

CITATION AS INTERTEXTUAL DEVICE IN LEGAL DISCOURSE*

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Abstract

Language and law relationship are in the focus of numerous researches both linguistic and legal as they are of importance not only from the theoretical grounds but practical application of law. The paper presents an analysis of intertextual relations of the court judgment using discourse analysis methodologies and semantic and structural implications of the intertextual devices to the law discourse. The adjudication process and legal research, which are central to legal practice, are considered as citation heavy activity. Legal citation as a widely used intertextual device has been studied in the text of court judgment. When lawyers present legal arguments they cite authority to relate law to a particular situation referring to statutes, previous decisions they find pertinent. These references known as legal citations are very specific characteristic of legal text. The task of legal citation is to provide necessary information and to aid a decision. Some researchers consider legal citation as technical language, which evolves in the process of its usage. The text of judgement is related to other legal texts through citation, which is one of important intertextual devices. The analysis of legal citation reveals their various semantic and pragmatic functions and their impact on legal text structure. The linguistic study of legal citation and its intertextual functions are important for producing and understanding of legal text, effectiveness of legal writing and provide insight into law and language relationship.

Keywords: law and language, intertextuality, legal citation, semantic and pragmatic functions

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1 INTRODUCTION

The paper aims at studying specific features of legal citation, its development and functions in law discourse. Citation relates the text of judgment to other legal texts such as Acts of Law, other court judgments, opinions and regulations and others. The interrelations of texts are important in building the semantic framework of the text and impact the text structure. Citations as intertextual devices perform various semantic and pragmatic functions. These functions are important in production and comprehension of the text.

The adjudication process and legal research, important legal practices, are described as citation heavy activities. Citations are a conspicuous feature of most judicial opinions. The fact that citation in legal profession requires special researches, knowledge, training and efforts makes it a complex and significant object of study which could provide insight into the nature, characteristics and specifics of this process. Legal citation analysis is an empirical tool for understanding functioning of legal system and improving its effectiveness (Posner,2000).

2 THEORETICAL APPROACHES AND METHODOLOGY

The notion of intertextuality has been considered in the context of legal discourse and legal citation analysis,

with the focus on the role of legal citation as intertextual device in meaning construction and citation functions in the court judgment.

The theory of intertextuality goes back to Mikhail M. Bahtin (1963) ideas of dialogism, his concept of polyphony and to post-structuralism approaches to textual analysis which focuses on various sources of meaning in the text (Barthes, 1968; Kristeva, 1986; Umberto Eco, 1980).

Intertextual theory suggests that all texts are interdependent, refer and rely on other texts for their meaning.

Citation analysis is defined as the examination of the frequency and patterns of citations in the documents. Citation analysis as a branch of information science is growing rapidly due to increasing number of Web services which enable new methods of citation analysis. The main application area of citation analysis is the evaluation of scientific publications, scientists and scientific institutions. But many scholars believe that citation analysis could explore new areas. Citation could be approached as object of study and a method. Citation analysis has proved to be a meaningful research tool (Peritz, 1992).

Legal citation analysis considered from the propositions of the Intertextuality theory, Discourse Analysis, content and functional citation analysis provides new ground for investigation legal discourse.

3. CITATION AS AN INTERTEXTUAL DEVICE IN LAW DISCOURSE

Citing is important in creating meaning and is sociologically oriented. It is determined by individual or institutional or domain norms (Zhan, Ding, Milojević, 2013) The process of citing is described as a complex behavior that is initiated by a variety of motivations (intellectual and/or social) and reasons such as to identify a source of information, to include information, to show compliance with antiplagiarism norms, to identify works or person an author disagree with ('negative citation'). An important reason of citation in law and other authoritarian institutions is to provide an authoritative basis (authority citing), but many citations of judicial decisions are informational rather than authoritative. Legal citations do not have to follow antiplagiarism norms (Posner, 2000).

Citation is an explicit manifestation of intertextuality, but the notion of intertextuality is more expansive. As E.J. Porter says, intertextuality provides rhetoric with important perspective in the text. When we consider intertextual nature of discourse the focus is shifted from the writer to the sources and social context of the discourse. The author is viewed as a participant of a discourse community that creates its own collective meaning (Porter, 1986).

3.1 Legal Citation analysis

Legal citation is a specific reference used in law discourse. When lawyers and judges present legal argument, they cite authority. The citation relates law to a particular situation, thus constructing meaning of a legal text in a legal, social and cultural context. Legal citation differs from other types of citation in their aims, forms and functions.

Legal citation analysis is an old practice dating back to 1873 when the index of citation links between court citations was first published. Legal citation analysis could pursue various aims and depending on them types of analysis could vary. Statistical and functional analysis of citation can be used to forecast the period the cases cease to be cited (typically in 3 to 15 years depending on the jurisdiction). Network Analysis of Citation provides valuable information that reflects the relevance of precedent. It was stated that the authority of a precedent depends on the consistency and uniformity with which other authorities have cited it (Neale, 2013).

Economic Analysis of legal citation using economic models of reputation and of human capital can frame and guide the use of citations in law (Posner, 2000).

3.2 Forms of legal citation

The form of legal citation depends on the country, the type of the cited document (case, statute, commission decisions, etc.), the court and type of the publishing where the document appeared. Every country has its standards of legal citation. In the UK the Oxford Standard for Citation of Legal Authorities (OSCOLA, 2006) is used.

The citation usually includes the name of the case or the statute (usually in italic), date of the volume publishing (in square brackets), date of the judgment (in round bracket) various abbreviations of courts (HL – House of Lords, QB – Queen Bench, etc.), volume of the series of Law Reports (e.g. AC- Appeals Cases), page, pinpoint (where exactly the passage can be found), etc..e.g.:

Pepper v Hart [1993] AC 593 (HL)

If the case has a popular name it is given in parenthesis at the end of citation and then used in the text, e.g.:
c-376/98 Germany v Parliament and Council [2000] ECR I-8419 (Tobacco Advertising case)

The form of citation contains a lot of information about the case in very specific way, which could be considered as specific way of communication of law practitioners.

3.3 Functions of legal citation

The functions of legal citation could be defined by its aim, reasons and motivations and other factors. Analyzing intertextual devices of the texts based on the British Housing Act, V.K. Bhatia (1998) stated that analysis confirmed that intertextual links served not only cohesive function with preceding legislation but revealed four major types of intertextual devices, performing the following functions: signaling textual authority, providing terminological explanation, facilitating textual mapping and defining legal scope.

In this research the legal citations in the court judgment have been analyzed with the aim of identifying the intertextual functions they perform in the text. The court judgment represents a written formal decision, which perform an authoritative function, resolving conflicts and regulating relations in society. Dictionary definition of judgement in the field of law is: 'a final court ruling resolving the key questions in lawsuit and determining the rights and obligations of the parties' (Nolo Dictionary).

The citations of a doctrine, the Law of Contract, the decisions of previous cases have been analyzed with the view to define the intertextual functions of citations. The citations are used in pursuing logical structure of the judgment and correspond to organizational structure of the text. The reference to particular document is made to rely on previous practices. The citations are used to provide legal base of the judgment, to inform about change of doctrine applied to similar context, to analyze the court practice and come to the relevant conclusion. The citation is preceded by the judge reasoning and introductory phrase which along with the citation define the function of citation and are important in constructing the meaning of the text. The introductory phrases could be the following:

1. To provide legal base:

'see e.g. Burrows, "A Restatement of the English Law of Contract" (2016) section 2'.

2. To provide an example and refer to similar situation or conclusion:

'This point can be illustrated by *Carlill v Carbolic Smoke Ball Co* [1892] 1 QB 256, another case which all law students learn'

'The same conclusion was reached in relation to an agreement...'

'Factors which may tend to show that an agreement was not intended to be legally binding include the fact that it was made in a social context, the fact that it was expressed in vague language and the fact that the promissory statement was made in anger or jest: see *Chitty on Contracts* (32nd Edn, 2015), vol 1, paras 2-177, 2-194 and 2-195'.

3. To inform about the change of doctrine:

'But it is now recognised that this mischief is better addressed by other doctrines such as economic duress and public policy. The decision of the Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1999] 1 QB 1 effectively rendered the rule obsolete.'

4. To refer to general attitude of the courts to particular circumstances:

'The courts are, however, reluctant to conclude that what the parties intended to be a legally binding agreement is too uncertain to be of contractual effect and such a conclusion is very much a last resort. As Toulson LJ observed in *Durham Tees Valley Airport v bmibaby* [2010] EWCA Civ 485, [2011] 1 Lloyd's Rep 68, at para 88: '

5. To inform about the application of Law:

'In determining whether an agreement has been made, what its terms are and whether it is intended to be legally binding, English law applies an objective test. As stated by Lord Clarke in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Co KG* [2010] UKSC 14; [2010] 1 WLR 753:'

6. To specify about problematic evidence based on recollection and substantiate judge's position with

experts' opinion in other case:

'But evidence based on recollection of what was said in undocumented conversations which occurred several years ago is problematic. In *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), at paras 16-20.'

'In some of these cases they were also supported by the evidence of psychologists or psychiatrists who were expert witnesses: see e.g. *AB v Catholic Child Welfare Society* [2016] EWHC 3334 (QB), paras 23-24, and related cases. My observations have also been specifically endorsed by two academic psychologists in a published paper: see Howe and Knott, "The fallibility of memory in judicial processes: Lessons from the past and their modern consequences" (2015) *Memory*, 23, 633 at 651-3'.

The intertextual relations revealed in the judgment under consideration in this study contribute to creating socially relevant meaning of the text. Relating the process of adjudicating to previous court practices they perform important legal and social functions, providing for law continuity, justice, unbiased court decisions and order in the society.

4. CONCLUSION

The analysis of intertextual relations performed by legal citations in the text of court judgment revealed specifics of their functions and significance to the field of law. The studies of legal citations are growing due to their role in law, legal profession and communication. Legal citations differ by their form from other types of citation, they bear specific relevance to professional knowledge and practice. The intertextual relations in legal discourse are of importance for meaning construction of the legal judgment and its structure, they also serve social and cultural functions in various communities.

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