

The objectivity of Australian judicial decisions

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Abstract: This essay reports on the cognitive grammar associated with the concept of judicial objectivity in Australia. The study analysed a sample of 100 cases. The evidence gathered shows that Australian judges share a set of grammar cognitive activities with British common law. However, over time, these cognitive practices diverged from the practices in contemporary Britain. The reason for such divergence is the object of much criticism by judges and academics. This essay is divided into three sections preceded by an introduction and followed by a conclusion. The introduction provides a theoretical overview of the debates across the concept of judicial objectivity. The methodology section explains how cases were selected and analysed. The text analysis is based on Ronald Langacker's research on cognitive grammar and Stephen Levison's examination on the pragmatics implications of texts. The third section analysed two groups of cognitive activities that Australian judges associated with the concept of objectivity.

Keywords: Judicial objectivity, cognitive grammar, judicial bias, objective textual interpretation, judicial impartiality, legal pragmatics, Australian jurisprudence.

Introduction: Modest Objectivity in Judicial Discourses

Global legal trends, from the development of cosmopolitan human rights culture to the adoption of contractual law principles in international transactions, are changing national legal systems (Husa, 2018). There is a general assumption that judges, who are at the forefront of these new developments, will remain up to date with the current legal trends. However, there is little research on changes in the cognitive processes that are required to implement global legal developments (Brodermann, 2011; Viven-Wilksch, 2019). At a general level, it is assumed that judicial qualifications, in theory and practice, of international and national laws, ought to be carried out by an objective court (Coleman, 1995; Leiter, 2007).

There is, however, limited theoretical research on the type of cognitive practices that can be qualified as objective in legal discourse (Azuelos-Atias, 2010; Breda, 2017a; Breda & Rodak, 2016; Dworkin, 1996; MacCormick, 1999; Skoczeń, 2016). There are several analyses of the effect of bias which indirectly indicate the elements of judicial objectivity (Abadee, 2000; Eerland & Rassin, 2012; Gazal-Ayal & Sulitzeanu-Kenan, 2010; Griffiths, 2010; Groves, 2009; Olowofoyeku, 2009), yet this process of defining an entity *at contrario*, so to speak, has limitations (Groves, 2009). It is a rather inefficient intellectual exercise to seek to prove the existence of something by looking under every stone to assert that what we wish to find is not there (Rorty, 1991). Neil MacCormick's *Reasonableness and Objectivity*, and Brian Leiter and Jules Coleman's article titled *Determinacy, Objectivity, and Authority* are among the few studies which tried to qualify judicial objectivity by asserting what ought to be, rather than what is not (Coleman & Leiter, 1993; MacCormick, 1999).

While both studies are endeavouring to analyse what judicial objectivity ought to be, the claims they make are different and explore judicial objectivity through divergent lenses. MacCormick focuses on the development of the *reasonable person* as one of the intersubjective criteria adopted by common law judges, whereas Coleman and Leiter deliver a comprehensive theoretical perspective on the concept of judicial objectivity in modern legal systems (Coleman, 1995; Coleman

& Leiter, 1993). In particular, Coleman and Leiter argue that judicial decisions are dependent on *modest objectivity*. Using the term *modest objectivity* they describe a series or set of cognitive practices that are adopted by judges (Coleman & Leiter, 1993). They argue judicial decisions depend on *modest objectivity* because a judicial decision must combine the cognitive practices adopted in pure science with textual interpretive practices.

The level of indeterminacy, which is inherent to any textual interpretation, is mediated by adopting shared cognitive practices that reduce the effect of individual idiosyncrasies. The *Modest objectivity* [...] *As an epistemic metaphysical theory, it makes the existence and character of facts of various kinds depend on us but not on our actual beliefs* (Coleman & Leiter, 1993, p. 621). *Modest objectivity* is a set of interpersonal subjective criteria that are perceived as a proxy for an objective decision within a community of legal professionals. The ideal reasonable person (MacCormick, 1999), the concept of *pater familias* found in civil law systems, the procedure to select and evaluate expert witnesses (Englich et al., 2016; Friston, 1999), are all manifestations of cognitive functions associated to an assumed valid epistemic theory.

Coleman and Leiter's theory offers a wider interpretation of the role of objectivity in judicial decisions. MacCormick focuses on the idea of *reasonable person* which suggests that judicial objectivity is contextually dependent (MacCormick, 1999). The roles of the external factors are well known to comparative lawyers who use terms like *legal culture* (Glenn, 2010) or *legal context* (Gutteridge, 1946; Hirschl, 2010). However, given that cognitive practices change across sub-strata of a society (Kahneman, 2015; Tversky & Kahneman, 1974), there is, also, a less ingenious effect of the contextual nature of judicial objectivity. These external factors are historically defined by the privilege of white middle-class men (Bankowski, 1991; Boyle, 1985; Christodoulidis, 1998; MacIntyre, 1981). Critical Legal Studies supporters denounced, for instance, ideological colonisation of the justice system in liberal democracies, a cavalier attitude toward gender violence, and a general institutional bias against minorities (Douglas et al., 2009; Dyzenhaus, 2010; Gazal-Ayal & Sulitzeanu-Kenan, 2010; Thomas, 2000).

Indeed, Leiter and Coleman's idea of *modest objectivity* in judicial decisions indirectly confirms many of the limits of judicial practices (Coleman & Leiter, 1993). The two authors explain that, even in hypothetical ideal epistemic conditions where a judge could witness an event, she would have the possibility to select multiple cognitive techniques to link her *true* version of the past to her interpretation of a rule (Coleman & Leiter, 1993; Hart, 1958; Irwin & Real, 2011).

The founding father of English speaking positivism, L.H. Hart also described the judicial process succinctly as 'choices between alternatives' (Coleman & Leiter, 1993; Hart, 1958, p. 612). It is safe to assume that as a second-generation Ashkenazi Jew living in London with a variety of sexual preferences, some of which were at the time criminalised, Hart was acutely aware of the social distinctiveness of British common law (Lacey, 2004). This is, however, a tangential narrative, the key element of Coleman and Leiter's article is that: judicial objectivity is pragmatically associated with a modest normative claim (Coleman & Leiter, 1993). In other words, an objective decision is a representation of the past that, even in ideal epistemological conditions, must be associated to cognitive activities that are perceived rational by a distinctive legal community (Coleman & Leiter, 1993).

A judge selects cognitive practices (e.g. by choosing acceptable evidence, believing a witness, deducing facts, interpreting laws, forecasting pragmatic ramifications) and each one of those choices triggers a cascade of deductions that is a proxy of a cluster of outcomes. Coleman and Leiter point out that:

[the choice of] '*these properties can be modestly objective only if they are sufficiently coherent to enable us to identify what would count as the conditions under which judgments about such properties would fix their existence and character*' (Coleman & Leiter, 1993, p. 625).

It logically follows that within each legal community there is an awareness of the subjective nature of judicial practices and toleration of divergence of judicial outcomes. Legrand, in his critique of large international homogenisation processes, reaches a very similar conclusion (Legrand, 1997). He coined the term *prejudices* to describe the set of accepted judicial practices (Legrand, 1997). *Prejudice* will be

used in this essay to describe contextual cognitive practices that judges associate to the concept of judicial objectivity.

In particular, this essay reports on the semantic manifestation of *prejudices* in a large sample of cases (100) taken by the jurisprudence of Australian Federal Courts, the High Court of Australia, and Supreme Courts of the states and territories over twenty-two years. In these cases, a court inserts a qualification to the concept of objectivity which indicates a cognitive activity described as objective. For instance, in *Repatriation Commission v Vietnam Veterans' Association*, the Supreme Court of New South Wales adopted a literal approach as a qualifier of an objective interpretation of the statute.

“To give the words their ordinary meaning fulfils the evident purpose of s 5AB: to achieve some measure of objectivity, to eliminate scientifically unsustainable claims” (*Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc and Others*, 2000, para. 209).

We will return to this point later, but the extrapolation of a text from its context, as it is claimed by the above extract, is a discretionary choice (Groves, 2009). That choice is recorded and classified as a cognitive practice associated with the concept of objectivity. The mapping of cognitive practices provides insight into Australian judicial reasoning and an indication of its distinctiveness (Groves, 2009).

Methodology and preliminary debates

In the previous section, we explained that Leiter and Coleman theorised the existence of modest objectivity in judicial decisions, and Legrand deduced the existence of national *prejudices* (Coleman & Leiter, 1993; Legrand, 1997, 2008). Again, *prejudices* are cognitive activities that a national community of lawyers and judges associate with an objective, fair, and ultimately just decision (Legrand, 1997, 2008). This study aims to map out the cognitive practices adopted by Australian judges. In this section, we review the semiotic methodologies adopted to extract this information (Azuelos-Atias, 2010; Breda, 2017a; Rorty, 1991). The study relies on the overlapping of Langacker's studies on cognitive

grammar and Levinson's analysis of the *context* (Langacker, 1991; Levinson, 1983).

The methodology of *The Objectivity of Judicial Decisions* project was designed at the 2012 International Association for the Philosophy of Law and Social Philosophy World Congress in Frankfurt (Breda, 2017a, 2017b; Breda & Rodak, 2016). It was derived from an insightful pilot study carried out by Lidka Rodak aimed at assessing the objectivity of Polish judicial decisions (Breda & Rodak, 2016). The Objectivity of Judicial Decisions relied on a similar methodology but compared the lexical qualifications of the concept of objectivity in a sample made by at least 100 cases from Brazil, Hungary, Italy, Lithuania, Slovakia, Slovenia, Spain, Romania and the UK (Breda, 2017b; Breda & Rodak, 2016). The result of the study proved, within the limit of reasonableness, that courts adopt a national cluster of grammar-based cognitive practices (Azuelos-Atias, 2010) and heuristic processes (Tversky & Kahneman, 1974) to qualify the concept of objectivity (Breda, 2017b). These grammar cognitive practices are distinctive of national judicial language (Legrand, 2008).

The idea of grammar cognitive practices adopted in this project was conceptualised by Langacker in his theory of Cognitive Grammar (hereafter CG). In doing so Langacker argues that individuals use grammar strategically (Langacker, 1991) and CG provides several tools that allow for precise description structures which might potentially be subject to empirical verification. He states, for instance, that the semiological function of language needs three structures being semantic, phonological and symbolic (Langacker, 1991).

For our study, the key takeaways from Langacker are the concepts of *profiling* a text, *trajectors*, and *construals*. *Profiling* is defined as an expression selecting a conceptual content (Langacker, 1991). For instance, "objectivity" might be profiled as a noun or as a notion in a specific setting like it is the case with the concept of judicial objectivity. The profiling, in other words, sets it out as the reader's specific focus of attention.

In contrast with profiling, a *trajector* specifies a point in space. For instance, in the utterance "beyond a reasonable doubt", the noun *doubt* is identified in a trajectory which is indicated by the adjective *reasonable*. The third element of Langacker's CG that informed our

study is the concept of *construal*. The term refers to how individuals comprehend the same situation in alternate ways (Langacker, 1991). Again, as the utterance “reasonable doubt” focuses the reader on the uncertainty of an event. Inferring *uncertainty* becomes a trajectory and “reasonableness” is, according to Langacker, a landmark.

As part of its explicative value, each symbolic structure construes the content in a certain way (Langacker, 1991). The possibility to change the content of a narrative whilst using the same concept as a reference, such as *judicial objectivity*, is fundamental to the qualification of the cognitive activities that judicial systems consider a manifestation of the rule of law.

In practice, one of CG central claims is that all linguistic generalisations occur from schematisation of specific lexical structures (Langacker, 1991). The judgment of a well-formed expression relies on the extent that it bears on a share reader’s elaboration (Langacker, 1991). A similar point is, also in Anna Borg (Borg, 2004). CG makes clear that a text cannot be grammatically neutered. It includes an objective element and a subjective focus and the interaction between the two can be classified. This concept is introduced by Langacker by comparing the activity of evaluating text to watching theatre a performance. The text directs the reader’s attention to a fictional stage in which the character is speaking. The reduction of the immediate circumstances results in the imbalance between what is being perceived from the text and the contextual elements that are subsumed.

For instance, in *Repatriation Commission v Vietnam Veterans’ Association of Australia NSW Branch*, the court stated”

“to give the words their ordinary meaning fulfils the evident purpose of s 5AB: to achieve some measure of objectivity, to eliminate scientifically unsustainable claims” (*Repatriation Commission v Vietnam Veterans’ Association of Australia NSW Branch Inc and Others*, 2000, para. 209).

The court states that an objective methodology is to be used to interpret text (*Repatriation Commission v Vietnam Veterans’ Association of Australia NSW Branch Inc and Others*, 2000, para. 209). The text in the case is referring to scientific truth and legitimacy, but this assessment is done by a fictional reasonable person. The qualities of a reasonable person are subsumed by a readership made of legal professionals and

are associated with a specific theory of interpretation. This is one of the many instances of interaction between the utterance in the text (*eliminate scientifically unsustainable claims*) and the focus of attention (*the evident purpose of s 5AB*) which is dependent on an unmentioned theory of interpretation.

A text is interpreted objectively, according to CG, because the text is coherent with a theory of interpretation. Langacker explains that construals can be surmised and within the margin of error implicit on semiotic analysis, qualified. Individual units, like the one extracted from *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch*, can be joined to form symbolic expressions. These expressions are linked by relationships, categorisation, and correspondence (Langacker, 1991). So specific assemblies constituting linguistic expressions such as words, clauses, phrases, and sentences should be referred to as constructional schemas (Langacker, 1991). The classification of the construals allowed researchers to compare the cluster of cognitive methods adopted by judges in a legal system and to compare them with other construals adopted in different states.

Again, the utterance “objective text” in *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch* indicates that the word “objectivity” can be asserted in different contexts, however for the perspective of the reader, its construal is a manifestation of theory of interpretation that is specific to Australian judges.

It is worth mentioning that some LexisNexis results returned false positives. That is the text does not include a construal related to the concept of judicial objectivity. In the *Australian Competition and Consumer Commission v Pratt* (Australian Competition and Consumer Commission v Pratt, 2008) the reference to objectivity was the activity of prosecutors as officers of the court and as party a of the proceeding. That ambivalent role is not related to the judicial qualification of the concept of objectivity which this study wants to assess (Evans & Levinson, 2009).

“The application of the duty of fairness imposes a heavy responsibility upon prosecutors and one which requires of them a considerable degree of objectivity, for it is no part of their function improperly to strive for a conviction or to permit their judgment to be swayed by feelings of professional rivalry. In

R v Apostilides (1984) 154” (*Australian Competition and Consumer Commission v Pratt*, 2008, para. 9).

The text includes a construal (that shows the double role of the prosecution) but that does not qualify the judicial objectivity.

In short, CG reduces the grammar of a text into its cluster cognitive process. It explains that utterances and the inexplicit relations in terms of profile, base, trajectory, landmark, and construal. The result is a schematic classification of text. However, one of the limitations of the schematic classification of the text is a relative lack of consideration for the pragmatics implication of a narrative.

Langacker does not explicitly exclude the relevance of the context but CG tends to describe text as a self-referential system the interpretation of which does not imply the cognitive activity of those involved on writing and reading it (Langacker, 1991). For instance, CG might deliver a schematic classification of the text of *Alice’s Adventures in Wonderland* and ethics for lawyers textbook (Carroll, 2018; McCormick, 1999). The two texts might indeed share many fictional stories but that is a trivial point. The shortcoming of CG, which Langacker indirectly acknowledges is the reduced role of factual context in which a schematisation might occur.

Judicial narratives that are attached to a cluster of activities which is burdened by pragmatic implications is a limiting factor on the analysis. In other words, the grammar of a legal decision is an eminently pragmatic activity that has to make sense for those who are affected by it. It is for this reason that the classification of grammatical narratives was integrated through the study on pragmatics by Levinson (Levinson, 1983). Levinson’s pragmatics provides a methodology to study the relationship between language and context which allow a comparison between judicial narratives in different legal systems (Levinson, 1983). Two concepts are particularly relevant to this project (Levinson, 1983). The first one is *deixis* and the second is *maxims*.

Levinson defines deixis as concerning how languages encode contexts into utterances (Levinson, 1983). He outlines the categories of deixis as person, place, and time. For instance the utterance, ‘he came to court today’, engages the three categories. The engagement, from the reader’s perspective, inserts a meaning into a context (Levinson, 1983).

He noted that in a normal situation writer and reader cooperate by assuming several contextual factors. He called these factors: *maxims*. They refer to the interaction between context and text (Levinson, 1983). There are several features. First, maxims are generally presupposed by the reader and the writer. Second, they deliver subsumed and overt meaning to a text (Levinson, 1983). The exchange process increases the efficiency of the conversation. One of the most memorable explanatory examples of the effect of context in a conversation is provided by Skoczeń:

“A, B and C are standing in front of a lake. A points toward the water and says: Look! A hippo’s head! B. Oh! So it is!. C. It’s probably a whole hippo; it’s just that the rest of him is under the water.” (Skoczeń, 2016, p. 620).

The failure to acknowledge the contextual *maxim* delivers both a persuasive explanation of the role of external factors and a comedy punchline. It should be noted that a cooperative speaker can intentionally misuse a maxim. This is known as flouting the maxim which providing context and sufficient indicators are used to be noticed for example: during a discussion regarding policy *V: well our people matter! E: Really? Indeed we do love being shot in the foot by a gun!* Skoczeń’s insightful analysis highlights the effect of contextual elements in legal discourse and explains the relative paucity of deep disagreements in the liberal legal narrative (Borg, 2004; Skoczeń, 2016). She explains that one of the reasons for the relatively small number of disagreements is related to sharing minimal interpretative propositions.

As mentioned earlier the idea that Skoczeń’s minimal propositions in law are in tune with Legrand’s idea of prejudices (Skoczeń, 2016). In this context, Levinson provides a methodology to assess and classify the effect of context. To distinguish what is said and what is meant he divided the text into two categories: Direct Speech Act and Indirect Speech Act. Direct Speech Act in which a sentence includes information that he called *locution*. Levinson explains that saying something and then doing something are simultaneously functioned (Levinson, 1983). For example: *look at the hippo’s head in the middle of the lake*. The assertion of a river dweller animal is linked to its natural habitat. In contrast, Indirect Speech Act is a case where

locution and illocution differ (Levinson, 1983). The reader, in this case, is expected to discard irrational interpretations. The utterance A: *look at the hippo's head in the middle of the lake* would normally imply that its head is still connected to its neck.

One might be forgiven for expecting that such a cognitive process of “cleaning the text” from its absurd meanings, is carried out in all legal judicial narratives in which the court qualifies the concept of objectivity. However, this study noted multiple instances in which the court focused almost exclusively on the grammatical coherence or cut and paste narratives for rhetorical effect. The tendency to focus on lexical objectivity at the expense of the pragmatic implications is the object of multiple critiques (Allan & Aroney, 2008; Griffiths, 2010; Groves, 2009).

Langacker instructs us how to extract inferences from a text while Levinson's pragmatics show how textual meaning is linked to a cluster of pragmatic evaluations. *The 2012 Objectivity of Judicial Decisions* confirms that such a cluster also populated judicial narratives and they are embedded into a national legal culture (Coleman & Leiter, 1993; Levinson, 1983; Tversky & Kahneman, 1974). Again, the possibility to select one significant text, among many, has the effect of locating judicial objectivity within an area of intersubjective indeterminacy. The limits of such indeterminacy are defined by and for the benefit of a community of legal professionals (Tversky & Kahneman, 1974). This is not unique of lawyers. All social sciences, from economics to sociology via political studies, combine hard evidence with intersubjective evaluations.

The process is best described by Amos Tversky and Daniel Kahneman as the *illusion of validity* (Kahneman, 2015; Tversky & Kahneman, 1974).

“As we have seen, people often predict by selecting the outcome (for example, an occupation) that is most representative of the input (for example, the description of a person). The confidence they have in their prediction depends primarily on the degree of representativeness (that is, on the quality of the match between the selected outcome and the input) with little or no regard for the factors that limit predictive accuracy.” (Tversky & Kahneman, 1974, p. 1126).

This conclusion is supported with multiple statistical analyses indicating that cognitive practices within a discipline are often validated

by communal assumptions rather than scientific evidence (Kahneman, 2015; Tversky & Kahneman, 1974).

In contrast, to the 2012 *The Objectivity of Judicial Decision Project*, which endeavours to map the set of communal assumptions adopted by European judges (Breda, 2017b), this essay reports on the Australian jurisdictions. In particular, the research intends to list the set of assumptions adopted to qualify the objectivity of a decision by Australian Federal Courts, the High Court, and the Supreme Courts of the states and territories.

Data collection and case classification

In the previous section, we explained that scientific communities might adopt assumptions that are rarely tested (Tversky & Kahneman, 1974). CG surmises that text could be qualified in a schematic classification which might be broadly compatible with findings across other disciplines.

Legrand called the assumptions *prejudices*. For example, the *Objectivity of Judicial Decisions Project* found evidence of Legrand's claim in Europe. This project is designed to investigate if there are any Australian prejudices. This process requires multiple pragmatic steps that ensure the quality of the research results and the plausibility of the research assumptions.

The irony of looking for an objective methodology to define judicial objectivity is not lost in the authors of this essay but that is a tangential point. The first pragmatic step was the retrieval of a significant sample of case law in which courts qualified the concept of objectivity. Based on the experience of the *European Objectivity of Judicial Decision Project*, 100 Australian cases were randomly selected. These cases include utterances that are related to the term objectivity (Langacker, 1991). Multiple queries of terms such as “objectivity” and “objective” were inserted in a commercially available legal database called LexisNexis (Recanati, 2002). The time range sufficient for collecting a significant sample was between 1998 and 2020.

The accuracy of the sample and its retrieval process was tested by an academic trained to collect and assess data (in this case a criminologist). The sample revealed 20 cases in which the decision refers to objectivity, but the qualification was not related to cognitive activity. The data retrieval exercise is a *quasi-mechanical* endeavour. The LexisNexis' database provided the random sample of cases from Australian Federal Courts, the High Court, and Supreme Courts of states and territories. The randomness and accuracy of the section were validated by a third party (Borg, 2004; Skoczeń, 2016). An academic expert insured the randomness and objectivity of the selection process and two researchers, working independently, divided the cases into a group of similar construals.

The output of the first phase of the project is a series of extracts. These are paragraphs or a series of paragraphs taken from the sample of cases that are analysed using Langacker's' grammar but to find a cognitive function using Levinsons' pragmatics (Evans & Levinson, 2009; Langacker, 1991). The raw data is available for review via Australia's Academic and Research Network (AARNet). For instance, the sentence:

"references to intention must not divert attention from the text, for it is through the meaning of the text, understood in the light of background, purpose and object, and surrounding circumstances, that the legislature expresses its intention, and it is from the text, read in that light, that intention is inferred." (*Singh v The Commonwealth*, 2004, para. 19),

was extracted from the case *Singh v The Commonwealth*. There is in the text a direct qualification of the concept of objectivity that was flagged by LexisNexis. The two researchers, acting independently, collected the extracts, and derived the construal from the texts and decided, within the limit of reasonableness, whether the court considered the pragmatic implications of its narrative (or focused primarily on its lexical coherence).

In the second phase, the qualification of the case's cognitive activities was shared between the two researchers. The sharing process allowed for mediation of the results and ensured consistency (Breda & Rodak, 2016). The cases and their related construals were divided into macro and subgroups. In the analysis of the Australian sample, the first

group includes extracts in which the court refers to an objective interpretation of the text, the second group of extracts are taken from cases in which there is an allegation of judicial bias. Each macro group includes several labelled construals associated with the concept of objectivity (Azuelos-Atias, 2010; Skoczniak, 2016). For instance, the first group considers all cases in which the court asserts that its interpretation of the legal text is objective because:

- i. that is its literal meaning
- ii. that is the intention of the legislator
- iii. that it is coherent with a theory of interpretation
- iv. the judge follows an objective methodology
- v. that it is a logical interpretation of the text
- vi. all the relevant aspects of the case were considered, and the situation is covered by a specific rule, or
- vii. there is no evidence of bias (the negative definition).

Note that a single judicial decision the concept of objectivity might be inserted into multiple construals. An allegation of bias, for instance, requires an evaluation of the existence of a judicial interest in the matter under review and references to intersubjective criteria such as the *reasonable person* (Breda, 2017a; Groves, 2009; Olowofoyeku, 2016).

It is also worth mentioning that in 2012, at the start of the European Objectivity of Judicial Decision project from which this study emanated, none of the researchers knew whether all legal systems had a cluster of construals related to the concept of judicial objectivity (Breda & Rodak, 2016). There were strong indications from studies on heuristic bias and linguistics that professionals tend to be trapped in a self-validating loop that could lead to cognitive bias (Kahneman, 2015; Tversky & Kahneman, 1974). For instance, Evans and Levinson's analysis of meta-cognitive practices tends to support divergence as one of the common dominators in linguistic analyses (Evans & Levinson, 2009).

Given that judicial reasoning is, at least partially, a semantically based cognitive activity, it was reasonable to speculate that a large multinational analysis would find evidence of national diverging cognitive practices (Azuelos-Atias, 2010; Evans & Levinson, 2009; Skoczniak, 2016). The Objectivity of Judicial Decisions project did

indeed find strong evidence of national clusters of heuristic activities in Europe (Coleman & Leiter, 1993; Kahneman, 2015; Tversky & Kahneman, 1974), that was sensed by Legrand's critique of European legal homogenisation endeavour (Legrand, 2008). The Australian sample of cases, we can anticipate, also supports Legrand's idea of national prejudices. Furthermore, this analysis indicates dynamic links between social context and judicial practices (Breda, 2016). Australian leading cases related to the concept of objectivity are often taken from British jurisprudence, however, our analysis shows that Australian and British concepts of objectivity might have started from the same case but diverged over time following distinctive national patterns.

Before discussing the results, the essay requires several preliminary qualifications. First, the term *judicial objectivity* is sometimes confused with *judicial independence*. However, *independence* is an external condition of the judicial decision-making process and it is often part of a series of constitutional arrangements which separate it from other political powers, whereas *objectivity* is an internal element of the judicial process (Lucy, 2005) which may consist of a body of external factors. This essay does not report on the independence of judges.

Second, all liberal legal systems endorse the rule of law and one of the corollaries of such an endorsement is that judges apply such a law objectively. The study aimed to map the way courts lexically construct the concept of judicial objectivity and not to scrutinise the process adopted to achieve an objective decision. In other words, the study does not claim that a legal system has a better, or worst cluster of cognitive methods to find an objective decision (Breda, 2019b).

Third, Australian Federal Courts, the High Court, and State Supreme Courts were selected because of their national representativeness. Australia is a federal system with two-tier sovereignty (Williams et al., 2018). Federal and State jurisdictions operate *quasi* independently and decisions of final appellate jurisdiction from the High Court of Australia have a binding effect on lower courts which presumably, provides a nationwide indication of established cognitive processes.

Fourth, the study focused on a sample of recent cases. Cases outside the timeframe were considered in the analysis but were not

inserted in the sample (*Esso Australia Resources v Commissioner of Taxation*, 2011). Fifth, the study shows an indication of the cluster of cognitive activities adopted by the Australian legal system and not a comprehensive analysis of the evolution of the Australian concept of objectivity. Sixth, it is assumed that Lexis Nexis adopts Natural Language Software in its search function (LexPredict, n.d.; Natural Language Toolkit, n.d.) however that has limited effect on textual analysis.

Seventh, multiple rhetorical and incongruent uses of the term *objectivity* were marked as false positives but reported as relevant results because they indicated what is perceived as meaningful use of the term *objectivity*. Similar conclusions are reached in Azuelos-Atias's study of Israeli judicial narratives (Azuelos-Atias, 2010). Finally, the submission complies with COPE guidelines and the Australian Code for the Responsible Conduct of Research.

Analysis of the Australian Jurisprudence

In the previous section, we explained that the universal normative meaning of utterances have been disproved by semiotic studies (Evans & Levinson, 2009; Levinson, 1983) and comparative lawyers (Husa, 2018; Skoczzeń, 2016). The persistence of the myth of a normative *universal meaning*, however, has repercussions on the application of international law, legal transplants, and the development of global legal community (Azuelos-Atias, 2010; Breda, 2017b, 2019a; Husa, 2018).

In this section, we provide a commentary on the results extracted from this study that can be found in table one. The table has the exclusive intention of visualising the methodology of the project and not to make deductions on the quality of judicial practices. For instance, the order of the extracts, and their grouping might change the visual appearance. The aim of the study, however, is to show that each nation has a cluster of procedures and cognitive methods that are perceived by a community of lawyers and judges as objective. The results of the lexical analysis show that Australian courts have, over the years, constructed a distinctively large range of the construals related to

the concept of *objectivity* which is, as Legrand suggested, distinctive to Australia.

Contruals	Legal Systems									
	Australia	UK	Hungary	Slovakia	Brazil	Italy	Lithuania	Romania	Slovenia	Spain
Objective interpretation: THE TEXT is interpreted objectively because:										
a. the court refers to its literal meaning	V	V	V		V		V			
b. the court refers to the intentions of the legislator	V	V	V				V		V	V
c. the court refers to a coherent theory of interpretation	V		V							
d. the court refers to an objective activity of interpretation	V		V	V	V	V				
e. the court refers to a logical and therefore an objective interpretation	V	V								
f. the court refers to an holistic interpretation that support an objective judicial interpretation	V		V							
Objective impartiality: The Court is engaging in ALLEGATION OF BIAS: The judge's decision is/feel unbiased because:										
a. the court refers to the subjective impartiality of the judge	V	V	V	V						
b. the court refers to the objective impartiality of the judge	V			V				V	V	
c. the court refers to external objective criteria,		V	V	V	V	V	V	V		V
d. the court references the activity of a third party (subjective bias)		V	V	V			V		V	
e. the court's decision is de facto unbiased			V	V		V		V	V	V
f. the court's decision considered all the facts of the case		V	V	V	V	V	V	V	V	V
g. the court's decision referred to the opinion of experts	V	V		V	V	V	V			V
h. the court's decision references legal rules and procedures	V			V		V		V		

Table 1. (Data integrated from: The Objectivity of Judicial Decisions, courtesy of Peter Lang GmbH, Internationaler Verlag der Wissenschaften, 2016 Authorisation to republish in a journal Order license ID1055967-1)

In table one, the upper row indicates the name of the legal systems. The first column on the left shows the most common construals related to the concept of *objectivity*. The significances are grouped into two large thematic macro-groups. The first group includes a list of reasons for qualifying a textual interpretation as *objective*. The second macro group separates the extracts from cases in which a court responds to an allegation of bias. In these abstracts, the test of the decision states that a judge's decision is/is not objective because:

- i. the court refers to the subjective impartiality of the judge,
- ii. the court refers to the objective impartiality of the judge,
- iii. the court refers to external objective criteria,
- iv. the court references the activity of a third party (subjective bias),
- v. the court's decision is de facto unbiased,
- vi. the court's decision considered all the facts of the case,

- vii. the court's decision referred to the opinion of experts,
- viii. the court's decision references legal rules and procedures.

The labelling of the case provides a graphical rendering and the classification from i. to viii.

The table should be read by conjoining the textual references in the extracts listed within the rows of the first column (called objectivity – contextual evaluation) with the list of cognitive activities in the national columns. The cognitive activity is inferred using Levison's studies in pragmatics which associated meanings to an evaluation of the context. For instance, the Australian sample of cases includes references to the literal interpretation of a binding legal text as an objective judicial activity. We already mentioned that such a possibility is heavily contested (Groves, 2009) but that is not an element of this study (Groves, 2009).

In the sample of Australian cases, there are 57 instances in which literalism is considered the best cognitive practice for extracting an objective interpretation of the text (Borg, 2004; Skoczeń, 2016). 23 of these instances seek to retrieve the meaning of contract and 13 infer the objective meaning of a statute (or of the constitution). For example, in case of *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch* in our sample, the extract from the decision states:

“to give the words their ordinary meaning fulfils the evident purpose of s 5AB: to achieve some measure of objectivity, to eliminate scientifically unsustainable claims” (*Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc and Others*, 2000, para. 209).

The court describes its interpretative activity in a two-stage process: first, the text of the section is clear (that is section 5AB of the *Veterans' Entitlements Act 1986*) and second, its literal meaning will be a proxy for an objective decision. The commitment is delivered in the lucid narrative.

“The paragraph is not expressed in obscure language. It simply requires the identification of relevant criteria and then asks if the relevant information meets those criterion [...], nor whether it is assessable by reference to those criteria” (*Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc and Others*, 2000, para. 208).

The example case indicates a direct connection between a plain lexical analysis of a text and a claim of procedural correctness but used the term *context by the courts* refer to the statute and not to the contextual elements as discussed by Levinson (Azuelos-Atias, 2010; Groves, 2009; Skoczeń, 2016).

“The relevant decision-making processes are those conducted by the RMA and the SMRC. They provide part of the context, internal to the legislative scheme, in which the words must be construed.” [Our Emphasis] (*Repatriation Commission v Vietnam Veterans’ Association of Australia NSW Branch Inc and Others*, 2000, para. 106).

Column one includes qualification of the type of extracts. In this case, these are qualifications of a cognitive activity which references a text. In Row two of Column one, there is an indication of the activity reported which is a reference to a literal meaning of a statute. All cases are decided based on an interpretation of a text but, in these 57 instances, the court explains what are the cognitive activities that are required to make such a reference *objective*.

Column two, Row one reports on the types of cognitive activities (as we semantically extracted from the text) carried out by the Supreme Court of New South Wales. In this case, the state Supreme Court asserts that it has found an objective interpretation of a statute. The decision lists out the cognitive processes that are necessary to obtain such an objective interpretation. The court describes the text in *section 5AB* as having a self-evident meaning. It asserts that such a clear meaning is proxy for an objective interpretation. That is the meaning of the text that bound the court. The three processes (firstly describing a legal text, secondly explicitly asserting the correctness of the procedure adopted in interpreting its meaning, and thirdly evaluating of its implications) are confirmed in row two – column two.

Table one provides a graphical representation that makes the result of the process more digestible, but it is not a substitute for analysing the cases. The analysis of *Repatriation Commission v Vietnam Veterans’ Association of Australia NSW Branch* also shows an indication of a historical divergence between England and Australia of similar cognitive practices (associated to the concept of judicial objectivity). The *Repatriation Commission v Vietnam Veterans’*

Association of Australia NSW is one of the reported cases, in which Australian courts refers to a test of objective interpretation of a statute that is derived from *Gissing v Gissing* (*Gissing v Gissing*, 1971).

In *Repatriation Commission v Vietnam Veterans' Association of Australia NSW*, there is a reference to *Abigroup Contractors Pty Ltd v Transfield Pty Ltd* which provides one of the clearer examples of cognitive activity that is perceived as objective by an Australian court.

The general test of objectivity is of importance in the law of contract and Lord Diplock illustrated the importance of the objective test when he said in *Gissing v Gissing* [1971] AC 886 at 960 the following:

as in so many branches of English law in which legal rights and obligations depend upon the intention of the parties to a transaction, the relevant intention of each party is the intention which is reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party' [Emphasis added] (*Abigroup Contractors Pty Ltd v Transfield Pty Ltd*, 1998, para. 37).

The general test requires, according to the Supreme Court of Victoria, that legally binding text in a contract or a statute is interpreted without considering the subjective intentions of the drafters.

"That is not to say that there may be rare cases where subjective intention may be directly in question. For example, something may have been said which showed that the parties were not serious, were not intended to be taken at face value or there are issues such as mistake, misrepresentation, duress or undue influence" (*Abigroup Contractors Pty Ltd v Transfield Pty Ltd*, 1998, para. 38).

Once more, the Supreme Court of Victoria adopts the cognitive method set in *Gissing* and reasserted in *Abigroup Contractors Pty Ltd v Transfield Pty Ltd*. The court states that whenever a text had a plain meaning at the time it was drafted, it should be interpreted as it was historically intended. That is outside its contextual meaning. It also asserted the correctness of the procedure, which is set in *Gissing*, and finally evaluated its implications for the present case. All these three cognitive processes were inferred as *objective*.

However, the English case *Gissing v Gissing*, that is referred to in *Abigroup Contractors Pty Ltd v Transfield Pty Ltd* and *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch* is a case of “constructive trust” that is no longer considered “good law” in England and Wales. In *Gissing v Gissing* the House of Lords decided that the conduct of the parties subsequent the purchase of a house was irrelevant to establishing a *constructive trust*. Lord Reid explicitly excluded the possibility of considering element that was not part of the purchase since it would add an intention that was not manifested at the time of drafting the contract. The narrative is clearly delivered: ‘*imputing to the parties an intention to agree to share even where the evidence gives no ground for such an inference*’ (*Gissing v Gissing*, 1971, p. 897). As mentioned earlier Lord Reid’s stance has been reverted and contextual elements are currently considered in the formation of trust among marital couples (Douglas et al., 2009; Jones v Kernott, 2011), yet Australian jurisprudence continues to refer to the *Gissing* case as a reference for interpreting contracts and statutes.

The diverging evolution in the UK and Australia of respective lines of authority based on *Gissing* is only an indicator of one, among many, diverging cognitive practices where UK courts adopted an assessment that is in tune with Levinson’s Pragmatics. It is incidental to this study that such idiosyncrasy is the target of multiple critiques. For instance, Aroney and Allan squarely engage the implication of the Australian textual method and its paradoxical pragmatic implications with distinctive clarity.

“[T]he techniques by which the High Court of Australia has done this are perhaps unique, for they have rested upon a rather unlikely foundation: a certain kind of textual formalism [...] Each time the conclusion reached looks laughably far-fetched, or at minimum implausible, when viewed from the initial vantage of the rules (statutory or case law ones) used to determine the outcome.” (Allan & Aroney, 2008, pp. 246–247).

Aroney and Allan’s narrative shows signs of frustration with the predominance of *textual formalism* as a cognitive method. Grove notes, instead, the Australian courts’ obsession with the search of:

“the mythical fair-minded and informed observer who might be using her infinite wisdom, find the criterial objective internal interpretation of the text that eluded world-leading semiotic experts” (Groves, 2009, p. 488).

These are powerful critiques however, the persistence of a cognitive practice within a legal system as Legrand explained, is related to its perception of validity by the legal community. Whether such a practice is hindering or enhancing the objectivity of a legal system is for the national community of legal practitioners to decide.

The second element that sustains a myth of objective acontextual interpretation is related to the opportunity to challenge it. In the UK, one of the reasons for the limited popularity of textual formalism is related to the case *Mandla (Sewa Singh) and Another v Dowell Lee and Another* (Mandla (Sewa Singh) and Another v Dowell Lee and Others, 1983). In the 1983 *Mandla v Lee*, Lord Fraser’s opinion trammelled the plausibility of textual formalism as a cognitive method to interpret English and Welsh law (Mandla (Sewa Singh) and Another v Dowell Lee and Others, 1983). In particular, Lord Fraser inserted a specific requirement in English and Welsh law. That is statutory interpretation is linked to context. A practice that is also more in tune with the latest semiotic analyses (Levinson, 1983, 2013).

“[The] Court of Appeal thought it did, then “can” ought logically to be read literally. The word “can” is used with many shades of meaning. In the context [...] it must, in my opinion, have been intended by Parliament to be read not as meaning “can physically”, to indicate a theoretical possibility but as meaning “can in practice” or “can consistently with the customs and cultural conditions.”” (Mandla (Sewa Singh) and Another v Dowell Lee and Others, 1983, pp. 565–566).

So modal verbs do have a cluster of significances (Borg, 2004; Skoczeń, 2016), and selecting one over the other requires, the House of Lords states, an analysis of the context. In this case, Dowell Lee’s private schools’ policies, which could have been objective in 1931, were surmised as racist in 1983.

Indeed, the 1930s were not good years to establish an objective definition of race and Lord Denning’s choice was particularly unfortunate, yet Lord Fraser brings into the British legal system a general point: statutory material must be interpreted in a social context. Again the reason for the Australian jurisdictions to choose an unbidden

cognitive activity extracted from *Gissing* and to overlook the one adopted by Lord Fraser in *Mandla* is a matter of speculation (Groves, 2009). The element that is relevant to this study is that the diverging history of textual formalism in Australia and the UK gives indicated the existence of a national cluster of lexical construals and pragmatic evaluation of legal utterances.

As mentioned earlier, the cognitive assumption that a text could be interpreted objectively by excluding it from its context is also adopted in interpreting contracts. However, in contract law, the court's cognitive activity revolves around an interpretation of the text that is integrated by an intersubjective assessment of the knowledge that each of the parties should have, again by the perspective of the reasonable person, at the moment of signing the contract. Lander delivers this point in a lucid narrative.

"It is now clear and settled law that the meaning of commercial contracts and documents is to be determined objectively. To determine the objective intention of the parties regard must be had, of course, to the words in the document themselves, but regard should also be had to all of the surrounding circumstances which were known to the contracting parties at the time the document was created." (Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd, 2006, para. 251)

The assessment of the circumstances surrounding the contract also included the adoption of intersubjective criteria. The sample yield 57 instances in which courts explain that the text has to be interpreted as it would be by a reasonable person at the time in which the contract was signed. The leading case is *Pacific Carriers Ltd v BNP Paribas* (Pacific Carriers Ltd v BNP Paribas, 2004) yet concerning the interpretation of the test, this decision relies on the authority of the aforementioned *Gissing v Gissing* (Gissing v Gissing, 1971). As it has been stated in our assessment of the interpretation of statutes by Australian courts, the cognitive methodology adopted to interpret the purchase of family homes in *Gissing v Gissing* has lapsed. The line of authority is still "alive and kicking" in Australia but that is not an indication of the quality of either British or Australian judicial decisions. The point is delicate and so it is worth mentioning again that a comparison between the construals of the concept of judicial objectivity shows that, even when cognitive practices originated from

the same case, they dynamically change in ways that meet the expectations of a particular community or point in time. One of the elements of our study was to find evidence of dynamic mutation, so to speak, in Australian common law. That would indicate, within the limit of reasonableness, that judicial objectivity depends on social perceptions as suggested by Legrand and that such perception axiomatically changes over time.

Allegation of Judicial Bias

In the previous section, we commented on the search of objective interpretation of a text and show both the distinctiveness and the contextual nature of judicial cognitive practices even when the court tries to overlook the pragmatics implications of their decision. This section comments on the *objectivity impartiality group* which is the second macro-group of functional uses of the concept of *objectivity* considered in this essay. These are appeal cases in which party alleged judicial bias. An analysis of these cases delivers the most obvious indicators, *ab contrario*, of the cluster of cognitive processes associated to the concept of *judicial objectivity* because a judge's ability to carry out an objectivity cognitive activity is directly questioned by the party (Breda, 2017a; Groves, 2009, 2014). Within the sample, we found thirteen cases in which a court qualifies the concept of *objectivity* and cases of alleged judicial bias. The extracts from the thirteen cases were engaged by a series of negative construals of the concept of *judicial objectivity* which are represented in table one. Overall, the extracts from these cases show indications of highly complex (perhaps too complex) clusters of cognitive evaluations.

Before analysing the results, it is worth noting that the literature considers three types of allegations of judicial bias (Gazal-Ayal & Sulitzeanu-Kenan, 2010; Olowofoyeku, 2009; Tarrant, 2012). The first group is composed of instances in which a party claims that a court is ideologically biased. The second group is composed of cases in which, a party claims that a judge has an objective financial interest in the case. The third group includes cases in which one of the parties allege that a

judge has a subjective connection with the parties in the dispute or the lawyers representing one of the parties. The Australian legal community calls these instances *apprehended bias cases* (Abadee, 2000; Griffiths, 2010).

Allegations of institutional bias, *à la Gramsci*, cuts across a very articulated theoretical debate over the ideological leaning of all Western-style constitutional systems (Bankowski, 1991; Boyle, 1985; Gramsci, 1999). However, Leiter and Coleman explained that judges in liberal systems (Coleman & Leiter, 1993), within the constraints of their institutional setting, are bound to apply the rule of law and that entails an attempt to provide a rational and objective application of the law (Christodoulidis, 2003; Gramsci, 1999). The sample did not find cases in which an Australian court was dealing with a claim of ideological bias (Coleman, 1995; Dworkin, 1996). In *Re Colina and Another*, one of the parties alleged ideological bias, but such an allegation was tangent to the case. The allegation of ideological bias was against the Family Court and the Chief Justice of the same tribunal. Such an allegation triggered a charge of contempt of court (*Re Colina and Another*; *Ex parte Torney*, 1999). The appeal against the charge did not necessitate an assessment of the allegation of ideological bias.

The penury of cases in which there is a claim of ideological bias is not a surprise. In the *Objectivity of Judicial Decision Project* which analysed over 900 cases in nine different jurisdictions, only in two reported cases (the Budapest Metropolitan Court No. 27.P. 24.578/2006./3, the Supreme Court of Lithuania (CLS) case No. 3K-3-93/2011) has one of the parties alleged that the court was “ideologically biased”.

The analysis of the Australian sample also did not find a decision in which there was an allegation of objective judicial bias. Again the limited level of deep divergence in the legal narrative is confirmed by similar studies (Skoczeń, 2016). The paltriness of cases is partly related to testing an allegation of objective bias adopted by Australian jurisdictions. The leading case is *Ebner v Official Trustee in Bankruptcy* (*Ebner v Official Trustee in Bankruptcy*, 2000, para. 8). The *Ebner v Official Trustee in Bankruptcy* judges amalgamated the cognitive process that assessed objective and subjective bias. The so-called *Ebner Test* still referred to in the 1852 House of Lords case of

Dimes v Proprietors of the Grand Junction Canal (which discussed an allegation of objective judicial bias) yet it is applied to both an allegation of objective and subjective judicial bias (*Ebner v Official Trustee in Bankruptcy*, 2000).

Recall that objective bias cases are instances in which a judge has a financial interest in the object of the dispute and that might be easily proved by a hard-cognitive narrative (e.g. financial reports). These are instances in which a judge was expected to disqualify herself as soon as possible but failed to do so. The maxim “*nemo iudex in parte sua*” (extracted by the Codex 3.5.0 *Ne quis in sua causa iudicet vel sibi ius dicat* AC365) is the general principle recognised across most Western-style judicial systems including Australia (Abadee, 2000) (Breda, 2017a; Groves, 2009). One of the recent rewordings of the *nemo iudex in parte sua* principle is by Lady Arden in *Mengiste & Anor v Endowment Fund for the Rehabilitation of Tigray*, ‘*Judges who have a financial interest in a case are automatically disqualified*’ (*Mengiste v Endowment Fund for the Rehabilitation of Tigray*, 2013, para. 3). In Australia, however, having a monetary involvement in the case is not a cause of automatic disqualification (Abadee, 2000; Griffiths, 2010; Young, 2018).

The refusal to consider the Levinson’s context is a recurring theme in this area of law. In Australia, the party making the allegation of bias has to prove firstly that a judge had an interest in the case, and secondly, that such an interest would impede him/her from being persuaded by reasonable argumentation (Abadee, 2000). The requirements have substantial procedural implications. Firstly, a court that assesses an allegation of bias should be convinced that a reasonable person, as defined by the courts, would find a subjective or objective connection between a judge and the object of the case as potentially hindering the objectivity of the judge.

“[A judge] will do so without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case.” (*Minister for Immigration and Multicultural Affairs v Jia Legeng*, 2001, para. 185).

Secondly, a court has to be convinced that such a potential connection, as it was ascertained in phase one of the Ebner Test, might impede

him/her from being persuaded by one of the parties. Simply put, the party alleging bias should prove that a judge might not be persuaded by a party's narrative and that is due to her/his financial or personal interest regarding the matter under review. This set of cognitive activities are, concerning the aims of this paper, significantly diverging from the cognitive activities adopted in the UK and they deserve to be reported verbatim.

"First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation,[sic] or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision-making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed" (Ebner v Official Trustee in Bankruptcy, 2000, para. 8).

Again, this is a rather convoluted set of requirements but it is not the aim of this study to assess the benefit they might bring to the perception of judicial objectivity of the Australian legal system (Groves, 2014; Williams et al., 2018).

The two stages of the assessment, whether there is a reasonable potential objective bias and then whether a judge might be reasonably informed by it, increases the burden of the proof on the party making an allegation of bias. This point is well-rehearsed by Justice Kirby (Ebner v Official Trustee in Bankruptcy, 2000). Kirby explains the comparative oddity of the High Court of Australia's qualification of *objective bias*, by referring to the jurisprudential stances of England, Scotland, South Africa and Canada (Ebner v Official Trustee in Bankruptcy, 2000). For instance, in Pinochet No. 2 the House of Lords established that mere existence of a perceived connection was sufficient for allowing a retrial of the former Chilean dictator (R v Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No 2), 1999).

It appears that Australian jurisprudence, by comparison to British jurisprudence, gives the impression of being tilted toward the protection of judges from improper allegations and that might be at the

expense of a popular perception of the legitimacy of the court. In the sample of cases considered by this study, the Ebner test was applied in *Smits and Another v Roach* where a judge was called to decide a liability case against a law firm in which his brother was acting as managing partner (Smits and Another v Roach and Others, 2006). The connection was declared by the judge at the beginning of the trial but was subsequently appealed. The appeal was partly successful (Smits and Another v Roach and Others, 2006). However, the High Court noted that the Court of Appeal's decision focused on the first part of the Ebner test (that is an assessment of the potential interest of the judge in the case) and overlooked the second part of the test (that is an assessment of the ability of a judge to deliver a fair and reasonable decision).

It is reasonably clear that the House of Lords, and currently the UK Supreme Court, has developed their qualification of the *Dimes v Proprietors of the Grand Junction Canal*. In the *Pinochet No. 2* case, and the mere connection between a judge and financial institutions (Lord Hoffmann was one of the unpaid directors of the charity that collected financial support for Amnesty International) was deemed sufficient for allowing a retrial (Abadee, 2000; R v Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No 2), 1999). The House of Lords was adamant that Lord Hoffmann acted *de jure* impartially but he, and by proxy, the court, could be perceived by a bystander as biased. This bystander, by a way of comparison of the reasonable person, has very limited knowledge of rules and procedures.

The reference to the contextual implication in *Pinochet No. 2* was projected in the future (Levinson, 2013; R v Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No 2), 1999). The financial company shared part of the name with Amnesty International that campaigned against the Chilean junta. There are multifarious implications of the *Pinochet No. 2* (Abadee, 2000), but the perception of bias had, according to the Supreme Court, an effect on the future perceptions in the public domain of the legitimacy of the court. The Australian court, by comparison, adopted a construal that reduced the future expectations of perceived objectivity. In Australia, a perception of bias has to be assessed by an informed observer at the time of the allegation who should be able to understand

the difference between two companies that share a similar name, whereas in the House of Lords a popular perception of bias is sufficient for allowing a retrial (Breda, 2017b).

Speculation over the outcome of various cases from one jurisdiction to another is loaded with indeterminacy. However, it is reasonable to subsume that Lord Hoffmann's role as director of a financial institution, whatever the name of such institution might be, was not related to the case and therefore would not have been considered pernicious in Australia.

The analysis of the context has the effect of changing the line of authority which originated from the same case. The analysis of the construals of the *British American Tobacco Australia Services v Laurie* shows another distinctive element of the Australian qualification of judicial bias (*British American Tobacco Australia Services Ltd v Laurie*, 2011). The case discussed the subjective objectivity of a judge who, given the nature of the procedural challenge of an *interlocutory application*, had the opportunity to engage the allegation of bias during the trial. In *British American Tobacco Australia Services v Laurie*, one of the cognitive activities that were suggested to support the decision was *an absence of emotive text* in the judge's utterances.

"The interlocutory application was not accompanied by any objectionable or emotive language otherwise casting doubt on the willingness or ability to reconsider objectively the position earlier adopted" (*British American Tobacco Australia Services Ltd v Laurie*, 2011, para. 23).

This claim was rejected by the High Court, but it is worth reporting since it was an attempt to assert the use of contextual text analysis to reject a claim of judicial bias. As noted in the previous section of this essay, a similar construal is adopted to extract meanings from contract and statutes (*British American Tobacco Australia Services Ltd v Laurie*, 2011). Once more, the point here is not to mention another inconsistent qualification of the concept of *objectivity* (Allan & Aroney, 2008). Rather the example shows the inherent limitation of the search for acontextual judicial objectivity in case of allegation of bias.

The *Minister for Immigration and Multicultural Affairs v Jia* the *Hight Court* (*Minister for Immigration and Multicultural Affairs v Jia* Legeng, 2001) provides another noteworthy example of the

cognitive qualification of judicial bias. The case probed the objectivity of ministerial assessment that rejected a visa application. The High Court, among other elements, accepted that political accountability of government ministers implicitly allows a level of discretion that is different from a form of judicial discretion (*Minister for Immigration and Multicultural Affairs v Jia Legeng*, 2001). However, there is little in the text of the case that explains the cognitive difference between *ministerial objectivity* and *judicial objectivity*. Intuitively it is a reasonable conclusion, but it goes against the grain of a system that promotes the search for *acontextual objectivity*.

The comparative analysis of the cognitive activities associated with allegations of judicial bias might continue but, there is enough material to support the distinctiveness of Australian jurisprudential qualifications of judicial objectivity. There is, for instance, enough evidence to indicate a divergent nature of national judicial cognitive practices as theorised by Legrand. In the analysis of Australian cases, there are multiple references to English jurisprudence, but those have evolved in different construals. The divergence has been heavily reviewed and multiple criticisms have been levelled against it by judges, like Kirby, and by academics (Groves, 2009; Olowofoyeku, 2009; Tarrant, 2012). However, national variations of the concept of *objectivity* are most likely linked to evolving perceptions by a legal community that seeks to adapt to changing context.

Conclusion

The objectivity of judicial decisions is a requirement of modern legal systems. It is a direct requirement of the rule of law. However, the concept of *judicial objectivity* cannot be linked to a single apotropaic acontextual cognitive activity.

This article analysed the concept of *judicial objectivity* as defined by the Australian Federal Courts, the High Court, and Supreme Courts of the states and territories. The analysis of a large sample of cases shows that Australian courts adopt a variety of cognitive activities associated with the concept of objectivity. The sample of cases also

indicates that *objectivity* is pragmatically linked with construals, such as *reasonable person* and *acontextual interpretation*, that have pragmatic implications. The cluster of construals is, as Legrand explains, a manifestation of a unique set of national *prejudices*. These results are comparable to the ones retrieved in the Objectivity of Judicial Decisions Project which analysed in European and British legal systems.

The concept of *judicial objectivity* is constructed in Australia and Europe as a pragmatic activity. Distinctive of the Australian sample of cases, in comparison to the studies that focused on European legal systems, is that current cognitive activities were derived from English law but are currently developing along different lines.

In particular, the essay reported the cognitive activities that are associated with an objective interpretation of a legally binding text and an allegation of judicial bias. The analysis of the 100 cases indicates that in multiple instances Australian Federal Courts, the High Court, and Supreme Courts of the states and territories associated the concept of *objectivity* to an attempt to form an elusive acontextual literal interpretation of a text. The line of authority is derived from an English and Welsh common law. This branches out from England to Australia from *Gissing v Gissing*, however, this case no longer has the same application in the UK as it currently has in Australia. In England and Wales, *Gissing v Gissing* has been so heavily qualified that it is considered “bad law”. Australian jurisprudence, however, continues to refer to the case and its latest rendering to support the idea of the acontextual interpretation of constitutional rules, statutes, and contracts. This is a cognitive practice that is a proxy for increasing indeterminacy. All legal texts carry pragmatic cognitive functions because they aim at changing conduct, as explained by Levinson, that are contextually dependent and any attempt to exclude it increases, rather than decreases, the level of interpretive indeterminacy.

Evidence of the Australian divergence from the UK is found in the choice of cognitive practices adopted in cases of an allegation of judicial bias. The exegesis of the line of authority on judicial bias can be traced to the English interpretation of the Roman Codex, but the common reference case in Australia and the UK is the 1852 case *Dimes v Proprietors of the Grand Junction Canal* (*Dimes v Proprietors of*

Grand Junction Canal, 1852). Once more, Australian courts have chosen a set of construals associated with the assessment of an allegation of bias diverged from the UK. In *Pinochet No. 2* it was considered a perception of bias is a sufficient reason for a retrial. In Australia, a party alleging bias firstly has to prove the existence of a connection between a judge and a case, and secondly that such a connection prevents him/her from being persuaded by a party.

The Ebner test, as an attempt to find the acontextual meaning of statutory material, is distinctive of Australian jurisdictions. Perhaps ironically, as a test that is designed to assess the universal normative value of judicial objectivity, is one of the clearer manifestations of national idiosyncrasies which Legrand calls *national prejudices*. The aim of the analysis reported in this article was not, however to a critique of Australian jurisprudence. The study maps out a sample of Australian judicial cognitive practices and compares them with the results of analogous studies. In particular, the UK comparison shows that Australian and English judicial cognitive activities, which often originated from the same case, diverge over time confirming, within the limit of reasonableness, that judicial objectivity is contextually dependant.

Declarations

The submission complies with COPE guidelines and the Australian Code for the Responsible Conduct of Research. The raw data is available for review via Australia's Academic and Research Network (AARNet). Table 1 includes data integrated from 'The Objectivity of Judicial Decisions'. Authorisation to republish in a journal Order license ID1055967-1, courtesy of Peter Lang GmbH, Internationaler Verlag der Wissenschaften (Breda, 2017b).

Conflict of Interest Statement

The author declares no conflicts of interest to disclose related to this manuscript. If any conflicts arise in the future, the Author will promptly inform the journal.

AI Use Statement

The author confirms that artificial intelligence (AI) tools were not used in any aspects of this research.

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