

“An irrelevant mass media? – Comparing the perceptions of English and Danish lower Court judges when sentencing theft offenders.”

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An irrelevant mass media is a disempowered mass media if judges lack trust and respect in its' coverage and content. To reveal the level of impact from media reporting this research examined the lower Court theft sentencing practices of 12 Danish and 12 English judges. Their perceptions of the media influence were qualitatively compared. This revealed that there was a similar Danish and English judicial reaction to the media. The media was predominantly negatively perceived as having a low influence due to being biased and misinformed. However, judicial trust in academic and government sources was predominantly positively received. These two trusted media sources should be focused upon when developing future English sentencing guidance tools, i.e.) sentencing guidelines, legislation, theft case law and judicial training. This can then beneficially boost the relevance of the mass media and thus re-empower its' positive influence on the wider sentencing community.

Introduction:

There has been much academic debate about the frenetic pace of the modern media communication networks and its influence on the more measured pace of legal development as noted by (Dijk van, 2006: 128). The constant stream of media outputs on sentencing issues are hard for any judge in any European jurisdiction to ignore. Modern mass media communication networks such as the internet, television and radio all provide their own commentary on the sentencing reactions of judges and try to promote judicial self reflection. They are all part of a Media industry that is becoming ever more global and inter-connected. Where the mass media have criticised judges without further qualification as to why and positively shown how judges may improve their sentencing approach this has prompted an equally critical judicial reaction. The modern mass media is well placed to prompt positive judicial self reflection, but only if it chooses to do so. By comparing the extent of influence from the mass media upon sentencing practices in English and Danish Lower Courts the relative importance within judicial perceptions of their own independence, media trust and respect is revealed.

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Judicial perceptions of the media and its relevance to them can and will constantly change over time. This was prophetically understood by the weeping philosopher, Heraclitus who said, “everything changes and nothing remains still” (*Ta Panta rhei*), as interpreted within Plato’s *Cratylus* and later translated by (Fowler, 1921: 402a). Indeed, globally judges as the final sentence decision makers are guided by a multitude of sources that vary in influence from case law, legislation, national consistency guidelines, local training, academics and public interest groups. The list of course could go on. The multitude of guidance sources all provide some degree of support to the judge’s difficult task of sentencing, i.e.) to interpret complex offence and offender factors. They appear to demote the relevance of wider mass media sources especially when one considers the high workload of lower Court judges day to day. However it would be most unwise to think that due to the multitude of guidance sources an attempt to reveal judicial perceptions of the media when sentencing is not worthwhile. This is because the media industry is an integral part of globalization today. Rapid media technology advancements have made it possible and indeed encouraged wider debate on sentencing regulation. It has also made it conceivable to more closely connect judges to each other across the World. In gathering and comparing Danish and English judicial perceptions about how the media influences their sentencing, this research reveals new data about:

- 1.) How judges perceive their engagement with different forms of media technology.
- 2.) How judges decide what media content is influential to them and why.
- 3.) How judges manage their relationship with the media when approaching sentencing decisions.

In making comparisons between judicial perceptions of the media influence in England and Denmark there are a number of important preliminary questions to be asked. Some of the highly complex questions that comparing legal cultures asks about wider society, culture and humanity have been aptly summarized by (Nelkin, 1997: 69) in the following way:

What are we comparing when we compare cultures or legal cultures? Should our unit of comparison be single institutions, communities, countries, the world society? What about cultural differences within countries – between areas, age groups, classes and genders? How does legal culture relate to wider culture? Is comparison a question of explaining or of translating? Last, but not least, how far is it possible to avoid our definition of legal culture being already marked by the culture of the observer so that it reflects the situation in some societies better than others?

In asking judges to discuss the media influence through qualitative open ended questions new data is revealed. However, it must also be acknowledged that qualitative data carries with it certain limitations. Firstly, the data can only reveal a shared perspective between the interviewees and the interviewer. Secondly, the qualitative interpretation and comparison of the judicial dialogue provided is vulnerable to researcher subjectivity and therefore incoherence and bias. Both Roger Cotterell in defining ‘legal ideology’ and ‘legal culture’ (Nelkin, 1997: 13) and Laurence Friedman in replying (Nelkin, 1997: 33) recognised that understanding judicial attitudes is not about precise measurements or explanations.

Instead, it is about exploring common understandings, meanings and emotions. Laurence Friedman in his reply to Roger Cotterrell acknowledges that there is little comparative data on legal culture, (Nelkin, 1997: 34). A qualitative comparative study provides a very difficult challenge for any researcher whether experienced or in this case not. It is said that explorers are either very brave or very mad. However this exploring comparative researcher is not averse to attempting to ski uphill, (Davies, Takala & Tyrer, 2004: 757). The exploration inevitably produces indicative results only, but this is still of significant value

An assumption made in this research is the separation made between English and Danish judicial attitudes and the respective geo-political borders of England and Denmark. However, the wider influences on a legal culture are not always clearly restricted by legal jurisdiction. For Michael King, there is a danger of comparative researchers stereotyping legal identity, i.e.) judicial sentencing approach attitudes, with national identity, (Nelkin, 1997: 119). He further argues that for those who support Luhmann's 'social autopoietic theory' there is a preference for comparisons between legal systems based upon functional communications rather than geo-politically defined legal cultures. This could be a persuasive argument against the comparison of Danish and English legal cultures adopted in this research. However, the theft sentencing approaches of lower Court judges in Denmark and England are separate enough that they are predominantly influenced by their own distinctive domestic sentencing approach towards theft offences. There is little formal interaction or communication between Danish and English lower Court judges on theft sentencing approaches. This is because there is little time or economic resource for the respective judiciaries to meet regularly and influence each others' sentencing approach.

Overview of the sentencing frameworks in England and Denmark:

Judges in the English and Danish lower Courts operate under very different working relationship norms. In England, Magistrates' Courts consist of sole professional District Judges or panels of three lay Magistrates. In Denmark, District Courts consist of mixed panels of one professional District Judge and two lay District Judges. In England, judges of theft offenders must follow Sentencing Guidelines Council guidelines and are guided further by Criminal Justice legislation and Appellate Court guideline cases. In Denmark, judges of theft offenders are not bound by national consistency guidelines. They predominantly follow judicial sentencing precedents formulated within case law as well as broad principles in relation to offence seriousness stipulated in section 80 of the Danish Penal Code.

Methodology and Procedure:

The research journey began through a general literature review of global sentencing practices and the mass media influence. Lower Court Judges were identified as the traditional gatekeepers of their respective Criminal Justice Systems. In England, they predominantly sentence theft offences according

to (Ministry of Justice, 2008, 9 – 12). From the general literature review it was clear that other socio-legal studies had already analyzed the sentencing approach generally. Specifically, the media influence on the sentencing approaches of English lower Court judges had received some academic examination. In Denmark, there was a significant dearth in academic analysis of the media influence on lower Court judges there. Denmark as a comparison jurisdiction was considered a suitable focus in order to expand the scholarly limits.

Both Denmark and the UK joined the European Union and ratified the European Convention of Human Rights, Rome (1950) which led to the same 3rd September 1953 entry into force date. Both jurisdictions are subject to future political and legal developments that could lead to increasing European Union integration. This could well impact their respective legal cultures and society. More recently and specifically relevant to the English and Danish judiciaries is the development of the European Network of Councils for the Judiciary (ENCJ, 2004). The ENCJ has striven to integrate Court administrations across the European Union, (ENCJ Charter, 2004: 1 – 18). The ENCJ Charter is based upon judicial integration agreements made as a result of Articles 2 and 6 of the Maastricht Treaty (1992).

Denmark was chosen because it was considered to be accessible both geographically and linguistically, i.e.) high quality spoken English is common within Denmark. The Danish lower Court judicial composition was also similar enough to England to facilitate a comparison, i.e.) both jurisdictions have professional District judges and lay judges selected from the local community. In Denmark, lay judges serve 4 years before renewal, whilst in England a lay judge will serve indefinitely.

Theft offence sentencing as a focus when comparing Danish and English judicial perceptions of the mass media was due to three reasons. Firstly, English and Danish legislative definitions of theft share a reasonably similar understanding of appropriation and property, i.e.) section 1 (1) of the Theft Act (1968) and section 276 of the Straffeloven (Danish Penal Code). Both jurisdictions rely upon case law precedent to further define the boundaries of appropriation and property. Both England and Denmark also share a reasonably similar burden of proof for criminal cases, i.e.) beyond all reasonable doubt (*in dubio pro reo*) that the defendant is guilty. However, the English Theft Act (1968) does add two distinct elements of offender intention, i.e.) dishonesty and permanent deprivation. These elements are not contained within section 276 of the Straffeloven. Instead section 276 focuses more simply on the purpose of obtaining an unlawful gain through appropriation which does not have the consent of the possessor.

Secondly, theft is the most common offence category dealt with by Danish and English lower Court judges. All theft offences in Denmark initially go through the 24 Danish District Courts and may go up to the 2 High Courts on appeal, In England, theft is triable either way and can therefore be dealt with either in a summary trial in the Magistrates' Court or be sent up to the Crown Court on indictment. To use a less common offence category that is sentenced in the lower Courts risked being unrepresentative.

Thirdly, more socially contentious and thereby media attractive sexual and violent offences were considered to be significantly rarer case types which would not reflect the everyday sentencing tasks of

English and Danish lower Court judges. Such high seriousness offences were considered to be more fitting to a Higher Court comparison. Judicial perceptions of the media from a theft sentencing stand point offers an everyday view of the judge and media relationship.

A more specific literature review was completed to identify the conclusions of socio-legal scholars who had conducted research on Danish and English judicial perceptions of the media. This knowledge gathering helped to identify the scholarly limits to the existing knowledge. The scholarly limits were that the perceptions of English and Danish lower Court judges towards the media when sentencing theft had not been qualitatively compared. Two open ended questions were formulated which allowed the judicial interviewees to freely debate their perceptions of the media with the support of interviewer encouragement, (Foddy, 1993: 22).

A workable small sample size was developed that balanced the limited time and financial constraints available with the desire for a fair representation of lower Court Judges across England and Denmark. The sole researcher decided to focus on 12 Danish lower Court Judges, (6 legally qualified and 6 lay) and 12 English lower Court Judges, (6 legally qualified and 6 lay). These judges came from 12 different Court areas of geographical spread which served either predominantly urban or rural communities, i.e.) 3 urban and 3 rural areas in England and 3 urban and 3 rural areas in Denmark.

The 12 Court areas were selected and distinguished by using a quantitative approach. Each selected region in England and Denmark was classified in terms of rural (town) or urban (city) development by gathering publicly available population statistics. Using 2008 and 2009 as the focus years, the research attempted to try to represent regional perspectives across Denmark and England. This entailed a population density (census) comparison between the 6 selected Court areas in England (Office for National Statistics, 2004: 1 – 10) and Denmark (Statistikbanken, 2007) in order to distinguish between rural and urban Court service areas.

The Magistrates' Courts in England were Kingston upon Hull, Liverpool, Southampton, as urban areas and Worcester, Totnes, Wisbech as rural areas. The District Courts in Denmark were Århus, København, Odense, as urban areas and Hjørring, Holbæk, Svendborg as rural areas. This small sample attempted to reveal both professional and lay judge potential variations. It also attempted to reveal regional variations in sentencing approach opinions, values and feelings across England and Denmark.

Each judicial interviewee's permission was first sought by means of a formal letter of introduction. The letter contained the broad areas of investigation and was sent to the 12 selected Magistrates' Courts under Her Majesty's Courts Service in England and under the Domstolsstyrelsen (Danish Court Administration) in Denmark. In England, the Justices' Clerk liaised with those judges who were receptive to being interviewed. In Denmark, the Retspræsident (Court President) liaised with those judges who were receptive and comfortable with being interviewed in English. Both Her Majesty's Courts Service in England and Domstolsstyrelsen in Denmark and the eventually selected lower Court judges were

provided with copies of the relevant University ethics policy, (Southampton Solent University Ethics Policy, 2010: 1 – 5).

The qualitative interviews logistically were conducted individually and in suitably private Court offices so that each subjective perception was gathered separately and was not influenced by any group discussion conformity. The interviews were conducted in English which is commonly understood by both English and Danish lower Court Judges. This meant that only Danish interviewees with good English language skills could be used and could volunteer for the research. However, in pursuing this approach the practical problem of the interviewer's English background and Danish linguistic limitations were addressed. By avoiding the need to transcribe each Danish interviewee's perceptions from Danish to English, the complex linguistic and semantic problems of interpreting foreign language differences was addressed. It was replaced with as level a playing field as possible whereby English language responses from Danish and English interviewees were compared.

All interviews were audio recorded for accuracy and later idiomatically transcribed for further critical comparative analysis. Hand written notes on judicial responses were made to safeguard against any recording equipment failure. Prior permission was sought from each interviewee and the interview recording process was properly explained before recording commenced. The interview transcripts contained personal information which had to be stored in strict accordance with the Data Protection Act (1998) and the Freedom of Information Act (2000).

Measurement:

The research had to safeguard against three potential measurement problems. Firstly, there was the potential problem of ambiguity in the language used for the questions and how they were consistently explained to the each judicial interviewee (McNamara, 1999). Fortunately both Danish and English judges shared a high level of English language proficiency which helped ensure that the English language terms used could be given a clear and consistent explanation by the interviewer as noted by (Campion, Campion and Hudson, 1994: 999).

Secondly, there was a risk that the interviewee could refuse permission to record such personal aspects of their lives. Fortunately, this did not happen. However, this did not fully mitigate the possible loss of data after the interview had finished and recording had stopped, when some judges spontaneously chose to further discuss various issues of concern in relation to their sentencing approach. It was found to be helpful that written notes were taken to evade this potential problem. However, in taking written notes during interviews which was done as a safeguard against the recording failing there was the potentially negative impact of interviewees seeing that everything was still being recorded despite the recorder being turned off as noted by (Parker, 2005: 236).

Thirdly, the idiomatic transcription of the recorded interviews by the interviewer was highly time consuming and complicated. This was due to the high volume and complexity of the data collected. Transcribing errors such as mishearing, fatigue and carelessness were all potential risks which the

researcher had to contend with and safeguard against through patient and diligent work as noted by (Poland, 1995: 294).

Analysis:

The interviewer recorded the gender, age and length of time served on the bench for each judicial interviewee. This sample data was quantitatively analyzed. In terms of gender, there were 18 males, 9 from English lower Court judges and 9 from their Danish counterparts. There were 6 females, 3 from English lower Court judges and 3 from their Danish counterparts.

In terms of age, unsurprisingly all the 24 judges interviewed were beyond 40 years old and no older than 65 years old. In comparison, there was a more even age spread amongst the Danish District Judges whereas their English counterparts were predominantly of a more senior stage in their sentencing careers. Indeed, 3 of the English lay judicial volunteers were regular Chair persons in their respective localities. The seniority of the English judicial volunteers was perhaps reflected in the average mean time on the bench comparison of 15.3 years for the English sample and 12.1 years for the Danish sample.

The quantitative analysis of the gender, age and length of time served on the bench for each judicial interviewee further defined the overall sample. However, it was not expected to yield detailed information about the influence of the media on judicial perceptions when sentencing theft. This significant limitation justified why a qualitative methodology was considered necessary and was adopted as the primary mode of analysis, (Kleining & Witt, 2001: 6).

As qualitative researchers will know, there is no standard method for analyzing the complex semantics produced by *ad verbatim* interviews. Instead there is a close relationship of trust and mutual respect between the interviewer and interviewees which enables reliable data to be gathered. Ultimately it is the interviewers own skills of analysis which are extensively relied upon according to (Kvale, 1996: 103):

The quality of the analysis rests upon his or her craftsmanship, knowledge of the research topic, sensitivity for the medium he or she is working with – language – and mastery of analytical tools available for analyzing the meanings expressed in language.

The interviewer's skills of analysis of meanings expressed in language were tested by the comparison of judicial perceptions. This meant that any interviewer interpretations made would inevitably have an English perspective because of the interviewer's native English language and culture. The interviewer was therefore required to very sensitively interpret the *ad verbatim* transcribes. The repetition of similar perceptions by many judges was indicative of a common and shared understanding within the Danish and English lower Court judiciary. Testing and re-testing meanings may take time within interviews, but this was considered crucial to enhance the accuracy of the data gathered.

The raw data was analyzed in three stages. Firstly, common meanings were identified and condensed to reduce the *ad verbatim* data volume. Occasionally, where a common meaning was

expressed particularly clearly the raw *ad verbatim* data was used to form the basis of quotations direct from the judges.

Secondly, the level of analysis turned to *ad hoc* meaning generation which by its own flexible nature allows the interviewer to adopt a multiple analysis of all the approaches discussed above in order to understand the deeper data semantics. This approach recognizes that an interpretation of meaning and language requires recognition of the particular academic perspective being used. In this case, it is socio-legal which incorporates the interviewers' subjective interpretations of what is positive and negative, similar and different. This in turn is interpreted for and later by a validating readership of judges, the criminal justice research community, legal practitioners, politicians and the general public. The *ad hoc* meaning generation approach can be summarized in the following way according to (Kvale, 1996: 203-04):

There is a free interplay of techniques during the analysis. The researcher may read the interviews through and get an overall impression, then go back to specific passages, perhaps make some quantifications like counting statements indicating different attitudes to a phenomenon, make deeper interpretations of specific statements, cast parts of the interview into a narrative, work out metaphors to capture the material, attempt a visualization of the findings in flow diagrams or charts. Such tactics of meaning generation may, for interviews lacking an overall sense at the first reading, bring out connections and structures significant to the research project.

Thirdly, the researcher then added his own subjective critical analysis. This had its own limitations in terms of potentially reducing the objective validity of the research results examined. However, this could also be justified as an alternative way to develop an in-depth understanding of the influence from judicial peers at the sentence deliberation stage as supported by (Kvale, 1996: 236):

Though increasing the reliability of the interview findings is desirable in order to counteract haphazard researcher subjectivity, a strong emphasis on reliability may counteract creative innovations and variability.

The analysis of the raw data through these three stages created a multiple analytical approach. The transcribed interviews by the researcher produced the following data outcomes:

- 1) Common meanings.
- 2) *Ad verbatim* judicial quotations.

Results overview:

The influence of the media on English and Danish judges was examined by asking the following two open ended questions:

- 1) To what extent does the Media impact your theft sentencing discretion?
- 2) Is there anything positive or negative which the media could say that would affect your discretion?

Results of comparing the media influence on theft sentencing discretion:

It was perhaps an unsurprising result that the overall Danish and English judicial perceptions regarding media influences on their sentencing approach were remarkably similar, i.e.) either a low extent of influence or none at all. However, there was a slightly greater reluctance from the English judges to openly admit any media influence on their sentencing approach during their interview. It was noted that 3 English judges shifted from no influence to a low influence after being probed further to explain why they had answered this way when compared to only 1 Danish judge who required this further probing.

The Danish and English judges were asked to comment on firstly, how the media impacted their sentencing approach and secondly, they were then probed further on their sentencing discretion. For 7 English judges (2 professional, 5 lay) and 7 Danish judges (4 professional, 3 lay) there was a low media influence which affected how they approached their theft sentencing. This was based upon two common arguments.

Firstly, positive and more common negative information communicated by the media on sentencing issues was persuasive to judges provided that it was based on a responsible and credible source, i.e.) government or academic. Interestingly, for the 2 English professional judges the influence from police policy was accepted as aggravating their sentence approach in order to support their initiatives. However, these 2 judges also considered the police as being far more sensitive to media and politics than themselves. For 2 Danish lay judges there was some respect for and therefore influence from what they considered to be a historically independent and academic media source such as (Dagbladet Information, 2010).

Secondly, media involvement in sentencing issues could influence judges provided that there was a local community problem, i.e.) a theft crime wave, which once highlighted by the media could be addressed through the sentencing aims of deterrence and denunciation.

Particularly in relation to persistently occurring and local theft offences, deliberate judicial acceptance and use of wider media communications was felt apt for showing their intolerance towards future drug and alcohol abuse, violence and organized theft from gangs. It was also felt important to accept the influence of the media when there were reports of vulnerable victims within the local community that judges wished to reach and show support for. As one English professional judge further explained:

If there are local media reports of a higher incidence of handbag snatchers and then I hear from our local Criminal Justice Board and the Police that this is becoming a real local concern. In this instance, there could be an influence in that I would want to adopt a more deterrence and denunciation based sentencing approach. This would send out a clear message of local judicial disapproval, but the media reporting would need to have a strong,

relevant and reliable evidential basis. The media might enhance my awareness of a particular local problem, but the aggravating influence is dependent.

There was a complete negative rejection of any media influence on their sentencing approach from 5 English judges (4 professional, 1 lay) compared to 5 Danish judges (2 professional, 3 lay). Three common judicial arguments were provided to justify this stance. Firstly, these judges were highly skeptical of media distortion and misinformation when reporting theft cases. For one English professional judge the common presence of media spin and sensationalism was considered to be the reason why public denunciation had lost so much favour in England. Introducing this level of potential inaccuracy and inconsistency into the sentencing process was considered to be too dangerous to contemplate.

Secondly, there was a common perception that media sources repeatedly ignored common, uncontroversial theft offences. This was due to a general lack of readership interest in theft offending and the short attention span of media providers. Thirdly, both Danish and English judges cited a common respect and support for their independence from all forms of media criticism. There was a strong belief in due process and the appeals system. As one Danish lay judge argued:

There is no impact. A few times I have been criticized for a sentence I have given, but this has never influenced me. I think in this way, if I am wrong then either the prosecution or the defense can appeal. The media can have their opinion, but they have never been able to pressurize or influence me. If anyone disagrees with my sentences the system is flexible enough for the theft defendant concerned to seek another sentence on appeal.

Conclusions – What has been learnt by comparing English and Danish judicial perceptions of the media:

There should be no doubt that in asserting judicial independence this should not be achieved through a significant judicial disengagement and distrust of the mass media. In current times, it is getting ever more unimaginable that our judges can escape the wealth of communications that surround us all. Instead, judicial independence should be achieved through a significant judicial re-engagement with and trust in the media. Currently the Judicial Communications Office issues regular media releases online, (Judiciary of England and Wales, 2010). However, by expanding its coverage of judicial views and responses to incorporate all echelons of the judiciary a better public understanding can be gained of how judges, particularly in the Magistrates' Court support and serve society. A good example of when the public can become misinformed by the media is when judges decide in extreme cases to exercise their judicial mercy or severely denounce offenders in Court as noted by (Piper, 2007: 148).

Both the Danish and the English judges predominantly noted the low influence from the media who were more likely to negatively highlight local community concerns rather than positive local community solutions. Within the media effort the concerns of the local government (including local councillors and the police) and academics were highlighted as credible and responsible sources. These

influences should be incorporated into future English sentencing guidance source development, i.e.) sentencing guidelines, legislation, theft case law and judicial training. This can then beneficially boost the relevance of the mass media and thus re-empower its' influence on the wider sentencing community. The local media has a positive role to play increasing local community awareness of criminal justice issues and encouraging public engagement by accurately reflecting the efforts of their local judges. The lay judges in the lower Courts of England are best placed to take a leading role in ensuring these positive aspects of media influence continue because they are selected to directly represent local public sentiments.

The continuing media support for popular punitive politics and the sensationalised approach to reporting sentencing issues in both Denmark and England has left judges extremely distrustful and wary. Many English and Danish judges in this research negatively reflected on misinformed media reports which were designed to shock their readership and thus gain their attention and sell more newspapers. This was seen as an inevitable product of a reactive rather than a pro-active, informed and balanced media agenda. Both English and Danish judges commonly felt that they should keep a healthy distance from media reporters (television, radio, newspapers, internet), but thankfully not academics or the government. Whilst the mass media industry is unlikely to fully release itself from the populist shackles which their profit margins demand, it may be possible for them to think more carefully about the wider consequences of their reporting approach. In so doing, they can better ensure that they are less alienated than currently from the minds of our judges.

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