Terra Australis Incognita: A Comparative Outlook

by Vito Breda

Abstract: *Terra Australis Incognita: una prospettiva comparativa* – This essay argues that comparative law analyses between highly diverse legal systems are likely to yield significant cognitive advances in understanding legal systems and developing new methodologies. The unique characteristics of the Australian systems enhance the value of their comparison, both as a standalone initiative and within a combined comparative framework. The essay is structured into two parts, preceded by an introduction and followed by a conclusion. The first part applies a similar process to the Australian legal system, with a focus on the judiciary. The second part examines the uncommon regime of judicial bias.

Keywords: Australia territorial governance; Judicial bias

1. Introduction

The Italian and Australian legal systems are at opposite ends of the geographical and legal comparison spectrum. Italy is a civil law jurisdiction with strong ties to the French civil law tradition. In contrast, Australia is a common law legal system that is still historically connected to the body of legal decisions emanating from British courts.[1] Australia also has a federal system with a dual allocation of sovereignty.[2] While none of the above generalisations can withstand deep specific scrutiny – for instance, Australia has adopted multiple codifications and has a codified constitution – the distinctiveness of both legal systems might be construed as reasons for not comparing what are, in essence, uncommon legal systems. In this essay, I will contend that the divergences from their respective orthodox classifications of family law make them distinctive. This also makes them particularly apt to understand the essential role that social context plays in evaluating a legal system.[3]

[1] G. Appleby, N. Aroney and T. John, *Australian Federalism: Past, Present and Future Tense*, in G. Appleby, N. Aroney and T. John (Eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives*, Cambridge, 2012, 1, 10; H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, Oxford, 2010, 236.

[2] G. Appleby, N. Aroney and T. John, *Australian Federalism: Past, Present and Future Tense*, quot.,10; H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, quot., 236; *Commonwealth of Australia Constitution Act 1900* ch.12, ff. 51, 107 and 109.

[3] P. G. Monateri (ed.), *Methods of Comparative Law*, Cheltenham, 2012, 31; H. P. Glenn, *Aims of Comparative Law*, in J.M. Smits, J.Husa, C. Valcke, M. Narciso (Eds), *Elgar Encyclopedia of Comparative Law*, Cheltenham, 2023, 87.

In this essay, I argue that comparisons between seemingly heterogeneous legal systems classified as uncommon are one of the most enriching ways to provide an in-depth understanding of the inner workings of legal systems. In 1901, Australia adopted a federal system inspired by the U.S. experience. This system influenced the management of states and territories while maintaining the idea of parliamentary supremacy inherited from the British tradition.[4] The ideological assumptions that fostered legal transplants are all but gone, and it is also clear that such large transplants seldom produce the expected outcomes.[5] Jessica Kerr and Francesco Clementi's essay masterfully integrates historical constitutional analysis with an assessment of contemporary governance challenges. Their methodical exploration traces Australia's evolution from colonial dependency to autonomous executive power through rigorous examination of legal reforms, fiscal policy shifts, and electoral innovations. This analytical synthesis elucidates complex doctrines, offering a robust framework for understanding modern Australian democracy.[6]

At this point, however, it is essential to highlight that any departure from commonality often produces significant effects in comparative analysis. Such divergence compels comparative legal scholars to investigate the underlying reasons that contribute to a legal system's distinctiveness within a broader legal tradition.[7] One of many reasons is that both the Italian and Australian legal systems are dynamically moving along the line between autonomy and centralisation. Erika Arban and Nicholas Aroney, in this monographic section, discuss the details of this historical process.[8]

Australian states were designed to benefit from a system of divided sovereignty but have become increasingly dependent on federal fiscal revenue.[9] Arban and Aroney's principal contribution lies in their examination of the constituent power. Their analysis reveals a dual conception of constituent power, providing a framework that will significantly inform future comparative studies of Italian regionalism. The recent pandemic has made the effects of the fiscal imbalance particularly obvious. In their article, 'Australian Federalism after the COVID-19 Pandemic,' Lucia Scaffardi and Andrea Dolcetti explore the impact of cooperation and division between federal and central institutions in

[4] N. Aroney, J. Allan, *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*, in 30 *Sydney L. Rev.* 245, 247 (2008).
[5] J. Cairns, *Watson, Walton, and the History of Legal Transplants*, in 41 *Georgia J. of Int. & Comp. L.*, 637 (2014); V. Breda, *Introduction*, in V. Breda (ed.), *Legal transplants in East Asia and Oceania*, Cambridge, 2019,1.
[6] J. Kerr, F. Clementi, *On the evolution of the Australian form of government: three major trends over the past thirty years*, in this Monographic Section by *DPCE Online*.
[7] J. Husa, *Interdisciplinary Comparative Law: Rubbing Shoulders with the Neighbours or Standing Alone in a Crowd*, Cheltenham, 2022, 4.
[8] N. Aroney, E. Arban, *The Constituent Power in Australia*, in this Monographic Section by *DPCE Online*.
[9] Australian Constitution, Section 96, 1901; J. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, in *Publius*, 632 (2021); A. Fenna, *Commonwealth Fiscal Power and Australian Federalism*, in 31 *UNSW L. J.*, 21, 517 (2008).

Australia.[10] Carla Bassu and Prue Vines emphasise Australia's ongoing struggles in safeguarding Aboriginal identity and heritage, pointing to the lack of robust constitutional recognition and effective legal protections. Their analysis contrasts this with Italy's formal acknowledgement as a multinational state, exemplified by Article 6 of its constitution, which explicitly commits to protecting regions with significant minority populations and their cultural heritage.[11] By contrast, as discussed by Arban and Aroney, the Australian legal system has not reached a similar level of recognition or systematic commitment to minority protections at either the federal or state level.

Conversely, Andrew Lynch and Giovanna Tieghi examine the implications of divergence from established judicial frameworks and the extent of convergence within judicial panels in Italy and Australia. Their analysis explores the interaction between judicial independence and institutional decision-making, situating these practices within a broader global discourse on judicial conduct. Given the substantive differences in the internal functioning of courts and judicial practices, their analysis necessitates *ad hoc* methodological adjustments. Rather than adhering to a traditional methodology, such as functionalism, the authors employed a dialectical approach to assessing judicial practices and perceptions of aptness. These adjustments are a common feature in advanced comparative analyses, as they address the ontological assumptions of legal science by directly engaging with societal idiosyncrasies.[12] The same applies to the review by Prue Vines, Federico Lubian, and Filippo Viglione on the role of obiter dicta in the Italian and Australian legal systems. Their analysis, incorporating the latest doctrinal and jurisprudential developments, offers new insights into both the differences and commonalities in how obiter dicta function within these jurisdictions.[13] A comparative reading of the essays by Lynch and Tieghi and Vines *et al.* offers valuable insights into the construction of judicial narratives in Australia and Italy.[14]

As Maurilio Gobbo and Lucia Scaffardi succinctly and brilliantly explain, the works by the *International Research Law Group Italy-Australia* exemplify the multi-layered substantive and methodological advantages of collaborative scholarship.[15] This initiative not only represents a new frontier in the comparative analysis of Italian and Australian legal systems but also introduces a groundbreaking approach to uncovering ´truth[s]' within comparative legal methodology. That required conviction and courage.

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[10] M. Gobbo, L. Scaffardi, *A Conversation among Comparatists on the Australian Constitutional System*, in this Monographic Section by *DPCE Online*.
[11] P. Vines, C. Bassu, *Indigenous Cultural Heritage in Australia and in the Right to Keep It: A View from Europe*, in this Monographic Section by *DPCE Online*.
[12] G. Monateri (ed.), *Methods of Comparative Law*, quot., 31; H. P. Glenn, *Aims of Comparative Law*, quot., 69.
[13] P. Vines, F. Lubian and F. Viglione, *A Comparative Perspective on* Obiter Dicta*: from persuasive authority to seriously considered* dicta, in this Monographic Section by *DPCE Online*.
[14] P. Legrand, *The Impossibility of "Legal Transplants"*, in 4 *Maastricht J. of Eur. and Comp. L.*, 111 (1997).
[15] M. Gobbo, L. Scaffardi, *A Conversation among Comparatists on the Australian Constitutional System*, in this Monographic Section by *DPCE Online*.

2. Terra Australis Incognita

In this section, I will explain why the Australian legal system is uncommon. This uncommonness, strengthens, I argue, the case for comparative analyses. The Australian legal system is distinctive in several respects, including its divergence from common law traditions and the nature of Australian federalism. Dolcetti and Scaffardi evaluate this point at length in relation to the response to the COVID-19 crisis.[16] However, from a comparative perspective, three of the most notable elements are the persistence of racially discriminatory sections in the Australian Constitution, the lack of recognition of the country's original inhabitants, the absence of an equivalent of the US Bill of Rights, and an uncommon jurisprudence.[17] A recent attempt to formally recognise Aboriginal Peoples, albeit at a symbolic level, was rejected by referendum, with the majority of voters in each state and the overall Australian population opposing the proposal.[18]

In multinational societies like New Zealand, the US, and Canada, the legitimacy of a legal system is often linked to a 'rightful triangle.' This triangle involves constitutional recognition of multinationalism, respect for the normative values of majority will by minorities and the safeguarding of human dignity. The Australian Constitution lacks three elements of the 'rightful triangle'. First, the lack of recognition of Australian Aboriginal Peoples is due to historical reasons. The Australian Constitution was approved by a British Imperial Parliament, which had a vested interest in denying the multinational sociological structure of its dominions and by the misleading assumptions that aboriginal culture was due to disappear in modern societies.[19] The acknowledgment of social diversity in Australia remains rooted in colonial-era racial distinctions, which, until relatively recently, explicitly endorsed both physical and cultural genocide against Aboriginal Peoples and Torres Strait Islanders. Furthermore, while Australia's human rights culture has undoubtedly evolved, it still lacks constitutional recognition on par with other major common law systems.[20] In this normative blind spot, Australian states have taken the task of recognising Aboriginal Peoples in state constitutional preambles and adopting statutes that support a human rights culture.[21] The Australian federal legal system has chosen instead to follow the path of administrative

[16] Ibid.
[17] M. Langton, *Indigenous Exceptionalism and the Constitutional 'Race Power'*, in *Space, Place and Culture*, 1 (2023); N. Pengelley, *The Hindmarsh Island Bridge Act: Must Laws Based on the Race Power Be for the "benefit" of Aborigines and Torres Strait Islanders?*, in 20 *Sydney L. Rev.*, 144 (1998); Australian Constitution, Section 51(xxvi), 1901.
[18] J. Phillips, A. Carson and S. Jackman, *Issue Agenda-Setting in the Voice to Parliament Referendum: Using Big Data to Explain Voice Discourse on Traditional and Social Media*, in *Aust. J. of Pol. Sc.*, 1 (2024).
[19] R. Reynolds, *Dispossession: Black Australians and White Invaders*, Sydney, 1989, 10.
[20] U.S. Constitution, Amendments I–X (Bill of Rights), 1791; Canadian Charter of Rights and Freedoms, Section 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, s 35.
[21] J. Phillips, A. Carson, S. Jackman, *Issue Agenda-Setting in the Voice to Parliament Referendum: Using Big Data to Explain Voice Discourse on Traditional and Social Media*, quot., 344.

adjustments and improvements in the living standards of minorities, a process not dissimilar to the one adopted by France in its overseas territories.[22] This is, however, epistemically ad odd with other common law systems.[23]

Furthermore, the Australian legal system stands out within the common law tradition due to three key characteristics: the use of uncommon textual interpretation methods, the judicial selection process, and the management of allegations of bias.

In their article 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism,' Nick Aroney and James Allan argue that the High Court (and all subalternate courts) may have adopted interpretive practices that are out of tune with other common law systems.[24] The authors analyse the High Court's approach, particularly in the Engineers' Case, which demonstrated how the Court's interpretation of jurisdictional issues allowed federal parliament to assert authority over areas of law not explicitly enumerated in the federal constitution.[25] The analysis is delivered with a piercing narrative that is worth reproducing verbatims :

"Herbert's *Uncommon Law* is a brilliantly sustained parody of the common law. Its 66 so-called 'misleading cases', which over time first appeared in *Punch*, appear technically correct in both the language and reasoning typically used in common law judgments. And yet from sound, unexceptional starting points, the conclusions reached are ridiculous [...] Our contention in this paper will be that Australia's High Court, in deciding the federal distribution of powers cases over the last century, culminating in the recent *Work Choices* case, has created an end product that looks not unlike one of Herbert's misleading cases."[26]

This is a powerful statement. Aroney and Allan note, in other words, that the High Court's textual review approach significantly diverges from what is normally perceived as a semiotically sound legal narrative for a common-law country.[27] Moreover, this departure from the norm is not beneficial for the High Court or the Australian legal system.

It is important to remember that, unlike literary critics, judges must interpret the meaning of words and grammatical structures with practical implications. This restriction of discretion is more pronounced in civil law judges because their deviation from the text into the *penumbra* of

[22] G. Wilder, *The French Imperial Nation-State: Negritude and Colonial Humanism Between the Two World Wars*, Chicago, 2005, 50.

[23] Australia and Housing Department of Families Community Services and Indigenous Affairs, *Stronger Futures in the Northern Territory: A Ten-Year Commitment to Aboriginal People in the Northern Territory* (Dept of Families, Housing, Community Services and Indigenous Affairs 2012), at http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/closing-the-gap-in-the-northern-territory/stronger-futures-in-the-northern-territory-booklet.

[24] N. Aroney, J. Allan, *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*, quot., 247.

[25] *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited and Others (the Engineer's case) (1920) 28 CLR*, 129.

[26] N. Aroney, J. Allan, *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*, quot., 247.

[27] S. Levinson, *Recursion in Pragmatics*, in 89 *Lang.*, 149 (2013).

interpretation is acceptable only if it falls within an acceptable narrative range that aligns with the rest of the codified text.[28] Legrand uses the term national 'prejudices' to describe the set of interpretative tools that precede legal text.[29] He explains that judges 'still come to the interpretation of the law with an idiosyncratic 'pre-understanding' — what Gadamer calls a 'Vorverständnis.'[30] Andrew Lynch and Giovanna Tieghi's article in this monographic section , *'Judicial Independence and Individuality: Liberty as a Paradigm Shift from 'Judicial to People' Voicing Disagreement'*, offers a compelling examination of how pre-understanding influences judicial reasoning in Australia and Italy. Their analysis provides valuable insights into the evolving role of judicial independence and dissent within both legal traditions.[31]

It is the effect of these prejudgments and their intersection with statutory material (e.g., a codified constitution, a human rights declaration, and a civil code) that transforms court narratives into practical enforcement of ideas. A textual interpretation must make sense vertically in relation to the source of that interpretative practice and horizontally in relation to the practical implications that such interpretation might have with other decisions at the same level. A common law judge can use equity as one of the assumed pragmatic implications of their interpretative work, but they are constrained by the set of rules extracted from previous decisions.[32] Vines *et al.* explain in their article that the difference between common law systems and civil law systems in using precedents is marginal.[33] There are indications that both legal systems are using *obiter dicta* in highly influential ways.[34] Analogous deductive methods, albeit with different groundbreaking conclusions, are used in Tieghi and Lynch's essay.[35]

An important element in discussing the uncommon nature of the High Court's jurisprudence is that the semiotic practices chosen by the High Court are not fully aligned with the jurisdictional practices adopted by other common law jurisdictions, particularly the British common law tradition. Aroney and Allan explain that Australian courts, including the High Court, should not have diverged from what can be termed an orthodox common

[28] S. Azuelos-Atias, *Semantically Cued Contextual Implicatures in Legal Texts*, in 42 *J. of Pragmatics*, 728 (2010).
[29] P. Legrand, *Against a European Civil Code*, in 60 *The Mod. L. Rev.* 44 (1997); P. Legrand, *European Legal Systems Are Not Converging*, in *45 Int'l & Comp. L.Q.* 52, 51 (1996).
[30] P. Legrand, *European Legal Systems Are Not Converging*, quot., 51.
[31] A. Lynch, G. Tieghi, *Judicial Independence and Individuality: Liberty as a Paradigm Shift from "Judicial to People" Voicing Disagreement'*, in this Monographic Section by *DPCE Online*.
[32] V. Breda, *The Grammar of Bias: Judicial Impartiality in European Legal Systems*, in 30 *Int. J. for the Semiotics of L.*, 245 (2017).
[33] P. Vines, C. Bassu, *Indigenous Cultural Heritage in Australia and in the Right to Keep It: A View from Europe*, quot.
[34] P. Vines, F. Lubian and F. Viglione, *A Comparative Perspective on* Obiter Dicta*: from persuasive authority to seriously considered* dicta, quot.
[35] A. Lynch, G. Tieghi, *Judicial Independence and Individuality: Liberty as a Paradigm Shift from "Judicial to People" Voicing Disagreement'*, quot.

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law tradition.[36] There is little doubt that Australian federalism, according to Aroney and Allan, has been hindered by the High Court. Even if the divergence from an established semiotic is small, it reduces the predictability of decisions, which in turn reduces the perception of the legitimacy of common law institutions.[37]

3. An uncommon judiciary with a peculiar bias

In section two of this essay, I explained that the form of judicial reasoning adopted by the High Court is distinctly Australian. In comparative analyses, this distinctiveness might not necessarily be negative. In this section, I will discuss the judicial appointment process and its effect on Australian jurisprudence, particularly regarding allegations of judicial bias.

The second element that makes the Australian legal system uncommon is related to the management and appointment of judges. In Australia, judges are appointed by political officeholders who have a great level of discretion.[38] The notion that judges should be chosen by peers, with a tap on the shoulder, rather than through examination, is also a distinctive feature of the British systems.[39] In England and Wales, the post-2005 constitutional reforms brought a level of independence in the selection process via committees that reduced the role of the Chancellor to a rubber-stamping one in civil law appointments and completely removed her ability to influence criminal law appointments. It is still far from ideal. Statistical analysis shows that judges tend to recommend individuals who are similar to themselves. Minority groups, including ethnic and sexual preference minorities, are underrepresented. Women are still not fully represented at senior levels.[40]

In Australia, the judicial appointment system, both at the federal and state levels, primarily relies on political discretion, and there is a clear indication of patrimonialism.[41] For instance, Harry Debra and Elisabeth Morrison demonstrate a statistical connection between party membership and judicial appointments to the Administrative Appeals Tribunal during the Abbott, Turnbull, and Morrison administrations.[42] The primary concern is the political prerogative to select judges, even after they have been vetted by commissions, coupled with the influence of law firms through political

[36] N. Aroney, J. Allan, *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*, quot., 247.
[37] P. Vines, F. Lubian and F. Viglione, *A Comparative Perspective on* Obiter Dicta*: from persuasive authority to seriously considered dicta*, quot.
[38] J. Sproule, A. Karcic, *Judicial Appointments in Queensland: Options for Reform*, at https://law.uq.edu.au/files/1239/Judicial-Appointments-Law-and-Justice-Institute.pdf, 7.
[39] M. Weber, *Economy and Society: A New Translation*, Cambridge, 2019, 348.
[40] G. Gee, R. Hazell, K. Malleson, P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution*, Cambridge, 2015, 2.
[41] D. Harry, E. Morison, *Cronyism in Appointments to the AAT*, at https://australiainstitute.org.au/wp-content/uploads/2022/05/P1167-Cronyism-in-appointments-to-the-AAT-Web21-copy.pdf?utm_source=chatgpt.com, 29.
[42] Ibid.

donations.[43] Even if there is no indication of political interference at the High Court in the decision-making process *á la Amercain*;[44] yet the political decision process creates an uncommon situation where, despite transparent donation records, the overlap between political influence and judicial appointments becomes evident, particularly to comparative lawyers.[45]

This is not to say that Australia suffers from the same perception of bias that affects the American legal system.[46] In the United States, it is well-known that some of the lower court judges are elected, and stacking the court with political allies is a common practice.[47] However, a politically appointed judge is axiomatically perceived as less objective compared to one who earns their position through an open, widely accessible, and merit-based public examination.[48] While having a panel of peers propose candidates might improve the situation, it is akin to adding sugar to a contaminated glass of water— most rational people would naturally prefer a clear, uncontaminated liquid to begin with.

This 'contamination' is more evident in rural Australia. For instance, in larger rural areas, such as the Darling Downs in Southeastern Queensland, the limited number of local barristers—fewer than twenty—intensifies the overlap between political and judicial decisions.[49] Despite being a significant area (comparable in size to the region of Campania in Italy), the Darling Downs has a population of approximately 173,000 (Campania has 5.8 million residents). The small pool of available barristers is proportionally similar to the number of seats in state and federal parliaments (that is, seven). It is reasonable to expect that local politicians are well-acquainted with the law firms and individuals who contribute to their political parties and, more importantly, those associated with opposition to their rural political initiatives (e.g. the opening of a new coal mine by a multinational corporation which dreadful ecological record),[50] during election campaigns where financial support by lobbying groups and local opposition can make a significant difference.[51]

The close proximity between potential judicial candidates and political donors in these regional areas heightens the risk of perceived bias, but it is

[43] G. Appleby, S. Le Mire, A. Lynch, B. Opeskin, *Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption*, quot., 309–11.
[44] P. Leslie, Z. Robinson and R. Smyth, *Personal or Political Patronage? Judicial Appointments and Justice Loyalty in the High Court of Australia*, in 56 *Aus. J. of Pol. Sc.* 445, 459 (2021); H. M. Kritzer, *Appointed or Elected: How Justices on Elected State Supreme Courts Are Actually Selected*, in *L. & Soc. Inq.*, 371 (2023).
[45] Judicial Conference of Australia, *Judicial Appointments: A Comparative Study*, 2015, 67, 75, 81.
[46] H. M. Kritzer, *Appointed or Elected: How Justices on Elected State Supreme Courts Are Actually Selected*, quot., 372.
[47] J. Handelsman Shugerman, *The People's Courts: Pursuing Judicial Independence in America*, Cambridge, 2012, ch. 3.
[48] H. M. Kritzer, *Appointed or Elected: How Justices on Elected State Supreme Courts Are Actually Selected*, quot., 401.
[49] *Confronting State Capture* (Australian Democracy Network), at https://raisely-images.imgix.net/ca877520-8363-11ee-bc9e-c317a5e9d690/uploads/state-capture-report-2022-online-pdf-d2cfd0.pdf.
[50] Ibid., 45.
[51] J. Sproule, A. Karcic, *Judicial Appointments in Queensland: Options for Reform*, quot., 8.

also uncommon in relation to setting the Australian judicial appointments regime within the common law family of legal systems.[52] This situation contrasts with larger common law jurisdictions, where such overlaps are absent or are less pronounced.

A third factor that makes the Australian judicial system relatively uncommon is its approach to handling allegations of judicial bias. Australian judges, like those in most common law countries, must disclose any connection to a case. If this connection is likely to compromise their impartiality in the eyes of a fair-minded and informed observer, they are expected to recuse themselves.[53] Federal and state jurisdictions have slightly different procedural rules, yet they both apply the principle articulated in *Ebner v Official Trustee in Bankruptcy*, which provides the core test for judicial bias. This test focuses on whether a fair-minded and informed observer would see a real possibility that the judge *might* not bring an impartial mind to the case. Sometimes, the deductive process is referred to colloquially as the 'double might ' or 'uniform' test.[54]

The textual reference for the double 'might' is an unusual, almost unique, cognitive practice, and it might be worth reporting verbatim. '[W]hether a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial mind to the resolution of the question the judge is required to decide.'[55] The 'double might' test represents a two-step process for evaluating whether a judge's impartiality could be compromised after an issue of bias has been noted by one of the parties. First, an assessment is made - by another judge or a panel of judges - regarding the existence of any potential connection, conduct, etc, which links the judge and the case or one of the parties involved. For instance, this might include scenarios where the judge and a litigant share membership in the same water polo club. Second, once the existence of a potential pernicious relation is confirmed by the perspective of the fair-minded lay observer, the real impact of this connection on the judge's decision-making is considered again by the standpoint of the fair-minded lay observer.[56] This second safeguard protects judges from disqualification in cases where they have significant connections to the case or have expressed views about the conduct of one party in a previous case but whose integrity within the legal profession places their impartiality beyond suspicion.[57]

It might be argued that including this safeguard in Australia's legal system reflects practical considerations tied to resource efficiency in a vast territory and a lack of confidence in Australian judicial ethics.[58] However,

[52] G. Appleby, S. Le Mire, A. Lynch, B. Opeskin, *Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption*', quot., 310–1.
[53] M. Groves, *The Rule against Bias*, in 39 *Hong Kong L. J.*, 485 (2009)
[54] *Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337* [2000] HCA 63 350; *Without Fear or Favour: The ALRC's Report on Judicial Impartiality*, in *Aus. Pub. L.* 86, at https://www.auspublaw.org/blog/2022/08/without-fear-or-favour-the-alrcs-report-on-judicial-impartiality.
[55] [My Empahsis] *Ebner v Official Trustee in Bankruptcy (2000), 205 CLR 337*, 350.
[56] *British American Tobacco Australia Services Ltd v Laurie (as administratrix of the estate of LAURIE and on her own behalf) and Others* (2011) 273 ALR 429 (HCA) 466.
[57] *Without Fear or Favour: The ALRC's Report on Judicial Impartiality*, quot., 154.
[58] Ibid., 149.

these reasons are not convincing. First, there is a high level of public trust in Australian judges' judicial objectivity, which does not justify a distinct assessment of judges' cognitive abilities.[59] Second, its absence in other common law systems and the 49 ECHR signatory states reflects a general agreement among legal traditions and cultures that the perception of objectivity is the sole requirement for judicial self-recusal or eventual disqualification.

So why is Australia holding on to its 'nuanced' approach? The consensus is that it neither aids the assessment of bias nor enhances the perception of justice. Lord Hope highlighted this point in *Porter v Magill*, where he explained that English and Welsh law requires only that a reasonable person perceives a potential (not actual) risk of bias.[60] Again, slightly different from Australian law and currently similar to English and Welsh law, Scot Law demands the party alleging bias to demonstrate a possibility of partiality (not a real risk), judged from the perspective of a fair-minded observer.[61] Even Canada, which might provide the most analogous case—being a large country with a low population density—adopted the single 'might' test, grounded in the perspective of a reasonable person rather than the presence or absence of actual bias.[62]

In short, the rationale for the 'double might test' appears to escape both normative and practical reasons. First, it reduces the number of successful allegations of bias without a normative justification.[63] Second, it creates a unique stigma for judges when such claims succeed. Allegations of bias made by barristers - particularly when framed in a litigious manner - highlight two cognitive shortcomings. First, a judge may lack the self-awareness to recognise her/is connection to the matter. Second, s/he may fail to appreciate how this connection could compromise impartiality in practice and undermine the broader perception of justice within the legal system. A successful claim, in short, exposes a judge's cognitive theoretical and pragmatic dissonance. The disqualification of Judge Curtis in the *British American Tobacco* case is perhaps one of the best instances of the effects of the 'double might' test on a judge's reputation.[64] Indeed, it is axiological that judges have limitations, but it is difficult to see how humiliating a judge—in practice—benefits the judicial system or the public when the perception of justice is normally preserved without a second 'might ' assessment.[65] Furthermore, in cases where the initial 'might' is sufficient for

[59] Ibid.
[60] *Porter v Magill* [2002] 2 AC 357 (CA), 494.
[61] *Bradford v McLeod* [1986] SLT 244, 247.
[62] *Committee for Justice and Liberty v Canada (National Energy Board), [1976] SCJ No 118* [30]; J. Hughes and Dean P. Bryden, *Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification*, in 36 *Dalhousie L. J.* 171, 174 (2013).
[63] *Porter v Magill [2002] 2 AC 357 (CA)* (no. 67), 494.
[64] *British American Tobacco Australia Services Ltd v Laurie (as administratrix of the estate of LAURIE and on her own behalf) and Others (2011) 273 ALR 429*, 466.
[65] A. Higgins, I. Levy, *What the Fair-Minded Observer Really Thinks About Judicial Impartiality*, in 84 *The Mod. L. Rev.*, 811 (2021); K. Abadee, *Lessons from the Pinochet Case for the Bias Rule of Procedural Fairness in Its Application to Australian Judges*, in *Aus. J. of Adm. Law* 19, 32 (2000).

disqualification in most advanced legal systems but fails to achieve the same outcome in Australia, public confidence in accessing impartial justice may be compromised.

This is not a *tout court* argument against rigorously examining claims of bias; rather, it is an analysis suggesting that such an uncommon stance has proven unnecessary in large and well-established legal systems whose jurisprudence is subject to international court jurisdictions. I can provide more examples, but I think I proved that a 'double might test' for assessing claims of judicial bias is uncommon.[66] This observation is particularly relevant in Australia, where the combination of rural isolation and low population density could lead to an unwarranted level of protection for politically appointed judges. Such judges may be more susceptible to interpersonal pressures and less inclined to view connections as harmful. This issue is delicate, so I must be precise. The nuanced approach adopted by Australian law, combined with the political appointment of judges and contextual circumstances, does not suggest that judges are acting unethically or, worse, developing jurisprudence that protects unethical practices. On the contrary, the evidence supports the average Australian judge's integrity and their public perception of integrity.[67] The real issue is that the Australian judiciary stands as an international outlier, owing to its distinctive jurisprudence and reliance on political actors for final judicial appointments. Comparative legal research often overlooks these aspects and almost universally fails to consider the compounding effect of these distinctive features. The studies included in this monographic section aim to address these gaps.

4. Comparative Appearances and Perspectives: Exploring Uncommonalities in Italian and Australian Law

The Australian legal system offers insights into managing judicial appointments, developing distinct jurisprudential practices, and evaluating judicial performance. At a broader level, this essay, like others in the monographic section, advocates transcending traditional legal classifications to better understand the challenges and solutions faced by modern legal systems.

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[66] A. Higgins, I. Levy, *What the Fair-Minded Observer Really Thinks About Judicial Impartiality*, quot., 840.
[67] *Without Fear or Favour: The ALRC's Report on Judicial Impartiality*, quot., 5.