illustrative, and whether these circumstances may be taken into consideration if they have not been explicitly raised during the court hearing. In addition, the judges stated that in cases involving extenuating or aggravating circumstances, it can also be difficult to know how much weight these factors should be given in relation to other circumstances. The judges felt that there was greater clarity concerning equity factors, although it could be difficult to know the extent to which even these should be taken into consideration.

### **External factors that may adversely affect sentencing consistency**

The interviews also revealed external factors that may adversely affect sentencing consistency. The judges indicated that the pre-sentencing reports submitted by the probation service are not always consistent and do not always maintain a consistent level of quality, and that defendants' suitability for community service is assessed inconsistently by the probation service. The interviews also revealed that judges may vary in their propensity to impose a probationary sentence, depending on the level of confidence that the judge has in the probation service. A judge with a high degree of confidence in the probation service may be more likely to impose a probationary sentence than a judge with a low degree of confidence in the probation service. On the basis of the discussions during the interviews, there may therefore be a need to review the quality and consistency of the assessments made by the probation service in order to avoid such differences.

### **Proposals for the courts**

Research suggests that raising awareness is one strategy for reducing the significance ascribed to irrelevant factors in decision making. Increasing judges' awareness of potential stereotypical perceptions (for example, concerning the defendant's gender), might therefore be expected to reduce the

significance of these. In the same way, being aware of the uncertainties involved in the sentencing process may also contribute to greater consistency among judges' sentencing decisions. One proposal is therefore that judges work to create more forums in which they can discuss cases, in order to clarify those aspects and guidelines that are unclear, and that they also discuss types of cases that might involve a risk that their assessments and decisions may be affected by subconscious attitudes and stereotypes.

### A hope that the report will contribute to an increased interest in research on the work of judges

Despite the limitations of the study (which are primarily associated with the low level of participation), it has been possible to perform several different analyses, the results of which have also led to interesting discussions with judges. The report also shows the benefits of the experimental vignette method in the study of the assessments made by professionals. It is Brå's hope that the report may contribute to an increased interest in research on the work of judges in Sweden.