The Concept of Objectivity in the UK Supreme Court through a Comparative Looking Glass

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ABSTRACT.
This essay reports on the result of hermeneutical research entitled Objectivity in the UK Judicial Discourse. The concept of objectivity generates a plurality of analysis. For instance, in legal theory, MacCormick suggests the possibility of an objective interpretation of cases. Objectivity in the UK Judicial Discourse focuses on the interpretation of the concept by common law judges. In particular, the project sought to map out the cluster of interpretations (and arguments derived therefrom) on the concept of objectivity by the House of Lords and the UK Supreme Court. The result of the study shows that within UK law there is a cluster of interpretations of the term objectivity. The article is divided into three sections. The first section discusses the theoretical understanding of the concept of objectivity. The second reports on the methodological structure of the research. The third displays the results, providing a commentary.

KEY WORDS:
Objectivity, comparative law, jurisprudence, legal reasoning.
1. Introduction

During a public lecture on astronomy, the speaker is interrupted by an old lady sitting at the back of the room: 'What you told us is nonsense! The world is flat and it is supported by a giant turtle. The lecturer quickly responded: 'What is the turtle standing on?'. To which the lady rebutted: 'You are a very clever young man, but it's turtle all the way down!' The lecturer, who according to Hawking might be Bertrand Russell, had allowed the opportunity for the assumptions of the given argument to be questioned (that the world is flat and that it is held up by a giant turtle). Yet, he chose, showing perhaps a glimpse of arrogance, to question the internal logic of the old lady’s argument. The decision was indeed unwise and his attempt to discredit the ‘turtle argument’ was quickly repelled.

The anecdote is a powerful reminder to all public speakers of the dangers of belittling an audience, but that is a trivial point. The message that Hawking wants to deliver in the opening lines of his book is twofold. Firstly, 'I will not make the same mistake'. *A Brief History of Time* will be focused squarely on a representation of reality that can be, within the margins of error of any scientific analysis, objectively verified. Secondly (and perhaps as a corollary of the first point), the book will not be about the interpretation of the semantic structure of a theory.

The anecdote, I think, is also quite useful in understanding the difficulty of developing an objective legal reasoning in common law systems. In common law, judges often have to marry factual analysis with an interpretative activity of legal norms, which might be extracted from a common understanding of a narrative. For instance, murder is defined in England and Wales by the judicial interpretation of a section of a seventeenth-century textbook (Edward Coke’s *Institutes of the Laws of England*).\(^2\) The facts of the murder might include a historical narrative of events (e.g. Mrs Smith was killed by a bullet), which might be objectively tested. It is up to the parties to show that a factual narrative might be engaged by the facts of the case. In the case of our example, the death of Mrs Smith will require an interpretation of Coke’s book. The process is elegantly described by MacCormick:

In these situations, the private complainer or public rule enforcer must bring forward some assertions about the state of facts in the world, and attempt to show how that state of facts would call for intervention on the ground of some rule that

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applies to the asserted facts. Accordingly, the logic of rule-application is the central logic of the law within the modern paradigm of legal rationality under the 'rule of law'.

The debate over the rule of law will not be part of our discussion. My argument here is, instead, that a judge, by way of comparison to a scientist such as Hawking, cannot avoid evaluating objectively ‘hard’ evidence that describes reality and, at the same time, s/he has to assess the plausibility of the ‘soft’ legal arguments that describe the semantic interpretation of the text.

Even if the normative aspect of the idea of objectivity is normally excluded from the court’s daily activity, it appears that judges are asked to do what would appear to be two dissimilar activities: the evaluation of the scientific explanation of reality and the assessment of the parties’ legal argument. Both activities demand, respectively, an evaluation of arguments based on pre-set criteria.

Let me dwell on this point. On a general level, the criteria of evaluation of factual and legal narratives might be different, since they are retrieved from different branches of science. For instance, the laws of physics might help with the ballistic trajectory of a bullet and philological assumptions might explain the significance of the term ‘murder’ in Coke’s book. However, in both instances, the judge makes an assessment based on criteria set by a community of experts. In describing the similarities between hard and soft sciences, Rorty, I think, delivers this point in clear narrative: ‘They [hard and soft representation of reality] offer an account of enquiry which recognizes socio-logical, but not epistemological, differences between such disciplinary matrices as theoretical physics and literary criticism’. In short, having a shared idea of what is an objective analysis is an axiomatic aspect of any scientific endeavour. For instance, a basic mathematic formula (e.g. $1 + 1 = 2$) requires abstracting, synthesis as well as an agreement in principle on what numbers mean. Developing his argument, Rorty suggests that objectivity cannot be constructed in universal terms (neither in pure science, nor in the humanities) and the sooner we accept such a limitation, the more fruitful our understanding of the idea of objectivity will be.

The point I would like to make here is that judges can, and following Rorty, must adopt different criteria of objectivity in relation to the subject of their analysis. In other words, an

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4. The debate over legal objectivity includes a normative debate that seeks to anchor it to an external criterion/criteria of evaluation. However, it is outside of the remit of this essay – and indeed of the research – to discuss the concept of objectivity in absolute terms. For a succinct analysis of the normative debate see, for instance, B. LEITER, ‘Law and Objectivity’, in *The Oxford handbook of jurisprudence and philosophy of law*, ed. by J. COLEMAN and S. SHAPIRO (Oxford: Oxford University Press, 2004).

examination of the use of the concept of objectivity in the UK legal discourse should retrieve a cluster of criteria for both a scientific and interpretative perception of objectivity. An analysis of 98 cases did indeed confirm Rorty's analysis, and both the factual and interpretative ideas of objectivity. However, a second group of significances for the term objectivity (which is linked to a semantic interpretation of text) is, by way of comparison with the interpretation that associated it with factual narrative, far less common.

2. Research Methodology

The previous section discussed, albeit quite succinctly, the theoretical debates over the concept of objectivity. In judicial discourses, objectivity is assumed as an essential element of the evaluation of facts and of the interpretation of law. However, it remains unclear whether judicial objectivity might include a series of specifics for law criteria to assess ‘hard’ evidence and ‘soft’ semantic analyses. For instance, it is uncertain whether an objective assessment of a UK statute might include a specific grammatical analysis by the court, such as the one suggested in Langacker’s *Foundation of Cognitive Grammar.* There is anecdotal evidence, retrieved from case law analyses, which suggests a distinctive legal understanding of the concept of objectivity. However, Objectivity in the UK Judicial Discourse is one of the first analyses that seek to map out how UK judges use the concept in their decisions.

The study focused on a relatively large sample of reported decisions (98 cases) by the English and Welsh final appellate jurisdiction. There are a number of reasons for focusing on the jurisprudence of a final appellate court. The number of cases for a ten-year analysis is reduced to a manageable 98 (rather than an unworkable 1000 reported decisions that referred to the term objectivity). In addition, it was assumed that the 'doctrine of the biding precedent' would enable the significance of a concept to trickle downwards to the lower courts. The doctrine of the precedent allows the research investigator to assume that a UK Supreme Court qualification for the term objectivity will be replicated within similar cases in the lower courts. It was also assumed that the seniority of the court should increase the quality of the reasoning behind the qualification of the concept of objectivity.

In addition, the project’s methodology had to be standardised to allow for a comparative analysis of its results with other similar studies carried out in other legal systems. The research is

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8 On 1st October 2009, the UK Supreme Court substituted the House of Lords as the highest appeal jurisdiction in the UK in all legal disputes.
part of a large comparative study that involved several European states (e.g. Italy, Germany and Poland) as well as an analysis of the use of the concept in Turkey and Brazil.\footnote{A. CZARNOTA and L. RODAK, ‘Epistemologia, aktywizm sędziowski i dwie tradycje prawa’, in W. STASKIEWICZ (ed), Dyskrecjonalnośc w prawie: materiały XVIII Ogólnopolskiego Zjazdu Katedr Teorii i Filozofii Prawa, Miedzeszyn k. Warszawy 22-24 września 2008, (Warszawa: LexisNexis, 2010).}

To allow a ‘like for like’ comparison of the project results with similar activities carried out across Europe and beyond, the Objectivity in the UK Judicial Discourse study was divided into two distinct phases. The first hermeneutical phase focused exclusively on the textual meaning of the concept of objectivity. This stage of the research aimed at retrieving the effective (e.g. cognitive) significance of the term objectivity and, thus, reducing false positives. The test was based on Langacker’s studies on semantics,\footnote{R. LANGACKER, (1999).} and excluded the number of references to objectivity from the project results that were inserted in the judicial discourse for rhetorical effect. In our sample, there were 12 rhetorical references that were discharged from the project.

The functional phase of the research sought to qualify the arguments that were derived from the reference to the concept of objectivity. This part of the study sought to retrieve arguments and criteria that were directly linked to the concept of objectivity. For instance, in the first phase of the study, the script Helow v Secretary of State for the Home Department included a reference to objectivity that could have been relevant to the project.

My Lords, the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction.\footnote{Helow v Secretary of State for the Home Department - [2009] 2 All ER 103, para. 1.}

The functional analysis of Helow v Secretary of State for the Home Department retrieved two arguments from objectivity. The first derived argument from objectivity is a reference to a detached expert analysis. The second functional usage of the concept of objectivity is, instead, associated with the idea of reasonableness.

In short, the functional aspect of the case analysis sought to increase the depth of the project by retrieving second-level meanings for the concept of objectivity. In addition to the combination of hermeneutical and functional methodology, a series of adjustments were necessary to ensure the compatibility of the results between civil law and common law systems. Firstly, the term 'objectivity' was not appropriate to the aims of the research. For instance, the
search for 'objectivity' in the Lexix database of All England Law Reports retrieved only 18 cases. That was insufficient for the project. The research focused, instead, on equivalent terms (such as objectively and objective assessment) that inferred a process of judicial evaluation.

Secondly, results were retrieved from the Lexis@Library database. It is one of the two most popular legal databases available in common law countries. So that civil law lawyers are not left out in the cold here, it is worth mentioning that there is not an official collection of case law in England and Wales. The task of summarising cases and reporting them is in the hands, so to speak, of private publishing houses. The All England Law Reports is one of the many commercial firms dealing with such activity. Even if it might not be the most authoritative, for instance, the Law Reports series is checked by a judge before publication, The All England Law Reports has the advantage of only reporting the court’s decisions (excluding the party arguments), which were the principle focus of the study.

Thirdly, the Objectivity in the UK Judicial Discourse project divided the results into sections: public law and private law cases. In contrast with other European legal systems, the debate over the concept of objectivity has been widely influenced by established analyses such as that of MacCormick. The standards of an objective assessment, MacCormick argues, vary according to the area of law. Even if the project did not intend (at least at its conception) to assess MacCormick’s argument, there was the possibility of testing its veracity. In the next section, the project results are discussed at length, but it can be anticipated that a separation between law areas will enable a sharp distinction to be made in terms of the perception of the concept of objectivity in the public and private law subjects.

3. Project Results

The Objectivity in the UK Judicial Discourse project was designed to map out the different meanings of the concept of objectivity in the jurisprudence of the House of Lords and in UK Supreme Court decisions. The previous section explained the different steps undertaken during the studies. An evaluation of the use of the concept of objectivity requires a hermeneutical analysis of court decisions that includes figurative narratives (such as the reference to a reasonable person) and objective assessment (e.g. to affirm a scientific evaluation of facts through an expert witness). In this part of the essay, I will present the results of the study.

During the ten-year period considered by the research (which starts on the 1st of January 2000), the concept of objectivity was referred to in 98 different cases by the House of Lords and its successor, the UK Supreme Court. The hermeneutical phase of the project revealed that within the sample, on 12 occasions the reference to objectivity was inserted in the script of the case for rhetorical effect or to reproduce one of the parties’ arguments. For instance, in Joseph v Spiller a semantic analysis of the case script shows a textual reference to the concept of objectivity, but it is reported as one of the party’s submissions.

Counsel for the plaintiff submitted that the defendant had to establish that: (i) the words complained of were comment; (ii) the comment was on facts; (iii) the facts commented on constituted a matter of public interest; (iv) the comment was objectively 'fair', that is the comment was one that was capable of being honestly founded on the facts to which it related, albeit by someone who was prejudiced and obstinate; (v) the comment represented the defendant's honest opinion. If he discharged all these burdens, the defence could none the less be defeated by proof of malice on the part of the defendant.  

The functional analysis of Joseph v Spiller showed two interpretations of the concept of objectivity. For instance, there is an attempt to associate a factual analysis with a requirement for the fair evaluation of the defendant’s behaviour. The House of Lords, however, dismissed the plaintiff’s narrative and the reference was not considered as part of the project’s results.

As expected from Rorty’s analysis, the Objectivity in the UK Judicial Discourse project retrieved eight functional usages of the concept. Usages are arguments derived from the concept. In the tables that follow, the first column reports the type of functional argument made from objectivity, the second reports the number of instances in which the argument has been used (within the 98 cases), and the third column shows the percentage of the arguments (in relation to the 90 arguments retrieved from the sample of cases).

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13 Joseph and others v Spiller and another [2011] 1 All ER 947, para. 64.
Table: 1.

<table>
<thead>
<tr>
<th>Concept of Objectivity: ALL Law Areas</th>
<th>Arguments/Usages</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factual Narrative</td>
<td>64</td>
<td>71%</td>
</tr>
<tr>
<td>Expert Witness</td>
<td>8</td>
<td>9%</td>
</tr>
<tr>
<td>Reasonableness</td>
<td>7</td>
<td>8%</td>
</tr>
<tr>
<td>Fairness</td>
<td>4</td>
<td>5%</td>
</tr>
<tr>
<td>Intention of Individuals</td>
<td>2</td>
<td>2%</td>
</tr>
<tr>
<td>Intention of Parliament</td>
<td>2</td>
<td>2%</td>
</tr>
<tr>
<td>Impartial Witness</td>
<td>2</td>
<td>2%</td>
</tr>
<tr>
<td>The Assessment of an Ordinary Man</td>
<td>1</td>
<td>1%</td>
</tr>
</tbody>
</table>

At first sight, we can note an imbalance in the use of arguments from objectivity. In over two-thirds of the instances in which the court referred to objectivity, it developed an argument based on a factual narrative. That is an evaluation of evidence that describes a series of events. For instance, in *Majorstake Ltd v Curtis*, Lord Hope associated the concept of objectivity with a survey of a property.

The Leasehold Reform, Housing and Urban Development Act 1993 enables the landlord, unconstrained by their existing state, to identify the premises by drawing his own line around the tenant's flat in support of his counter-notice or whether it refers to the existing and objectively recognisable state of the premises [...] The context indicates that the extent of those premises does not depend on the intention of the landlord. On the contrary, it is something to be determined objectively by examining the existing state of the building within which the tenant's flat is situated.  

If narratives based on explaining ‘hard evidence’ were added to an expert witness evaluation, (such as an estimation by a surveyor in *Majorstake Ltd v Curtis*), 80% of the arguments from objectivity would be based on ‘hard’ scientific analyses.

One of the possible reasons for the small number of references to the objective interpretation of legal texts could be historical. In the second part of the twentieth century, a series of cases gave the opportunity to the House of Lords to clarify its role as the final appellate court in England and Wales. The concerns that arose from this debate were mainly focused on the constitutional limitations imposed on the judicial interpretations of legal texts. Lord Atkin, dissenting and obviously displeased, put the point across in a pungent narrative.

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14 *Majorstake Ltd v Curtis* - [2008] 2 All ER 303, paras. 2-3.
I protest, even if I do it alone, [...] I know of only one authority which might justify the suggested method of construction: "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more nor less". "The question is," said Alice, "whether you can make words mean so many different things". "The question is," said Humpty Dumpty, "which is to be master - that's all". After all this long discussion the question is whether the words 'If a man has' can mean 'If a man thinks he has'. I am of opinion that they cannot, and that the case should be decided accordingly.\footnote{Liversidge Appellant v Sir John Anderson and Another Respondent, A.C., 1941, CCVI, 206, p. 246.}

In \textit{Liverside v Anderson}, Lord Atkin is indeed concerned with the interpretation of his peers, \footnote{P. Madeleine, ‘\textit{Who’s Afraid of Humpty Dumpty: Deconstructionist References in Judicial Opinions}’ in Seattle University Law Review, 21, 1997, p. 215.} yet the reference to Carroll’s Alice meeting with Humpty Dumpty has become the canonical narrative to describe an unreasonable judicial interpretation of a legal text. \footnote{J. Bomhoff, ‘Humpty Dumpty and the Law’, available at: \url{<http://comparativelawblog.blogspot.co.uk/2006/12/humpty-dumpty-and-law.html>} [4 August 2012].}

The rise of Humpty Dumpty as a fictitious canonical figure and his association with an unhinged wigged judge has not helped the perception – shared by civil law academics and practitioners – that common law practices allow for an unreasonable level of flexibility. In particular, there is concern that common law judges interpret concepts in a way that is reasonably accepted by their own community, perhaps belittling the law as an expression of democracy. \footnote{R. Rorty (1991)} The idea of a 'common law made by the judges, for the judges' is also hinted at in Rorty’s essays. \footnote{R. Rorty, (1991) p. 188.}

However, since the \textit{Liversidge v Anderson} case, a great deal has been done to reduce the interpretative scope of UK judges. The issue of the objective interpretation of statutes has been, for instance, directly engaged by Lord Diplock: ‘Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral’. \footnote{Dupont Steels Ltd v Sirs, I.C.R., 1980, CLXII, 162 (p. 177).} Two points can be deduced from Diplock’s argument. Firstly, English and Welsh judges must be aware of their
constitutional mandate. To support his argument, Lord Diplock made an explicit reference to the UK Constitution:

My Lords, at a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them […] Under our constitution it is Parliament’s opinion on these matters that is paramount.  

Secondly, Diplock recognises that clear rules, within the margins of error of any semantic activity, should lead judges to objective and unbiased interpretation. In short, Diplock argues that the dilemma as to whether a legal text is objective or not cannot be constructed as a debate over whom is entitled to make a clear interpretation of a legal text. Rather, the task of the judiciary is to set criteria that define an objective interpretation.

The narrative might appear only partially satisfying. Having criteria of an objective assessment set by a particular group is only relatively better than accepting a subjective analysis. However, the objection is unsound. Recall that even pure sciences (from mathematics to physics), that seek to explain ‘hard phenomena’, depend on pre-set criteria decided on and shared by a community of scientists. The margins of appreciation in a semantic interpretation might be larger, yet they are (as scientific standards) anchored to a set of agreed criteria by experts in that field.

The practice of associating objectivity with factual narratives is not significantly different in the public and private law areas. In 68% of the public law (Table 2) cases and 75% of private cases (Table 3), the concept of objectivity has been associated with a factual narrative.

Table: 2

<table>
<thead>
<tr>
<th>Concept of Objectivity in Public Law Areas</th>
<th>Arguments/Usages</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factual Narrative</td>
<td>32</td>
<td>68%</td>
</tr>
<tr>
<td>Reasonableness</td>
<td>6</td>
<td>13%</td>
</tr>
<tr>
<td>Intention of Individuals</td>
<td>2</td>
<td>4%</td>
</tr>
<tr>
<td>Impartial Witness</td>
<td>2</td>
<td>4%</td>
</tr>
<tr>
<td>Expert Witness</td>
<td>2</td>
<td>4%</td>
</tr>
<tr>
<td>Intention of Parliament</td>
<td>1</td>
<td>2%</td>
</tr>
<tr>
<td>The Assessment of an Ordinary Man</td>
<td>1</td>
<td>2%</td>
</tr>
<tr>
<td>Fair-minded Assessment</td>
<td>1</td>
<td>2%</td>
</tr>
</tbody>
</table>

21 Duport Steels Ltd v Sirs, CLXII, 162 (p. 177).
Table: 3

<table>
<thead>
<tr>
<th>Concept of Objectivity in Private Law Areas</th>
<th>Arguments/Usages</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factual Narrative</td>
<td>32</td>
<td>75%</td>
</tr>
<tr>
<td>Expert Witness (Independent Assessment)</td>
<td>6</td>
<td>14%</td>
</tr>
<tr>
<td>Fairness</td>
<td>3</td>
<td>7%</td>
</tr>
<tr>
<td>Reasonableness</td>
<td>1</td>
<td>2%</td>
</tr>
<tr>
<td>Intention of Parliament</td>
<td>1</td>
<td>2%</td>
</tr>
</tbody>
</table>

On a general level, the results of the Objectivity in the UK Judicial Discourse project show that the House of Lords and the UK Supreme Court judges tend to shy away from the use of objectivity in interpretive activities (the so-called soft textual analysis). It is worth noting that a limited number of uses of an argument from objectivity do not make the concept less important for its judicial qualification. For instance, in R v G; R v J, the House of Lords adopted the criterion of reasonableness to limit a legalistic interpretation of criminal norms.

Of course, if accepted, the explanation would show that the accused's purpose was not to commit an act of terrorism. But that is not the issue under s 58. Under s 58(1), the mere fact that the defendant's purpose was not to commit an act of terrorism is neutral. What he has to show is that he had an objectively reasonable excuse for possessing something which Parliament has made it, prima facie, a crime for him to possess because of its potential utility to a terrorist. An intention to use information in connection with a bank robbery may well be an explanation of why the defendant had the information, but it cannot be a 'reasonable' excuse for having it. So the accused would be guilty of the s 58(1) offence. 22

So whilst in the overwhelming number of instances, judges in the final appellate jurisdiction for England and Wales tend to associate the concept of objectivity with hard factual narratives, Law Lords and UK Justices might, in complex cases (such as R v G), adopt soft criteria of evaluation.

Before moving on to the analysis of the cases in private law, it is worth pursuing the analysis of the public law cases a step further. In particular, a grouping of significances of the term objectivity associated with a factual narrative across different families of law (criminal, human rights, public law, land, tax, immigration) again reveals an imbalance.

Table: 4.

22 R v G; R v J - [2009] 2 All ER 409, para. 79.
<table>
<thead>
<tr>
<th>Factual Narratives: Breakdown of Results per Subject of Law</th>
<th>Arguments /Usages</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Human Rights</td>
<td>14</td>
<td>44%</td>
</tr>
<tr>
<td>Criminal Law</td>
<td>11</td>
<td>34%</td>
</tr>
<tr>
<td>Public Law</td>
<td>4</td>
<td>13%</td>
</tr>
<tr>
<td>Land Law</td>
<td>1</td>
<td>3%</td>
</tr>
<tr>
<td>Tax Law</td>
<td>1</td>
<td>3%</td>
</tr>
<tr>
<td>Immigration</td>
<td>1</td>
<td>3%</td>
</tr>
</tbody>
</table>

From the reading of Table 4, human rights cases are far more likely to invoke the principle of objectivity, understood as a factual narrative, than are any other public law areas. The higher number as well as the typology of arguments from objectivity highlights, perhaps, one of the most intersecting results of the research. For instance, it might generate a series of speculative arguments over the process of the accommodation of human rights in a common law system, which previously did not experience them. Recall that it is only from 1998 that some of the rights that are protected by the European Convention on Human Rights were introduced into the UK legal systems. Given the relative novelty, it is expected that common law judges will seek to qualify, in practice, the extent of the protection of the ECHR freedoms.

In addition, the lexical structure of the rights upheld in the ECHR is, by a way of comparison to other rights, more general. For instance, in the past few years, the House of Lords has been asked to qualify (in practice) what the remits are of Art 5 of the ECHR that protect individual freedoms in relation to UK police powers to stop and search UK legal residents. In Gillan v Metropolitan Police, Lord Bingham explained that Mr Gillan’s wait while carrying out a routine police search did not amount to an arrest (that would have triggered the protection of the individual freedom ex Art 5 of the ECHR).

The respondents for their part do not, I think, contend that compliance with the procedure is in any meaningful sense voluntary; but they submit that viewed objectively, and in the absence of special circumstances, the procedure involves a temporary restriction of movement and not anything which can sensibly be called a deprivation of liberty. [...] I do not think, that in the absence of special circumstances, such a person should be regarded as being detained in the sense of confined or kept in custody, but more properly of being detained in the sense of...

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kept from proceeding or kept waiting. There is no deprivation of liberty [ex Art 5 ECHR].

Again, a more articulated study might be needed in this area to flesh out a stronger analysis, but it is plausible to suggest that the higher number of arguments from objectivity in human rights cases (within the sample considered by the project) is related to the novelty of the area of law and to the intrinsic vagueness of human rights norms.

The analysis of the use of the concept of objectivity in private law areas (contract law and family law) was similar to other areas of law. Again, a large number of usages of the concept of objectivity (75%) were attached to a factual narrative with a limited space left to the other significances. Even if a breakdown of the data of the factual narrative in private law has not been carried out, anecdotal evidence suggests that contract law cases were more concerned with a qualification of the term objectivity than were those of family law.

4. Conclusion

Objectivity in legal discourse is important. It is essential that judicial narratives project a perception of fairness and independence from the parties and legal practitioners across the whole community. However, objectivity is a contested concept. Even if we were to exclude relativism that refutes the theoretical existence of an objective analysis, the concept of objectivity changes its significance in relation to the context.

The research carried out in the Objectivity in the UK Judicial Discourse aimed at clarifying how final appellate judges (in the UK House of Lords and UK Supreme Court) interpreted the concept of objectivity. The research cases were decided on during the ten-year period that started on the first of January 2000 and ended on the first of January 2010. The project retrieved a sample of 98 cases in which the House of Lords (until 2009) and, after that, the UK Supreme Court have referred to the concept of objectivity. The sample of references was analysed using a lexical and functional methodology. The results of the analyses of the sample show a high level of consistency on the usages of the concept of objectivity. The majority of judicial interpretations of the term make a uniform use of the concept by linking its significance to a factual explanation linked to hard evidence. Specifically, 68% of the public law cases and 75% of the private law cases expressly linked the concept of objectivity with a factual narrative.

However, the most important aspect of the research is related to the eight arguments derived from the concept of objectivity. These arguments are legal narratives that judges derived derived from the concept of objectivity. These arguments are legal narratives that judges derived

from the concept of objectivity (reported in Table 1). For instance, the concept of objectivity was associated with the criterion of the assessment of a fair-minded individual. In public law subject areas (e.g. criminal law, administrative law), instead, the cluster of arguments from objectivity appears to contradict established assumptions (such as the one suggested by MacCormick). Reasonableness is not strongly associated, at least in the way described by MacCormick, with the concept of objectivity.

In conclusion, Objectivity in the UK Judicial Discourse shows a variety of interpretations of the concept of objectivity. For instance, it appears that judges adopt different standards of objectivity in factual and semantic analyses. At first sight, such a result might appear worrying. Are UK judges using subjective criteria to decide on cases? The brief answer to the query is negative in nature. Variations in standards (and on the typology of arguments derived from objectivity) are axiomatic of the type of analysis that judges are required to carry out.