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# Presentence investigations in Probation Service – Creative Solutions in Bureaucratic Institutions

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*“In the pure form of bureaucratic organization universalized rules and procedures would dominate, rendering personal status or connections irrelevant. In this form, bureaucracy is the epitome of universalized standards under which similar cases are treated similarly as codified by law and rules, and under which the individual tastes and discretion of the administrator are constrained by due process rules..” definition of Bureaucracy in the Encyclopedia Brittanica*

## **Abstract**

The presentence investigation (personutredning) provides a foundation upon which the courts base their decision in sentence deliberation. It is a task performed mainly by probation officers who work for the Swedish Prison and Probation Service, a public administration authority. The organisation's structure is bureaucratic in nature, much the same as many other public authorities; the activities are rationalized through laws and directives. Max Weber regarded the bureaucratic structure to be the most effective and rational form of organising activity with impersonal rules minimising the need for discretion and personal judgement. The presentence investigation might well be such an activity, rationalized by instructions conveyed in the directive and legal text. However, texts have to be interpreted by human subjects and words have no intrinsic meaning. The objective of this study was to understand the extent to which the task is rationalized and at the same time examine the extent of the demand for personal judgement, bearing in mind the enormous power inherent in the task, the power to affect the future of an individual. What I found after interviewing six probation officers was that the task demanded a degree of interpretation greater than was expected, as well as a degree of personal judgement and an opportunity to apply the Aristotelean phronesis or practical wisdom that one would wish to be present in all social workers who make such far-reaching decisions.

**Key Words:** bureaucracy, personutredning, presentence investigation, presentence report, probation service, rational-legal authority

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## **Foreword**

This study would not have been possible without the generous co-operation and willing participation of the six probation officers who perform this, what I regard to be, intricate craft. Thank you for your openness.

I thank my supervisor, associate professor Max Koch, for his tailormade supervision, positive nature, motivation, constructive feedback and encouragement.

Special thanks to my life-partner and mentor, Jurgen, who has the patience of a saint and the wisdom of Solomon, always willing to get involved, to support, to encourage, to motivate and to help.

## **1. Introduction**

Probation Service, the division of Prison and Probation Service that administers the non-custodial sentences, in the criminal justice system in Sweden features during three different junctures of the criminal justice process - pre-trial, post-trial and the re-integration (post-custodial) phases. Sometimes, during the pre-trial phase, the courts order a presentence investigation to be conducted on the suspect. The investigation culminates in a report which is submitted much in the same manner as would a statement from an expert witness, the difference being that the report contains a recommendation for a sentence.

The conditions under which the presentence investigation is ordered vary in description but the object of the task is to provide the courts with a basis in the sentence deliberation. The presentence investigation as a phenomenon is remarkable, partly because of the power and authority aspects, taking into account that it is instrumental in determining the sentence. The degree of the impact of the presentence report can be debated but in the branch, specifically in Sweden, there is a general experience of that the judges rule in accordance with it. As is the case in the United States and many other countries, the presentence investigation and subsequent report are administered and coordinated by the probation authorities. The task itself is carried out mostly by probation staff that hold the office of, "probation officer."

The presentence report contains information about a suspect's current social situation as well as a brief description of his history, his attitude to the crime which he is suspected of and concludes with a recommendation for a sentence. In this manner, and in the interests of justice, the courts allow the suspect to be presented and in the interests of legal security, someone other than the suspect provides the representation of himself and his situation. The probation officer thereby finds himself in the precarious situation of maintaining his objectivity in serving the state, the community, and addressing, as well as attempting to accommodate, the needs of the suspect.

The sentencing reform in Sweden in 1989 (Borgeke 2008:18) was meant to give impetus to a shift in penal policy towards the proportionality principle, that is to say that the punishment should fit the crime, where the crime, as opposed to the offender, is the focal point in the sentencing process. Since the presentence investigation addresses the needs of the offender, one would therefore expect a corresponding decrease or, even, cessation in the number of investigations being conducted but in fact the trend seems to be moving in the opposite direction. Contributory factors may be many, one of them being that the "treatment

ideology”, which dominated Swedish penal policy in the nineties, seems to be still very much alive today. This results in individual prevention still receiving significant emphasis as a factor in the sentencing deliberation. It would be reasonable to propose then, that the increase in orders for presentence investigations might be an indication of the lingering of the individual prevention penal ideology.

The standardized procedures to be followed when conducting the presentence investigation are rationalised and set forth in the directive KVFS 2006:15 *Kriminalvårdens föreskrifter och allmänna råd om personutredning och yttrande i brottmål* (Prison and Probation Service regulations and general instructions regarding the presentence investigation and presentence report in a criminal case) and are based on the law, *lag 1991:2041 om särskild personutredning i brottmål m.m.* (on specific presentence investigation in criminal cases etc.).

The Swedish Prison and Probation Service is a public authority and part of the criminal justice system, as is the case in many other countries. The actions which comprise the work of Probation Service are regulated through a system of legislation and organised in a bureaucratic structure where authority is legitimized through legal codes. The administrative staff, in this case civil servants, hold an office (probation officer) with the accompanying authority which is legitimized by, and codified in, the legislation.

Weber’s approach to the way in which activity, or work, is arranged in an organisation led him to distinguish between three different types of authority through which orders for activity are legitimized (Parsons 1964:56). An organisation, according to Weber, usually bears traces of the dominance of one of three types of authority, namely rational-legal authority, traditional authority and charismatic authority. When the structure is bureaucratic in nature, the dominating authority is typically rational-legal. In such a bureaucratic organisation the source of, and legitimation for, this rational-legal authority, is the order (for activity) itself. Weber felt that bureaucracy in its purest form is the most superior method of attaining the highest degree of efficiency and rationality in an organisation. He conceded, however, that one of the social consequences of bureaucratic organisation is a prevailing sense of “formalistic impersonality” an approach devoid of hatred or passion, but unfortunately also without affection or enthusiasm. He also mentions the existence of norms as being based on uncomplicated duty-bound without regard to personal considerations or discretion(a.a.).

At the first glance, Weber’s model should be a favourable instrument of analysis with which to study the presentence investigation as it is rationalized by legislation and legitimized by legal authority. At a closer examination, however, it appears that there might

be significant room for discretion since the legal codes have to be interpreted by those who apply them. This study investigates whether the praxis in conducting the presentence investigation involves adhering to the rules in a strictly bureaucratic way and to which extent the factor of personal consideration plays a role in the process.

## **2. Objective**

The purpose of this research project is to investigate whether the phenomenon of the presentence investigation is conducted increasingly according to a system of formalized rules and regulations as Weber thought would be the trend for the organisation of activity in bureaucratic organisations or whether in fact a considerable amount of personal consideration and judgement is employed.

## **3. Central research questions**

- a) How does the probation officer integrate the authority and power inherent in the existing legislation and rules when conducting the presentence investigation?
- b) What leeway is there for a probation officer to exercise personal judgement or discretion when conducting the presentence investigation?

## **4. Methodological considerations**

### **4.1 Research Design**

Meeuwisse et al (2008:37) refer to Taylor & Bogdan's definition of qualitative methods as being research whereby descriptive data is produced and which pertain to people's written or spoken words and observable behaviours (2008:27, my translation). The criteria for qualitative methodology are mentioned as being inductive and regarding people within their contexts in their entirety, as opposed to simply regarding them as being variables in a study. Researchers trying to comprehend people from their own frame of reference is mentioned as a final criterion (a.a.). My research design is, in accordance, qualitative in nature. I have decided to use qualitative methods, rather than quantitative ones, since I am studying human subjects, their way of reasoning as well as their approaches and I feel that my selected topic is too complex for simply confirming or disproving a hypothesis. Galtung (1969:118) recommends using the interview (for its flexibility) and qualitative methods at the onset of the research thereby gaining insight for hypotheses and interpretation. Once the hypothesis is formed the researcher could then employ quantitative methods. The author explains that both

qualitative and quantitative methods have their place in social research and that each method can favourably be utilized according to their advantages. A quantitative study on the outcome of the level of congruence between the court's decision regarding the sentence and the probation officer's recommendation, for example, could be part of a greater study on the topic of my choice - the presentence investigation.

## **4.2 Method**

The interview rather than the questionnaire will be the method employed for data collection. I aim to focus on the human element. By that I mean that I am more interested in deliberation strategies of the probation officers as opposed to merely analysing which decisions they arrive at. As Galtung (1969:113) suggests, verbal responses can be more effective than written responses if the researcher is interested in the "softer issues" such as ideology. Another advantage of using the interview method as Galtung points out is the possibility for immediate "follow-ups". During the interview follow-ups can be improvised and favourably adapted to attain as much relevant information out of the respondent as possible.

The format of the interview will be semi-structured. Open-ended questions will be posed. The reason why I favour a less structured form of interview is because:

i) unstructured interviews permit unexpected responses (Galtung 1967:120) and ii) the respondents experience a greater level of freedom in responding which in turn creates a greater level of flexibility (a.a.).

## **4.3 Validity**

Galtung (1969:29) addresses the topic of validity in social research as being a question of whether or not data can be used exactly for the purpose they were designed to meet. Furthermore, data should be such that "legitimate inferences" can be made and that there should be some kind of preparation and awareness in the researcher before he embarks on the collection of data. The author adds, however, that the need for this preparedness is not as great when the nature of the study is more descriptive and exploratory (a.a.). My decision to use the interview rather than the questionnaire could contribute to a greater level of validity as Galtung explains, since the greater degree of flexibility provided by the interview produces more nuances, as opposed to written responses to questionnaires.

#### **4.4 Selection of data**

The interviews will be conducted with probation officers that carry out presentence investigations. As mentioned previously, it is the human aspect of the decision process which is of interest to me from the angle of possible deliberation strategies, interpretations and/or moral considerations. The degree of autonomy and discretion which the probation officer has at his or her disposal is arguably great and the guidelines provided in the law on presentence investigations comparatively meagre.

I have chosen probation officers of both genders, across a 25-year age spectrum and of varying experience as part of my strategy and intention to look for differences in the types of reasoning and motivation for the recommended sentence. Both genders are represented.

Other documents to be used as information sources will be the relevant legal text contained in the law, the Prison and Probation Service directive as well as scientific literature.

#### **4.5 Reliability**

Galtung (1969:70) differentiates between the manifest content of data and the latent content of data. In the interests of reliability the interviews will be recorded by a tape-recorder thereby removing a fallible in the collection of data. The recordings will later be manually transcribed, thus making the data accessible to the researcher in its original form.

#### **4.6 Litterature sources**

Litterature on presentence investigations is very rare. Göte Johnssons, *Personundersökningen : informationsmetodiska aspekter på lagen om personundersökning i brottmål* (Presentence investigations: information-methodological aspects of the law on presentence investigations in criminal cases {my translation}) will be used to gather knowledge about the Swedish conditions for the presentence investigation.

Previous research on presentence investigation – in particular a thesis, *Betydelsen av personutredning och yttrande i brottmål vid straffmätning and påföljdsval* (*The significance of presentence investigations and statements in criminal in the sentence deliberation*) from the legal faculty – will also be used in the framework.

Martin Borgekes book, *Att bestämma påföljd för brott* (choosing a sentence for the crime) while it does not mention the presentence investigation, it does provide a valuable background from a legal standpoint on how the underlying ideology of the Swedish sentencing system has developed over the years. Through his book I have been able to gain

more insight into the connection between the sentencing recommendation and the judicial outcome. Borgekes book is also the latest and most up-to-date book to be found on the subject at the time the research was conducted.

#### **4.7 Foreunderstanding**

To have foreunderstanding is to pre-comprehend the meaning of phenomena before fully understanding it (Blom & Nygren 2006).

The question of foreunderstanding and its relation to objectivity, prejudice and distance is relevant in this case since I, the author, have been employed in the probation office and have myself, on occasion, conducted presentence investigations. One may question how this situation might affect my striving after objectivity as well as the ability to apply critical thinking in the research process. I choose to see it as an advantage in that the knowledge contributes towards increasing the level of competence in studying the research question. Additionally it can be regarded as an advantage from the point of view that the knowledge possessed facilitates the designing of the research.

#### **4.8 Ethical Considerations**

The reflection upon ethical problems which might arise as well as how one may circumvent them is and should be an important factor of any research project. As a researcher one should strive to conduct the research in such a way that does not jeopardise the basic respect for human dignity. Principles of research ethics in humanistic-social scientific research (Forskningsetiska principer i humanistisk-samhällsvetenskaplig forskning, Vetenskapsrådets webbsida Codex – regler och riktlinjer för forskning) as numerated on the Codex official homepage (Internet 2009) emphasises four main criteria to ensure that ethical matters are addressed as they should be in social research, regarding informing of the participants, voluntary participation, confidentiality and finally utility.

##### **4.8.1 Informing of the participants**

The participants, in this case, the probation officers, who will actively be participating as interviewees will be informed of the purpose and the nature of the research, with special emphasis on information which might influence their willingness to participate. They will also be informed about the details of the participation, that is to say, the nature of the participation as well as the expected time-frame.

#### **4.8.2 Voluntary participation**

The active participation will be voluntary. The participants will be at liberty to terminate their participation at any time of their choosing without fear of negative repercussions. The issue of the nature of the relations between the participants and myself as the author cannot be avoided and deserves consideration since the participants have from time to time been colleagues of mine. I do not however feel that this might present ethical problems since the relation cannot be described as a direct dependency-relation.

#### **4.8.3 Confidentiality**

The probation officers will be pseudonymised. It will not be impossible for individuals who have not been involved in the research project to identify participants. The cassettes will be erased after the interviews and the transcriptions stored in a locked cabinet.

#### **4.8.4 Utility**

All information gathered will only be used for the purposes of this research project and not for any other purposes.

### **5. The presentence investigation**

Very little literature in Sweden is found on information regarding the presentence investigation which is puzzling when one takes into account how important the task is. One of the few and most basic sources on the subject is Göte Johnsson's book, *Personundersökningen : informationsmetodiska aspekter på lagen om personundersökning i brottmål* (Presentence investigations: information-methodological aspects of the law on presentence investigations in criminal cases {my translation}], published in 1971 and aimed at people carrying out presentence investigations. At that time the presentence investigation was referred to in Swedish as "personundersökning" which translates into "personal examination" in English. It has since been changed to "personutredning" which translates into "personal investigation".

"Do facts really speak for themselves?" is the provocative question with which Johnsson challenges the reader, as an introduction to the first chapter about presentence investigations. During the presentence investigation the "facts" or information about the suspect are transmitted to the investigator who analyses, processes and conveys them in a presentation to the courts in the form of a presentence report. A large part of the investigation

involves therefore processing of information and the author takes us through a rudimentary presentation of information processing theory. Information about the suspect is gathered partly during an interview with the suspect and partly from other authorities. Throughout the interview the suspect presents information to the investigator which is later processed, analysed, evaluated and, together with information from the authorities, presented to the courts. Other types of information which the investigator receives about the suspect are from various public authorities such as social services, the Swedish enforcement authority, social insurance, the criminal registry, employers and people who feature in the suspect's social network. Many different influencing factors come into play during the gathering and analysing of information which make it a highly subjective process. During the interview the investigator is presented with information about the suspect's situation through listening to the suspect. The investigator simultaneously interprets and conceptualizes the information. Other details such as facial expressions, verbal and non-verbal cues are also taken into account. The author reminds us that is human nature to choose the "easy way out" when it comes to interpreting and conceptualizing information. With our collective previous experiences we prefer to choose the interpretation which reinforces our own ideas and prejudices. Interpretations, expectations and attitudes contribute towards our making sense of our world - the way that we think it should be, and more than what it is (a.a.).

However, as Johnsson reminds us, the human factor in the communication process is not only negative or disadvantageous, despite the potential shortcomings in the interpreting of information, as it also lends itself to providing a therapeutic element in the rather sudden relationship that emerges between suspect and investigator. The suspect could perceive the information gathering process as an attempt by the investigator to bring about some form of change in the suspect's criminal behaviour or social environment(a.a.).

Another important task in the information gathering process mentioned by Johnsson is being able to utilize the information, that is to select the relevant information and present an accurate presentation of it. Having selected the relevant information the final task is to document it and convey it to the courts. The choice of text and language in the presentence report is of a decisive nature. Once the document has been conveyed to the courts that which is written in the report is final (a.a.).

In summarising the chapter and as a response to the opening question, "Do facts really speak for themselves?", Johnsson concludes that, only when the investigator has used the facts (information received) from the suspect in a systematically correct way, decided which facts are to be conveyed, the order in which they are to be conveyed as well as the

context in which they are to be conveyed, can we really claim that “facts speak for themselves” (a.a.).

The presentence report is, for reasons explained above, a communication instrument which is primarily used as a guideline in sentencing. It also features as a treatment instrument in the planning phases of the suspects encounter with Prison and Probation Service.

## **5.1 Problems**

Johnsson (1971:26) warns about the pitfalls of two erroneous approaches in the stage of gathering information. The first of these approaches is to take something for granted after, for example, having read information from the preliminary investigation. This could mean that upon meeting the suspect the investigator has pre-conceived ideas about the suspect and subsequently fails to confront the “real” suspect during the interview. The second erroneous approach is to have a preconceived solution based on the most available and convenient alternatives instead of focusing on the actual situation at hand.

Johnsson challenges the reader to think about his role as an investigator and poses the following questions: What is my attitude towards my task? What is the driving force for my involvement as an investigator? Do I regard myself to be a bureaucratic collector of information or do I approach the task with understanding and attentiveness, ready to help and inform as needed? How will the suspect regard me? Will the suspect regard me as a positive element in the judicial process?

## **5.2 Information received prior to meeting the suspect**

This information consists of the application for arraignment (with a description of the criminal act), an extract from the criminal registry and, on occasion, the protocol of the preliminary investigation. As mentioned previously by Johnsson, information is also received from social services, the Swedish enforcement authority and social insurance. The advantages of receiving the above-mentioned information in advance is that it can provide a basis for the interview and also that the investigator is presented with an idea of the nature of the suspect’s social complex of problems in a discrete way. The investigator can thereby also avoid posing questions about certain sensitive issues since he already has received that information. In this way the information also saves time.

### **5.3 Education/training of presentence investigators**

As Johnsson (1971:5) points out, despite the fact that the presentence report can have a decisive effect on an individual - in this case the suspect's - future, there are no special qualifications required to conduct such an investigation. Most of the investigations are carried out by probation officers who either have a degree in law, the social sciences or behavioural science, but not much formal education or training in personal investigations is provided.

## **6. General sentencing principles and underlying sentencing ideology**

As an introduction to the subject at hand, it might be useful to mention the underlying ideology and principles upon which the Swedish sentencing system is based. The most basic premise underlying the penal code is that non-custodial sentences receive preference by the sentencing officer over custodial sentences according to Prison and Probation Service's official homepage on the Internet (Kriminalvården). Furthermore, the penal code is designed to allow the courts "considerable latitude" in the sentencing deliberation. While on the one hand measures with the interests of promoting the protection of society are taken into account, measures aimed at rehabilitating the offender receive more prominence (a.a.).

### **6.1 Changing times, changing values**

Borgeke (2008:18) mentions the paradigm shift – from deterrence principles to proportionality principles - which took place in accordance with new sentence regulations which came into effect in January 1989. The underlying ideology is not the only factor that brings about change in the sentencing process. Other changes, such as change in a society's value-system, can also influence the process. Borgeke exemplifies by mentioning how society's views on incarceration have changed, long before the current regulations. Another example provided is the increasing inclination towards more stringent sentences (a.a.).

### **6.2 Equality**

Under Swedish sentencing doctrine legislation demands first and foremost that the court's decisions on sentencing be uniform, that is to say that like cases shall be treated alike or uniformly (Borgeke 2008:19). However, the question arises, to which extent is it possible to treat cases alike? The problem, as some would claim, is that no one perpetrator is exactly like another. Neither can one criminal event be identical to another. Furthermore, the deliberation in the sentencing process is carried out by individuals and all human operations of this type

are subject to variation in forms too many to explain. Similarly, in applying the law, the individual judges are expected to be independent in the exercising and to take responsibility for interpreting both the laws to be applied as well as assess each specific case according to legal doctrine. All in all one must conclude that, even if cases can appear to be very similar, they will differ in some way in varying degrees (a.a.).

### **6.3 Humanity**

The sentencing process as a system rests upon fundamental tenets, the most prominent being the principle of humanity. By applying this principle as a point of departure means that, in the sentencing deliberation, the most lenient sentence will be chosen.

### **6.4 From retribution to treatment ideology**

Punishment theory has developed over time, focusing initially on retribution which Borgeke explains belongs to the “absolute punishment theories”. According to these theories, punishment does not have a social or practical purpose but it is expressed as an ethical demand. The reaction to the crime must be just retribution as in the principle of *lex talionis*, “an eye for an eye”. Such a principle has no place in today’s society, claims Borgeke. Subsequently the relative punishment theories have emerged and here one can distinguish the purpose of punishment, namely, to deter crime, as the point of departure. These theories are broadly categorised into general deterrence (aimed at deterring the general public) and individual deterrence (aimed at deterring the individual). The strain of individual deterrent theories found their expression and enjoyed the greatest influence throughout the 20<sup>th</sup> century via the prevalent treatment ideology. With treatment ideology as a point of departure punishment was replaced with treatment alternatives, in that way addressing the causation of crime in the perpetrator instead of punishing him. An example of the introduction of contract treatment as a sentence alternative – where the suspect signs a contract thereby binding himself to undergo treatment as an alternative to serving a prison sentence – is a result of the effects of the treatment ideology on the sentencing system. The author accentuates the problematic nature of administering treatment in this way, by using force (a.a.).

### **6.5 Proportionality**

According to the proportionality principle that he who has committed a crime shall suffer a consequence (punishment) proportionate to the gravity of the criminal deed. At the most basic

level, the principle rests on the fairness of the punishment. Satisfying these two criteria means that the sentence must be congruent with legal norms which can be motivated by ration.

### **6.6 The significance of recidivism (reoffending)**

Reoffending and whether the occurrence of it should be a factor in sentencing deliberation is a point of contention in the political arena. Borgeke argues that a criminal action can not be more injurious or dangerous because the perpetrator has committed crimes before, not even if it is the same crime being repeated. Applying a more severe penalty could, in effect, mean that he is being punished once again for a previous crime. Borgeke offers an alternative approach, according to the principles of tolerance. One could reason that with a first-time perpetrator, if the prescribed penalty were to be more severe than a fine then he would be sentenced to a penalty in the “warning” category, such as conditional sentence, in the spirit of tolerance. If he were to be committed of a crime a second time, he would be received with less tolerance and sentenced to a more invasive sentence, for example, probation. With repeated criminality, the probation could be applied more stringently and finally, a prison sentence. The current situation is, if the perpetrator has a criminal record it will count in his disfavour (possibly resulting in a more severe penalty) in the sentencing deliberation (a.a.).

### **7. Phronesis – an Aristotelean virtue**

In Aristotle’s *Nichomachean Ethics* (1990) the virtue phronesis is described as “practical wisdom” or “prudence”. It is the capability to consider which course of action to take in certain situations which would enhance the quality of life. Phronesis comprises not only of the skill of deciding how to achieve a certain result but also includes the ability to reflect upon the result. Knowing the principles of action is necessary, but knowing how to apply them in the real world in sometimes unforeseen situations requires experience of the world (a.a.).

Similarly, in the presentence report, a recommendation for a course of action, in this case the sentence, is conveyed by the probation officer. In the deliberation process, an assessment of the risk of recidivism is made and a decision arrived at, as to how best to prevent it. This skill of deliberation and arriving at the best course of action is not one which is learned overnight.

## 8. Previous Research

In her thesis, *The significance of presentence investigations and statements in criminal in the sentence deliberation* (my translation), Bondeson (2004) points out that, since sentencing ideology has changed from being focused on individual and general deterrence to proportionality towards the end of the 1980's, the presentence investigation should subsequently and gradually have received less prominence or even become redundant. However, the opposite has proven to be the case and the number of presentence reports carried out annually has increased significantly, rather than decreased.

According to Prison and Probation Service own statistics, obtained from the official homepage (Kriminalvården) the number of presentence investigations carried out in Sweden have increased annually from 25 302 in 2003 to 28 565 in 2008.

Figure 1: Amount of presentence reports and statements 2003-2008

År	Person- utredningar
2008	28 565
2007	27 477
2006	27 051
2005	26 061
2004	26 155
2003	25 302

Bondeson reflects that the presentence investigation is more than just an element of due process or proper legal procedure, designed to facilitate the courts' task. The author analyzes the presentence investigation as an information process, an ideological issue and an examination, the primary purpose being to act as an instrument of communication rather than being an end in itself (a.a.).

The author also highlights the problem of interpreting the standard phrase of "stable social conditions" in the presentence report. During her interviews with probation officers, when posing the question of which meanings are attached to the phrase, she is met with different answers. Posing the same question to the courts results in yet another different answer (a.a.).

## 9. Theory

### Weber's rational-legal authority

One of the most noticeable features of Weber's sociological work according to Talcott Parsons is his concern with what he sees as the minimizing of the significance of authority in social relationships (1964:56). I have chosen to contrast the phenomenon of presence investigation against certain aspects of the Weberian "rational-legal authority" because of the significant amount of, possibly undermined or understated, authority and ensuing power which is encased in the task of carrying out a presence investigation, the power to influence the future of an individual.

In the introduction to *The Theory of Social and Economic Organisation* Parsons (1964:56) presents Weber's model on authority where he distinguishes between three basic types, namely *charismatic authority*, *traditional authority* and *rational-legal authority*. He believed that the charismatic authority reigned first, chronologically and that, by means of a revolt, traditional authority would surface after which in more modern times, the rational-legal authority would be the dominating type (a.a.).

The third of these types - rational-legal authority - is the type which is in focus for the purposes of this study. This kind of authority in an organisation, as Parsons points out, rests upon the belief of its members in judicial law (legal authority) or natural law (rational authority). Where rational-legal authority is prevalent, conduct is arranged according to rationalization and a normative order, the terms of which are codified in a group of generalised rules which apply to all the members. The order has been legitimized by its having been imposed by a legitimate organ and/or procedure. Here the basic source of authority is the authority of the order which is impersonal and all-encompassing. The individual member only has a function within the organisation in so far as that he possesses a specific and legitimized "office" as expressed in the rules. Even with the status attached to the office, the members' powers are restricted to a "sphere of competence" which is clearly defined in the rules. Beyond this sphere the members are treated as citizens with no more authority than any other individuals. Obedience to the order is not directed at a specific leader but to the order itself.

Where traditional authority is the dominant source of authority, the order is regarded as always having existed and is binding. There is no legitimate body which has imposed the order, as is the case with rational-legal authority. In the underlying order one

finds a definition of a system of statuses of the members whereby they receive legitimation to exercise authority. Parsons draws attention to the difference between the status and the “office” as with rational-legal authority. The powers of the status are not specifically defined. Neither are they limited to that which is legitimized in the contents of the order. The status comes with a sphere of arbitrary free choice where decisions can be made discreetly (a.a.).

The first two types of authority emerge and exist as attributes of an established social system. Charismatic authority – the third type - differs from the first two types of authority in character. While these types are more passive in their nature and while they emerge as a matter of routine, the charismatic variant has arisen as a result of an active claim to authority by a charismatic leader. Charismatic authority, according to Weber (1964:361) exists and thrives beyond everyday routine and the civil sphere. In this manner it is, by nature, in opposition to the origins of legitimacy found in rational, bureaucratic or traditional authority. The charismatic leader introduces a code of “conduct conformity” which is interpreted as a definite duty, thereby also claiming moral authority and, consequently, legitimacy. Obedience in this case originates out of members’ duty and/or obligation to the leader rather than free will. Members are disciples of the leader and do not hold an office in the rational-legal sense nor do they receive a status as in the traditional sense.

In an organisation with administrative staff where rational-legal authority prevails, the organisation takes the characteristics of a bureaucratic structure which Parsons presents as an ideal type in Weber’s model (1964:58). Weber is positively disposed towards bureaucracy and bureaucratic control and suggests that it is a more effective and rational form of organisation than the preceding forms which have existed, characterised by charismatic and traditional authority. One of the social consequences of bureaucratic control is an ascending atmosphere of uniform impersonality, the focus on duty according to the rules without taking into account personal considerations. A bureaucratic official utilises his skills and judgement but these have to be aligned with the rules. If personal persuasion is in conflict with the rules it is sacrificed since discretion results in inequality and disharmony. Everyone is subjected to uniform decisions and treated equally. The “ideal official” according to Weber (1964:340) conducts his office in this manner.

## **10. Summary of empirical material**

All of the officers approached were willing to be interviewed. Their educational background included a Bachelor of Science in Social Work in five cases and a degree in Law in one case. Their experience ranged from 23 years to two years.

It was brought to my attention on numerous occasions during the interviews that the presentence report is only a foundation upon which the courts base their decision. The authority that accompanies the submission of a presentence report is therefore subordinate to the courts' legislative authority and power. Another matter that I was reminded of was that the presentence report only receives consideration if there is a guilty verdict. The regulations regarding the process and format of the presentence investigation as specified and rationalised in the directive were not challenged or questioned during the interviews. On the contrary, the officers referred to the directive to substantiate their responses, on a few occasions. The directive is derived from the law and the presentence investigation was conducted by the officers according to their understanding of the specifications in the directive.

In this section the summary of empirical material is arranged according to the order that the related questions are placed in the interview, for practical reasons, but really they could have been categorised according to recurring themes which can be traced through many of the questions. These themes were namely, authority (of the office and the directive) and the accompanying power, discretion or personal consideration (the decisions which had to be taken while conducting the investigation), methods (used during the investigation) and interpretation (of the task), and deliberation (in arriving at a recommendation for a sentence).

I commenced the interviews by posing the question of how the officers defined their tasks as presentence investigators. Questions about how the officers conveyed information to the suspect revolved around the authority and power (of information). Questions on whether external factors were taken into account in the deliberation process were related to the theme of discretion, although the theme about methods also became relevant. Questions about character references and about discussing the criminal event were based on methods and interpretation but elements of discretion and deliberation were also present. The theme of methods and interpretation provided the background for questions about cooperation with the courts, the processing of information from other authorities and the use of documents. These questions however also had elements of the discretion theme, deliberation and interpretation. These themes are more fully discussed in the analysis and

discussion. The interview was concluded with a request for factual information regarding training and education.

Here follows a summary of the empirical material gathered during the interviews:

### **10.1 The task of the presentence investigator, according to the respondents**

Most of the respondents regarded the main objective of the presentence investigation to be to provide the courts with a foundation on which to base their decision regarding an appropriate sentence. The respondents did not fail to point out that the submitted report culminated in a recommendation, thus emphasizing that the courts had the final say in the sentencing deliberation and not the respondents/officers themselves. One respondent pointed out the importance of conveying this information to the suspect, i.e. that the investigator did not have the final say in the sentencing process, and that the presentence report would only be taken into consideration by the courts if there were to be a guilty verdict. As a point of departure, the variation in the suspect's needs as different individuals was a recurring theme and it was stressed that the sentencing recommendation should specifically be suited to the particular suspect's needs at the time of conducting the investigation. Certain officers saw their task as involving the responsibility for presenting the courts with a representation of the suspect. This was important since during the court proceedings the impression of the suspect (presented by other parties) would be based on past events. The presentence report brought the courts up to date with the suspect's current situation. Quite often a year, or even two years, had lapsed since the criminal event and it was not uncommon that the suspect had gotten his social life in order by obtaining employment, seeking treatment for substance abuse and/or had not been suspected of further crimes.

When it came to the recommendation of a sentence the respondents explained that it came down to a question of taking a stance on whether the suspect was a suitable or unsuitable candidate for supervision and/or community service. Motivating in the report one's recommendation for a sentence was regarded to be important.

Most of the respondents mentioned that the interview which was conducted provided an excellent opportunity to scout out and campaign for potential candidates for rehabilitation.

It served the interests of Prison and Probation Service as a whole, to make the presentence investigation and report as meaningful as possible. In this way, if the suspect were to be convicted to a custodial or probation sentence, the presentence report would serve

as a useful foundation for the planning and execution of the sentence, as well as a valuable information instrument to staff members who would be working with the suspect.

### **10.2 Keeping the suspect informed (using expertise/information authority in a positive way)**

Most of the officers sent out Correctional Services' information brochure on presentence investigations together with the summons to the interview. It was apparent that the suspects very seldom read the brochure. The officers commenced the interview by explaining the nature, contents, proceedings and purpose of the presentence investigation. Most mentioned that they pointed out that the report would be read out at the hearing if they were found guilty and that it would then become a public document.

The voluntary aspect of participation was also discussed. The suspect is summoned to, and consequently has a legal obligation to present himself for, an interview for the purposes of the presentence investigation but he does not have a legal obligation to participate in the investigation. In the case of non-participation it was noted in the presentence report which ultimately would affect the suspect disfavouredly in the courts' sentencing deliberation. This would present a problematic situation since the probation officer, in the interests of impartiality was not able to inform the suspect that his non-participation would have adverse effects. The probation officers solved this by advising the suspect to reconsider after discussing the matter with his attorney. Often the suspect experienced himself as being in a state of emotional imbalance and consequently more apt to make hasty decisions. Therefore it was important to allow him the opportunity to reconsider the possible consequences resulting from his decision.

Another confusing situation can arise regarding community service. When the suspect signs the form indicating that he agrees to abide by the rules relating to community service should he be found guilty and should he be sentenced to community service, confusion can arise as to whether the suspect is, at the same time, figuratively signing an admission of guilt. He might also be get the impression that, by signing the form, he would increase his chances of being sentenced to community service as opposed to prison which most suspects would want to avoid. Some officers dealt with this problem by allowing the suspect to take the form home and sign it when they felt ready. Two officers commented on the importance of explaining to the suspect in detail the consequences of signing the form.

During the interviews the significance of treating each suspect as if he were unique was emphasized. The officers felt that it was easy to slip into the routine of "conveyor

belt” processing, especially after having carried out personal investigations for a number of years. They tried to put themselves in the suspect’s situation, of “having your whole world turned upside down in a moment”, especially the suspects who were being processed in the justice system for the first time. “We owe it to people to treat them as though their situation was unique, because it is unique for them, “ commented one officer.

### **10.3 Broaching the criminal event during the interview**

Responses to the question, “do you address the matter of the criminal event during the interview with the suspect” were varied - from “never” to “always” and included nuances in between.

A definite affirmative answer to the question was substantiated with the reasoning that it was important to address the matter of the consequences (in a “pedagogical manner”) resulting from certain behaviours, especially if the suspect was young, that is to say, in his twenties and especially if the suspect was suspected of a violent crime such as “assault”. The importance of discussing the criminal event increased in a positive relation to the amount of times the suspect had been suspected or charged with a similar crime previously.

Certain officers saw the discussion around the criminal event as being connected to addiction problems and used questions as a springboard to gather more information on that subject. In that way possible candidates for correctional services’ treatment programmes could be screened.

Questions relating to the criminal event were posed to determine such topics as motivation (for actions related to the criminal event), insight (into the reasons as to why the event took place) and regret (for the harm inflicted or for bad judgement). The suspect’s attitude to these matters were included to substantiate the officers’ recommendation of a sentence.

The probation officers broached the subject of the criminal event by posing the questions, “how did it come about that you ended up in such a situation?” or “how did this situation come about?”. If the suspect denied having committed the actions he was asked “how did it come to be that you are suspected of ...(the actions)?”

Most of the officers made a point of mentioning to the suspects that they (the officers) did not take a stand on whether the suspect was guilty or not. One officer reinforced this declaration of impartiality, symbolically, by placing her pen down on the table to indicate that she would not be documenting this particular portion of the interview.

Another comment arose about the vulnerability of the suspect and appreciation for the fact that he was in a traumatic situation – especially if he was being held in detention. Concern was expressed that the risk for possible attachment (by the suspect to the officer) was greater in such situations and it was therefore more advantageous to the suspect in the long-term for the officer to keep a professional distance and to protect the suspect from exposing more of himself than was necessary for the purposes of the investigation.

If the suspect was convinced that he was innocent of the crime that he was suspected of, he would generally not be willing to discuss any possible problems in his social situation and the discussion during the interview would be limited.

Those officers that answered in the negative, to my question of addressing the criminal event, were qualified by statements such as, “it is not really my task to address the subject” and “one tries to remain as neutral as possible.” Another response was that the officer was more often met with the attitude that the suspect took it for granted that the officer had been informed of the details of the event.

#### **10.4 Character references**

On the matter of whether or not the officers obtained character references from the suspects the responses ranged from “always” to “sometimes”. The feeling was on the one hand that it did not receive high priority amongst half of the officers while the other made a point of always attempting to obtain references. Among the officers that always attempted to obtain references a “good reference” was the suspect’s employee which could attest to the fact that the suspect was reliable, punctual and showed no signs of having substance abuse problems. One officer reasoned that if the suspect came across as being “simple” and “honest” and if there was no indication of underlying problems then a character witness was not considered to be necessary. Some of the presentence investigations were last-minute affairs where the order from the courts could arrive as late as a week before the trial and because of time constraints, references would receive a lower priority status. Another officer commented that it wasn’t of any particular significance in the sentence deliberation. There was also the shame aspect. Some of the suspects had not informed anybody in their lives about their suspect-status in a criminal case, thus making it difficult for them to supply references. In that case it would be noted in the report that the suspect was the only source of information (with the exception, of course, of the public authorities). Finally, the “best reference” was considered to be the suspect’s employee.

The quality of the reference was important. Ideally it would have to be a person who was close enough to the suspect to be able to know them well enough but not so closely connected that they would be biased. Everybody agreed that getting a character reference from, for example, parents or life partners wasn't very meaningful. One way of compensating for the "bad quality" of the reference was to specify the source very clearly leaving it up to the courts to decide whether they would take the information into consideration or not.

The motivation for obtaining references differed. Most agreed that having "good references" was a prerequisite for being regarded as a suitable candidate for community service. In that case the employer was the preferred character witness since he would be able to testify to the suspect's reliability, punctuality and ability to cooperate. However, the employer was not aware in all the cases that the suspect was involved in a criminal case so in order not to jeopardize their employment the suspect was not required to use the employer as a reference. One officer methodically refrained from assessing the suspect's suitability for community service in the absence of character references. Another assessed suspects without references and felt that the fact that the suspect had a permanent employment was enough of an indication of suitability for community service.

Another reason for obtaining character references was to corroborate information which the suspect had provided.

## **10.5 Taking into account external circumstances in the deliberation process**

### **10.5.1 When a large time period had lapsed since the criminal event**

If the suspect has not been suspected of any other crimes and if he has a socially stable situation then these two factors, in addition with a long interval since the criminal event, play a role in the deliberation process, specifically with regards to whether the suspect is to be regarded as a suitable candidate for supervision. One officer expressed that it was wrong to "persecute people for old crimes", especially if they had taken charge of their lives and improved their social situation.

### **10.5.2 When the suspect has suffered a serious injury as a result of the crime**

Only in the practical sense is this aspect taken into account, in that it can reduce the risk of further crimes being committed. The proportionality aspect is not taken into account, that is to say, the investigator would not consider it to be a significant factor in the sentencing deliberation in that the amount of suffering would result in a recommendation of a more lenient sentence.

### **10.5.3 When the suspect risks losing his employment**

It was felt by one officer that the loss of employment would increase the risk of further crimes being committed and therefore this factor would indirectly influence the sentencing deliberation. One of the officers would recommend probation if the suspect risked losing his job as a result of a prison sentence.

It was pointed out to me the interviewer that these factors in the directive were only meaningful to the officer in that they might play a part in affecting the risk for further crimes being committed. I was reminded yet again that the investigator does not have the ultimate responsibility for deciding on the sentence. One officer expressed relief that it was not encompassed in the task of the investigator to make the final decision on the sentencing issue.

In one interview the discussion took a turn towards the human aspect of prejudice, the tendency to moralise, the problem of feeling judgemental towards the suspect, dislike for the suspect, abhorrence of his alleged actions at the criminal event and how these factors influenced the attitude with which the suspects were received and treated throughout the investigation. It was vital to be aware of these feelings and to distance oneself from them so that professionalism could come to the fore and help the investigator to conquer these obstacles. It was felt that the most effective way to approach these obstacles was to be aware of them and to try to understand them as opposed to denying that they exist. One way of coping with these human aspects which could negatively affect the communication process in the transfer of knowledge was to confer with a colleague. It was considered counter-productive, and not in the interests of rehabilitating the suspect, to approach the sentencing deliberation in the spirit of revenge since it could convey the wrong moral message to the suspect, namely that revenge could be justified.

### **10.6 The form – assessment of suitability for community service and supervision, the stance on conditional sentence**

During my interviews with the officers I brought into the discussion the matter of a form which exists and which one would send or fax to the courts together with the presentence report. On the form the investigator would indicate whether he thought that the suspect is suitable for community service. Further information which could be completed on the form had to do with whether the suspect was suitable or unsuitable for supervision. A square with the words “conditional sentence” next to it could also be found on the form. The question was

posed to the officers as to whether or not they completed the section of the form pertaining to conditional sentence.

Four out of six would normally not complete this section. One officer replied that the square was left blank. As the interviewer I was once again reminded that the purpose of the presentence investigation was to assess whether there was a need for supervision and suitability for community service. Furthermore, if it was expressed that the suspect was not in need of supervision, this did not necessarily mean that he was assessed to be a good candidate for community service or that he should receive a prison sentence. Taking a position on the suspect's suitability for conditional sentence was not considered to be included in the task of the presentence investigator. Another officer did not use the form at all and included his assessment of the suspect's suitability for community service in the actual presentence report. (It should be pointed out here that it is always included in the presentence report which in essence means that the investigator reflects twice his position on the questions of supervision and community service). It was believed that the courts did not pay heed to the form so there did not seem to be reason to complete it. Another officer who also had responded in the negative to this issue felt that the courts would be able to "read between the lines" in the presentence report as to whether or not a candidate was suitable for conditional sentence. An indication to guide the courts would be produced when it was written that the suspect was not suitable for supervision. If the investigator motivated his decision by highlighting the suspect's orderliness then it was hoped that this would be interpreted that there was no need for supervision and therefore conditional sentence would be a possible alternative. If the investigator motivated his decision by accentuating that the suspect was active in a criminal lifestyle and that supervision could not be considered as an option to lessen the risk of recidivism, then it was hoped that the courts would interpret this as being grounds for a more invasive sentence.

Of the officers that did check the square, one reminded me, once again, as the interviewer, that it was the courts that had the final say.

### **10.7 Processing of information from other authorities**

As previously mentioned, information about the suspect is obtained from other public authorities. The most common sources are the criminal registry, social services, the Swedish enforcement authority and social insurance. This information provides valuable insight into the social situation of the suspect from a different source, information on whether a suspect has been sicklisted, pays child support, receives a pension or some form of financial

aid from the state, whether he has previously been taken into custody by social services for treatment, has unpaid debts, a criminal record, to mention a few examples.

The information can have an indirect influence in deciding on the sentencing recommendation and is an important component in providing a picture of who the suspect is. An officer exemplified by explaining that while substantial debt reflected in the excerpt from the Swedish enforcement authority did not necessarily mean that the suspect was an obvious candidate for probation, it was indicative of a problem in the suspect's economic and possibly social situation. It was important to use discretion when using this type of information in the process of the investigation since one could not conclude that the suspect was disorderly based solely on his debt situation. The officer in question usually raised such matters in the interview with the suspect, in order to gain more clarification.

During the interview, another example was offered as to what this kind of information could further reveal. In one case a long-term sicklisting was reflected on the excerpt from the social insurance authority records. Upon probing into the matter the officer discovered that the suspect had been involved in a traumatic incident which had affected his psychological health in a permanent manner. The balance between protecting the suspect's integrity (since the report would become a public document at the trial) and presenting a fair representation of the suspect and his current situation to the courts had to be found. The officer arrived at the solution of presenting the suspect as having been involved in a life-changing trauma which had affected his mental health.

In addition to the above-mentioned information is also the actual request for presentence investigation from the courts which inform about the crimes the suspect is suspected of and in some, cases, an account of the criminal act in the arraignment application.

## **10.8 Cooperation with the courts and prosecution office**

According to the general instructions in the directive KVFS 2006:15, Probation Service should have regular contact with the courts as well as the prosecution in the matter of presentence investigations regarding general issues as well as specific cases.

### **10.8.1 General issues**

According to my knowledge a meeting for the purposes of discussing general issues between the above-mentioned parties had been held once in a period of one and a half years since January 2008 at the probation office where I conducted my study and the officers couldn't accurately remember the date when such a meeting had taken place before that occasion.

During that meeting the question had been posed by probation staff to the guests (defense attorneys, prosecution and judge) as to whether they were satisfied with the quality of the presentence reports they were receiving and it turned out that they claimed to be satisfied. The impression was that it was a symbolic meeting in the interests of goodwill but that one was left with a feeling that nothing of true substance had been discussed. The fact that the meeting took place at all was considered to be positive because “something happens when people meet” even if the protocol is slim or even non-existent.

### **10.8.2 Specific cases**

Because of time constraints contact with the prosecutor regarding specific cases was gradually diminishing. Furthermore, prosecutors were difficult to reach by telephone. It was custom to contact the prosecutor if probation was working towards a “treatment agreement” (kontraktsvård) which meant that probation would recommend and prepare for the suspect to receive treatment for an addiction instead of a prison sentence. One of the conditions of a “treatment agreement “ is that the prison sentence imposed cannot exceed two years. In such cases it would be meaningful to contact the prosecutor, inform him that there were plans to look into a treatment agreement and to somehow find out from him (while carefully trying to avoid influencing the case) whether or not it would be meaningful to continue with the planning of the treatment agreement.

## **11. Analysis of empirical material**

Weber offered the model of bureaucracy as the most effective and most rational structure upon which to organise activity. Despite the negative associations (impersonality, excessive rules, inflexibility) which the concept of bureaucracy infers, supported by recurrent warnings in the form of 20<sup>th</sup> century dystopian literature, Orwell’s *1984*, Gilliam’s *Brazil* and Kafka’s *The Trial* to to name but a few, it still remains the most common contemporary form of organisational structure, and not in the least, in public administration. Since Probation Service - being a division of Prison and Probation Service which is a public authority - has a bureaucratic organisational structure, one could be inclined to analyse its activities using the bureaucratic model as a frame. Furthermore, since the administrative procedures, and consequently, the presentence investigation, are regulated and authorised according to legislation, a comparison with Weber’s rational-legal authority model could initially be an obvious choice. However, as much as there is no escape from the rules designed to rationalise

the procedures in conducting the presentence investigation, neither is there escape from the human factor, the need for interpretation of the rules and the innumerable junctures – during each presentence investigation – during which the demand for personal judgement arises. The rational-legal authority concept within the bureaucratic model provides an interesting vantage point from which to examine the presentence investigation. The presentence investigator grapples with many issues.

### **11.1 Authority and power imbalances**

That the authority - encapsulated in the task of the presentence investigation as codified in the directive KVFS 2006:15 (Prison and Probation Service regulations and general instructions regarding the presentence investigation and presentence report in a criminal case) and the authority embedded in the office of “probation officer” – receives its legitimation by means of the fact that it is included in the legislation is self-evident. Whether the officers’ motivation to carry out their tasks is connected with a belief in the rules, in this case the directive, was not addressed, is difficult to gauge and could possibly be examined in a new study. Neither was the extent of the officers’ current knowledge of the contents of the directive addressed.

On the one hand the application of the rules allows for such a significant amount of interpretation and discretion that one wonders to which extent a belief in the rules would be needed for the execution of the task. On the other hand, the directive was not openly challenged or critically evaluated during the interviews, despite the fact that it formed the basis of the interview schedule. Through delegation the more senior, experienced officers have the authority to conduct presentence investigations and to submit reports without there being any scrutiny or quality control from a higher authority. For those that have not been delegated the authority, the presentence reports are reviewed and cosigned before submission to the courts.

During the interviews I was constantly mindful of the respondents’ awareness of, and the cautiousness with which they handled, the authority of their office and the power manifested in the procedure of conducting the presentence investigation. This was repeatedly expressed, categorically, as well as implicitly. One way in which it was felt to be expressed were the frequent reminders directed at the researcher that the ultimate decision with regards to sentencing would be taken by the judge. I interpreted this as possible reluctance to acknowledge the magnitude of the authority inherent in the directive and the effects of the presentence report in the trial. It turns out that, the courts ruled up to 85% in agreement with the sentence recommended in the presentence report.

Power imbalances between the respondents' knowledge and expertise regarding the task and the suspect's ignorance in the area of knowledge and procedure were positively addressed. Often the suspect had not previously been exposed to the justice system and did not have a clear understanding of the proceedings or functions of the presentence investigation. Attempts by the respondents to compensate for this imbalance were made by repeatedly providing information. Information brochures were sent by mail to the suspects in preparation for the interview but almost all of the suspects, according to the respondents, failed to read them. Commencing the interviews with an overview of the procedure and the aims of the presentence investigation was standard procedure with all the respondents.

The investigators also sympathised with the fact that many suspects found themselves to be in an anxious state merely at the thought of having to deal with an agent of the Prison and Probation Service authority, especially if it was the first time that they had been suspected of a crime. This form of power imbalance, that is to say between the suspect and the power and the authority attached to the office and status of an agent of "Probation Service" and the organisation in general, was another issue to be addressed.

Situations arose during the investigation, as mentioned in section 10.2, where the suspect could become confused as to the extent of the investigator's authority, such as the instance where the suspect was required to submit his signed consent to the community service rules. This could mislead the suspect into thinking that the probation officer would be authorised to effectively sentence him to community service, as opposed to, for example, a prison sentence.

Some investigators tackled the power imbalance by reminding the suspects that his participation in the investigation was voluntary. The negative effects of this was that the investigator, in the interests of objectivity, was unable to inform the suspect of the negative impact of non-participation and in so doing risk influencing the case. Non-participation would be indicated in the report giving the courts an impression that the suspect was uncooperative, thereby attracting the courts' disfavour. The investigators circumvented this risk by advising the suspects to consult their legal representative before making hasty decisions about withdrawing their cooperation.

It is my opinion that the investigators used their authority and ensuing power in a positive way. Not only were they aware of, and willing to discuss, the extents and effects of the authority of their office, they appeared to channel and utilise it in a way which would be beneficial to the suspect. A general high regard for the client's unique needs and a concern with preserving the client's integrity was ever present during most of the interviews. This was

far removed from the impersonal effects of extreme rationalisation associated with rational-legal domination and the negative side of bureaucratic organisation for which Weber has been criticised.

## **11.2 Personal judgement or discretion**

Personal consideration and discretion, or the human factor (in stark contrast to conditions as described in Weber's ideal type rational-legal authority) come into play during many different instances and present themselves on many different levels in the process of conducting the presentence investigation and finally, composing the report.

The following are but a few examples of such instances:

- interpreting the instructions implied in the law and the directive
- interpreting and selecting the information received about the suspect prior to the interview
- interpreting the message in the communication process during the interview with the suspect
- deciding which information to include/exclude in the report
- deciding on a suitable recommendation for a sentence (deliberation)
- conveying the information to the courts

### **11.2.1 Interpreting the rules and linguistic indeterminacy**

One of the many instances during the investigation at which the demand for exercising discretion presents itself is the interpreting of the legal text in the directive. The directive for conducting the presentence investigation (KVFS 2006:15), which includes instructions as to the format of the report and the procedure, covers seven-and-a-half pages of informative text, that is to say, seven-and-a-half pages of words to be interpreted by each individual that conducts presentence investigations.

Not only do individuals attribute different meanings to words, phrases emerge over the years and are used as though they have a "commonly accepted" meaning. For example, in the directive it states that it is important to observe the specific grounds for supervision if "a marked improvement" has taken place in the suspect's personal or social situation. Still further on in the directive it is stated that the nature of the crime can contribute towards being grounds for supervision if, despite a stable social situation, the suspect's "values" are such that they could contribute towards an increased risk for repeated crime. One could wonder which values those would be. How would the investigators determine what it is

that constitutes “a marked improvement” and how would they determine whether it had taken place? Could there be a consensus amongst the investigators as to the definition of these values? Which meanings are attached to these phenomena?

Furthermore, the directive states that the report should reflect an assessment of whether or not the suspect is in need of supervision, the suspect’s disposition towards supervision and whether the prerequisites for supervision are met. Certain psychosocial factors are said to bring about an increased risk for recidivism, but what exactly these factors are, are not specified. Even the crime itself, it is stated, can constitute grounds for a need for supervision but which crimes these would be, are not specified. Repeated criminality within a specific time can also be a criterion for the need for supervision, but what the specific time would be is not indicated.

### **11.2.2 Interpreting and processing information about the suspect**

Prior to even meeting with the suspect, the investigator receives various information which may or may not play a part in influencing the disposition with which he approaches the suspect. Here all sorts of factors can become relevant, like for example, the investigator’s view to the particular crime which has been committed, the investigator’s penal ideology and moral persuasions. Society tends to view crimes committed on women and children more seriously than those committed on men. Certain individuals echo these attitudes. The extent of the victim’s vulnerability is one of the factors taken into account when classifying the criminal act which also can affect investigator’s view of the crime. Some regard crimes where physical violence has featured as being more severe than crimes where there has been no violence.

As one officer expressed it, it is important for the investigator to try to remain objective when confronted with all this information, and, to take it to a more advanced level, to at least to be aware of his own prejudices and attitudes. It has been the researcher’s experience that such prejudices are sometimes discussed with colleagues where a second, third and fourth opinion is requested, thereby obtaining the input of other experienced officers who are not involved in the case in question. Johnsson emphasises the importance of the investigator acquainting himself with the information received by the authorities, to minimize “sensitive issues” having to be discussed during the interview. However, the negative aspect of the suspect feeling at a disadvantage due to the fact that the investigator has been furnished with a substantial amount of personal information prior to being given a chance to present himself should not be overlooked. Furthermore, in some cases, a description of the crime in

the application for summons which sometimes accompanies the official request for PSI has been made available to the investigator. Once again it is important for the investigator to remain aware that the person to be investigated is only suspected, as opposed to having been convicted, of the crime.

### **11.2.3 The communication process during the interview**

During the interaction a host of different obstacles or challenges are presented which affect the communication process as pointed out previously by Johnsson.

Certain suspects find themselves in a state of distress, whether it be due to having been detained and isolated (certain presentence investigations are conducted at remand custody), and/or suffering substance abuse abstinence, the criminal event itself or simply affected by the fact the he is being exposed, as a suspect, to the criminal justice system for the first time. This leaves the investigator once again in the precarious position of having to find a suitable balance between conducting the investigation in an objective manner and keeping their professional distance while at the same time being able to receive, address and contain, the anguish of the suspect. Here it is important not to be so receptive that the clients attaches himself too closely since the interview is the often the only occasion that the suspect will meet with the investigator.

Sometimes the investigator receives more information than what they are able to process, like in the case of the long-term sicklisting which was reflected in the excerpt from the Social Insurance authority records.

### **11.2.4 Processing the information**

The selection of information takes place during this phase and the probation officer has to choose which information to include in his report as well as which information to omit. Many factors influence how information is selected and formulated in the report. From my own experience, those officers who do not have delegation, which effectively means that their presentence reports are co-signed by a superior, have a demand on them to formulate the report in such a way that would meet with the co-signer's approval. There is also the temptation of selecting only that information which would support the sentence recommendation.

### **11.2.5 Deliberation process**

The criteria that are to be fulfilled rendering the suspect a suitable or unsuitable candidate for probation are debated on a daily basis. The same line of reasoning can be used for and against motivation for a particular sentence. Take, as an example, a suspect who suffers from ill mental health. The possibility for including a directive regarding contact with psychiatric health care is one solution which can be recommended in the interests of preventing further crimes being committed by the same suspect. In a discussion with an experienced officer it was felt that, if contact with psychiatric health care had been established and functioned well, there would be no need to impose a directive for contact. A different officer felt that this contact should be reinforced by imposing the directive.

### **11.2.6 Conveying information to the courts**

The presentence report acts as a communication tool between the investigator and the courts. One could begin by posing the question, “is there a common ground shared by the courts and the investigators as to the meaning of the contents in the presentence reports?”. As Bondeson (2004:97) points out, certain standard phrases are repeatedly used in the presentence report such as “socially stable conditions”. The fact that the suspect was referred to as living under “socially stable conditions” usually were grounds in motivating that the suspect was assessed to not be in need of supervision. In her study Bondeson received varying answers as to which meaning the investigators, and the courts, attached to the phrase. Most, when asked, agreed that “socially stable conditions” implied that the suspect had a place to live, employment and a lack of substance abuse. To others, it meant that the suspect had “a sound attitude towards alcohol and drugs” and that one should not have a bad debt record. Then there was uncertainty as to whether or not “employment” included unofficial employment.

A lack of regular feedback from the courts is, to say the least, puzzling. Can it really be that the courts are so satisfied with the presentence reports that they are receiving that they never have any complaints?

## **11.3 Ethical deliberations**

As much as Weber idealised the rationalization of activity in a bureaucratic organisation, there is no escaping the fact that, even when the rules for the task are as precise and detailed as they possibly can be, there is a human subject carrying out the task, a human subject with morals, views, opinions, principles and prejudices which surely must affect the interpretations

and decisions made. New methods of carrying out the presentence investigation are occasionally introduced and imposed throughout Prison and Probation Services in an attempt to further rationalize and standardize the procedure. I have been shown the previous model - a rather cumbersome few pages of areas to be covered in the interview. At the time that this research was undertaken at least one district, other than the one in which this research has been conducted, had re-implemented a standardized template.

Having a standardized procedure arguably could contribute towards a decrease in the unequal treatment of the suspects and thereby increasing legal security but suspects are not prepackaged specimens and they will not always be able to fit into the Probation Services' mould. As such the need arises for creative solutions and a demand for phronesis or practical wisdom, beyond the standard requirement regarding the skills of the investigator.

The objective of the presentence investigation, despite it being defined in the law and the directive, becomes cloudy. As an investigator one is divided and torn between many masters. The question is: which master is served when doing the presentence investigation? Obviously, it is for the benefit of the courts, since they are the customer but the effects of the report have varying impacts on the suspect, the community, society, the victim.

The choice of recommendation for a sentence is partly an ethical decision. It is often difficult to focus on the simple matter of whether or not the suspect is a suitable candidate for probation. As Kitchener (2000:42) points out, sometimes decisions need to be made where one ethical principle is violated in order to uphold others. Take the following case as an example:

A suspect, separated from his wife, is suspected of and charged with assaulting her. The court orders a presentence investigation. The couple have two teenage children, one who chosen to live with the mother and the other with the father. Quite some time has past since the criminal event and it becomes clear during the investigation that the bond between the suspect and his child, who lives with him, has become stronger, and that the child has become the top priority in the father's life. The suspect's social situation is, according to formal standards (permanent employment, stable economy, comfortable home and established social network) such that there does not seem to be a need for supervision and the criteria for supervision is thus not fulfilled. The prescribed punishment for assault is incarceration. If after the investigation the conclusion is that the criteria for supervision is not fulfilled, the father, if found guilty, faces possible incarceration, resulting in a break-up of the family.

It is not unimaginable that the investigator in the above example would be tempted to recommend probation despite the criteria not being fulfilled, in an attempt to

prevent the subsequent breaking up of the family that would result from the father's incarceration.

The choice of recommendation must surely also (albeit indirectly) be affected by the investigators' own views regarding the type of crime in question. Some have the view (in alliance with current penal policy) that crimes committed against children and women are more serious than crimes committed against men. A read-through of the arraignment application (which contains a description of the criminal event) can be quite effective in raising strong feelings of, for example, dismay, disgust and even vengeance in the reader. It would not be unimaginable that the investigator would be tempted to increase the requirements for supervision criteria, thereby increasing the likelihood of a custodial sentence.

Penal ideology of the individual could also come into play in the deliberation process. There are those who are not positively disposed to incarceration and those that think that incarceration should be an obvious choice in certain cases.

The investigators can find themselves caught between the interests of the suspect, the courts, justice, the victim and society. It is not coincidental that one of the qualifications that a probation officer is recommended to have is a degree in social work which is where the altruistic factor comes into play, the ability to use in this case, the power of the presentence report for the benefit of the suspect and ultimately to contribute towards crime prevention. Clearly the virtue of phronesis would be invaluable in such a deliberation process, the ability to choose a course of action which would be beneficial in the long run, the only question being, beneficial to whom?

In smaller districts and/or during "skeleton staff periods" such as over the summer, where probation officers diversify, ie, the same officer can be carrying out presentence investigations as well as handling the probation sentences. This could give rise to the issue of a conflict of interests, or rather a catering to self-interest. During the interviews it has been discussed that the handling officers in question would be taken in account in the deliberation process and that it might have an influence in the deliberation.

## **12. Concluding Discussion**

Although the presentence investigation is rationalized and regulated by law and directives, those who carry it out cannot escape the demand for personal judgement and/or exercising discretion. Attempts are made, however, to increase the level of rationalization by, for example, introducing interview models.

The presentence investigator does not have the final say in the sentencing process, but he does seem to have significant influence on the court's decision in the sentencing deliberation. He also has the responsibility of presenting the suspect's life history to the courts. I feel privileged to be able to have witnessed how the probation officers apply their skills and how they respectfully utilize the power and authority inherent in the task together with their valuable experience to find prudent solutions in intricate situations.

To Göte Johnsson's question, "Do I regard myself to be a bureaucratic collector of information or do I approach the task with understanding and attentiveness, ready to help and inform as needed?" I dare say that my experience would speak for a favourable response.

An interesting topic for further investigation might be to investigate the nature of the mysterious relationship between the courts as the remittant and Probation Service as the remittee and/or the dynamics between the presentence investigation and the judicial outcome.

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## **Appendix 1**

### **Extracts from the legal text in the Law on Presentence Investigation in a criminal case (my own translation)**

#### **Presentence report**

According to the law on presentence investigation in a criminal case (Lag (1991:2041) om särskild personutredning i brottmål, m.m.) a presentence report is commissioned by the courts to act as a basis for sentencing when a suspect's personal circumstances are taken into account or when it can be considered that certain measures could be taken to counteract recidivism. Correctional Services is responsible for producing such a report. A suspect who has been detained is obliged to present himself for the purposes of the investigation. Failure to present himself can result in his being fetched by police.

#### **Presentence investigation**

It states further in the law that the presentence investigator may partake of documents pertaining to the preliminary investigation as well as be present during interrogation if it is deemed necessary for the purposes of conducting the presentence investigation.

## **Appendix 2**

### **Extractions from Correctional Services' directive for the presentence investigation and report in a criminal case (KVFS 2006:15) (my own translation)**

- i) Purpose: The purpose of the report is primarily to provide a basis for sentencing in the courts' deliberation process. Probation service will consult with the courts in order to produce a report which complies with the courts' requirements. The secondary purpose of the report is stated as being a source of help and support for the suspect pending the trial.
- ii) Cooperation with the courts and public prosecutor: Probation Service should have regular contact with the courts and public prosecutor regarding general issues surrounding presentence investigations/reports as well as specific cases.
- iii) Procedure: The presentence investigation and report will be suited to the courts' requirements for a basis for the deliberation process in each specific case. The investigation should focus on the suspect's current situation and should furthermore be limited to that which is relevant for the court's assessment. The investigation should elucidate the need for measures to be taken in the following areas: economy, occupation, health, addiction, leisure, family and criminality. It should also be indicated in the report whether there exists a need for supervision, and if so, a suggested plan for supervision should be included. The suspect's attitude towards the sentence recommendation should be made clear.  
Special mention should be made in the report if there are specific grounds for recommending probation such as:
  - a) If an obvious improvement has come about in the suspect's personal or social status which could be considered to be connected to his criminality or
  - b) If the suspect is in the process of undergoing treatment for an addiction or if other conditions exist which could be connected to his criminality or
  - c) If abuse of an addictive substance or another specific condition which calls for treatment has been a contributory factor in the committing of the offence and the suspect has declared himself to be willing to undergo appropriate treatment which can be arranged for him in connection with execution of the sentence.
- iv) Information/references: Information from the employer, caregiver and other people in the suspect's social network unless specific grounds apply. The suspect should

be requested to submit suggestions for people that can be approached for references.

- v) Need for supervision: An assessment of whether the suspect is in need of supervision is included in the investigation. Furthermore the question of the suspect's attitude towards, as well as the general conditions for, supervision is addressed. Psychosocial factors which can be regarded to increase the risk of recidivism receives carries great weight in the assessment of the need for supervision. Even the nature of the offence can constitute a need for supervision, despite the suspect's social stability, if the suspect's lifestyle and values could contribute towards recidivism. Repeated criminality within a certain timeframe can also constitute a need for supervision.

## **Appendix 3**

### **Interview guideline**

#### General

- 1) What is the aim of the presentence investigation? What do you see your task as being?
- 2) Describe how you go about the task.

#### Conditional sentence

- 3) Do you consider recommending "conditional sentence" as a possible alternative?  
Which kind of conditions should prevail for the suspect to be considered a good candidate for conditional sentence?
- 4) Is it evident in the presentence report that you have considered conditional sentence as an alternative? How?

#### References

- 5) Do you contact other authorities for the purposes of obtaining more information about the client? Which ones?
- 6) When do you obtain references?
- 7) Which references are regarded as suitable or less suitable?
- 8) What type of information is obtained from the referents?

#### Community service

- 9) When is a client regarded to be an unsuitable candidate for community service?

#### The criminal event

- 10) Do you address the actual crime which the suspect is being charged with?

#### Deliberation

- 11) Does the suspect's attitude towards the crime influence the choice of sentence recommendation? In which way?
- 12) Do you take into consideration extenuating circumstances which might influence the choice of sentence recommendation?

#### Education/training

- 13) Have you undergone specific education concerning presentence investigations?