

**Citation:** Hussain, A., Pirzada, M. M., & Saeed, M. A. (2020). Literary References in Obiter Dicta: A Study on Intertextuality in Legal Discourse. *Global Language Review*, V(II), 160-169. [https://doi.org/10.31703/glr.2020\(V-II\).17](https://doi.org/10.31703/glr.2020(V-II).17)

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p-ISSN: 2663-3299

e-ISSN: 2663-3841

L-ISSN: 2663-3299

Vol. V, No. II (Spring 2020)

Pages: 160 - 169

## Literary References in Obiter Dicta: A Study on Intertextuality in Legal Discourse

### Abstract:

*The courts around the world have been introducing reforms into judicial systems, and one of these is to improve the language of judgments in which the judges of superior courts add their comments and observations. This attached discourse resembles the obiter dicta, which often contains moral and ethical exhortations. It is to add the literary touch (i.e., from dramas, novels, poetry, etc.) to a legal decision so that the people easily understand the verdict. Obiter dicta of the higher courts is often taken as a reference by the subordinate courts. It is, therefore, very much obvious that every word articulated in a judgment would be weighed with paramount importance. This study explores how judges around the globe have utilized intertextuality in achieving these goals and discusses the advantages and disadvantages of this technique.*

### Key Words:

Law, Obiter Dicta, Literature, Law, and Literature; Literary References, Judgments

### Introduction

Intertextuality is considered as a distinctive feature of legal discourse. The most widely used forms of intertextual relations in legal discourse include citations, reported speech, academic and literary references. Citing literature in judgments is a debatable issue all over the world. Despite a controversy with regard to this technique, Judges refer to a wide variety of resource documents in their judgments, such as dictionaries, legal textbooks, and historical accounts, but the most debatable resource by far is popular literature. Although judge's usage of literature is comparatively rare some Judges at times are seen resorting to citing popular literature from novels, dramas, and poetry.

The debate of whether it is appropriate to use creative literature in a court case comes up with the argument, "What does literature has to do with law?" The answer is that law Land literature has been acknowledged since the time of Greek Philosopher Plato's in which he defines the relationship between Law and Literature through his famous words by quoting:

*"A society's Lawbook should, in right and reason, prove, when we open it, for the best and finest works of its whole Literature."*

It is argued that it takes an exceptionally well informed and well-versed judge to refer quotes to famous literary works, and also there is a possibility of misquoting that same work if a deep study of it has not been done by the judge. The way each person responds to literature may differ considerably.

### Research Questions

- 1) Does the judge's remark enhance the quality of judgment through the choice of literary references in their obiter dicta?
- 2) Is it appropriate for a Judge to use intertextuality as a tool by citing literary references in their obiter dicta?

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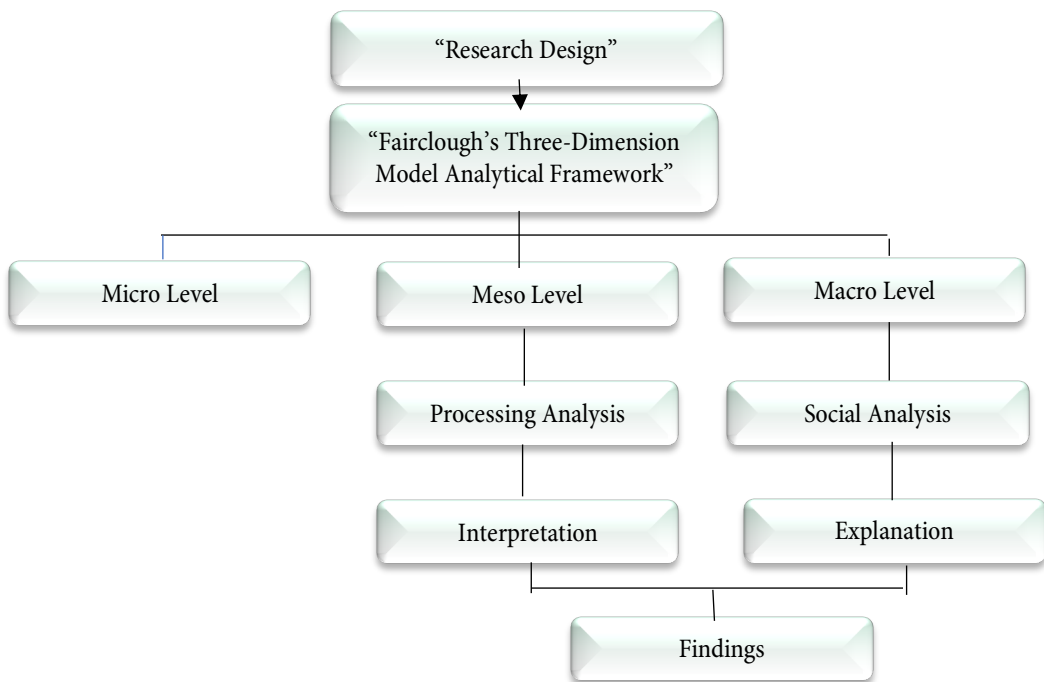
- 3) How does the use of this stylistic device portray the political and socio-cultural relationship of the Judges with litigants and the general public?

### Research Design

The current study employs a ‘*qualitative approach*’ for analyzing the data. For a clear understanding of the topic under discussion, “*Fairclough’s three-dimensional model*” is applied in which two dimensions of Fairclough model, i.e., ‘*Discursive*’ and ‘*Social*’ dimensions are focused on analyzing the socio-cultural and political impact of citing literary references in judge’s obiter dicta. As discursive dimension includes processing analysis of the text at meso level, which deals with “*interpretation of the focused text*,” the social dimension deals with “*the power relations, ideologies and hegemonic struggle that discourses reproduce, challenge or restructure*” at macro level in terms of explanation of the focused text in its socio-cultural context.

### Analytical Framework

The literary references in the obiter dicta of judgments are analyzed through “*Fairclough’s three-dimensional model*” framework focusing on ‘*meso*’ and ‘*macro*’-level analysis in which meso level analysis involves “*intertextual and interdiscursive elements*” whereas macro-level analysis considers “*the broad societal currents that are affecting the text being studied*.” The following figure demonstrates the analytical structure of the current study:



### Data Analysis

For the analysis purpose, five randomly selected news articles each for the following three Judgments of “*Justice Asif Saeed Khan Khosa*” were considered:

- i. Contempt proceedings against the then Prime Minister of Pakistan “*Syed Yousaf Raza Gillani*”
- ii. The Panama Papers Case ‘*3-2 split verdict*’ of “*Mian Nawaz Sharif*”, the former Pakistan Prime Minister.

iii. *Landmark blasphemy case against “Aasia Bibi”, a Christian woman.*

The statements from the randomly selected news articles were further analyzed and discussed individually in accordance with their levels of analysis, i.e. meso and macro-level analysis, in order to get a more appropriate and clear result for more appropriate cognizance and for the outcome of the answers of the focused questions.

## **Literature Review**

### **Obiter Dicta**

The term ‘*Obiter Dicta*’ or ‘*Obiter Dictum*’ (in plural) is a phrase in Latin whose literal meaning is "by the way". ‘*Obiter Dicta*’ is, therefore, making those remarks or observations that are "said in passing" in a judgment. Even though being a part of the opinion of the court, obiter dictum does not constitute a vital constituent in the decision of the court. Under the Common Law of England, a judgment mainly incorporates the elements like ‘*Obiter Dicta*’ and ‘*Ratio Decidendi*.’ The main difference between the two in a judicial precedent is that ‘*ratio decidendi is binding*’, whereas ‘*obiter dicta are convincing only*.’

There are occasions where judges feel the need to provide context for their opinion or have to provide a hypothetical illustration even if it’s relevant or not, which they do so through obiter dicta because it would not affect the facts of the case. This ambiguous tension cannot be ignored or neglected that dicta create in terms of “*equitable dissonance*” as dicta have this capacity to reveal new facets of legal principles that are not meant to be disregarded. This equitable dissonance carries an indirect desire for its own vindication once it is instigated into the legal discourse.

Nowadays, an obiter dictum is spoken of as a judicial opinion, but one observation regarding this practice in the context of the Pakistani legal system is worth mentioning. In *Pakistan Electrical and Mechanical Contractor Ltd.* case (1984), the High Court of Sindh held:

*“Observations neither deciding nor necessary for the decision of controversy in issue in a particular case is Obiter Dicta.”*

### **Dissenting Judgments or Opinions**

One of the basic reasons that the opinions of the judges are reflected in their judgment is to settle disagreements and convey the rationale behind their proposition and justify that the judge's reasoning behind their decisions is correct and meticulous. The legal history of the world reveals that many dissenting opinions have been successful in transforming the defined rules and regulations, either by convincing the lawmakers to authorize new or elaborated enactment. A worthy and outstanding dissenting opinion not only can refrain the judicial system from mortification but even has this capacity to correct the court’s mistakes for future judicial references.

### **Obiter Dicta is not Binding**

In the proceeding of the judgment, a judge may make observations not precisely relevant to decide the issues as these observations are ‘*obiter dicta*’, which have no binding powers. They are helpful to rationalize law, only to propose a way out of issues that are not resolved or concluded by the court. In [Sajjad Ali Shah v. Asad Ali \(1999\)](#), the Superior Court of Pakistan held that the stance of petitioner’s counsel, ‘*Abdul Hafeez Pirzada*’ relied heavily on various foreign jurists in holding up his arguments, but these opinions had no binding legitimacy on the Superior Courts.

### **Obiter Dicta Relevancy in Subsequent Judgments**

Judges often cite references of obiter dicta from previous judgments to come up with legal reasoning while establishing their own stance. Usually, these passages’ status as dicta is overlooked while quoting such quotations and ultimately end up becoming part of the judgment in future cases. Although most of the obiter

has turned out to be very prominent and convincing for future legal proceedings, they are not statutory or obligatory rules for a court experiencing an almost similar situation in other cases.

### **Dicta as a Precautionary Injunction**

Dicta as a precautionary injunction are fundamentally directed towards the future. Like other equitable remedies, the injunction's primary purpose is to prevent harm. Obiter dicta are, therefore, like an oratorical contrivance that not only enables the judiciary to express their concern against legally backed inequity but also demonstrates their determination and commitment to stand up for the glorification of justice as well. A model example of this type of precautionary remedy is found in Supreme Court's adjudication in [Miranda v. Arizona \(1966\)](#). The Court by forcing 'Miranda warnings', attempts to limit the possibilities of forced admissions and exhausting cross-questioning and examination of the oppressed litigant in the absence of a legal practitioner as the obvious goal is not to lessen such harm but to prevent them.

### **Intertextuality**

Textuality is a concept that is widely used in linguistics and various literary theories whereby a text is considered as a linguistic unit having distinct communicative functions like cohesion, coherence, informativity, acceptability, intentionality, situationally, and intertextuality. Among these communicative functions, "intertextuality" has achieved considerable recognition. The word intertextuality is believed to be stemmed out from a 'Latin' word "intertexto", denoting "to intermingle while weaving".

Being an instrument of literary analysis, intertextuality was formed to conduct the analysis of literature in a more holistic manner. It is believed that every text, whether literary or non-literary, in one way or another subsist with the other related work making each customary study of a transcript to be associated with the other one too. So, for the proper interpretation and understanding of any given text, it is very important for a reader to have the awareness of intertextuality in that text.

### **Intertextuality Elements and Processes**

Intertextuality elements are those "intertextual cycles" that permanently cohere the correlating content with the quarried one. Translation, quotations, conventions, adaptation, literary genres, and figures of speech are some of the prominent and important literary devices that an author derives from their acquaintance with other texts in order to show their linguistic artistry and abstractions which they portray in their future work. Ahmadian and Yazdani (2013) elaborate it as:

*"They are the linguistic devices through which the influences of the previous texts may be traced in the latest work of an author."*

### **Intertextuality Dynamic Nature**

Since segments of content can be formulated to be understood in various ways by contrasting recipients, therefore, this particular dynamic nature of intertextuality is important as it links these cognitive depictions of divergent legatee with the appropriate assumption that has been deep-rooted in them previously. This type of uncertainty makes intertextuality more dynamic. According to Culler (1981):

*"Producers do not necessarily realize what the text presupposes. Rather, it is the others who reveal these presuppositions depending on their experiences and on the clues provided in the text for their interpretation."*

### **Intertextuality and Critical Discourse Analysis**

Discourse is a broad term having several definitions that are generally considered in linguistics as a "unit of language longer than a single sentence". The analysis of discourse is sometimes referred to as the analysis of language 'beyond the sentence'. Cook (1992) defines discourse as:

*“The use of language for communication and it refers to sentences that are grammatically well-formed but which do not necessarily have to be grammatical.”*

Critical Discourse Analysis (CDA) originates from a ‘*critical theory of language*’ that realizes the usage of language like a manifestation of societal practice. The concept of intertextuality is important in CDA in analyzing discourse practices as they manifest the versatility of the text’s style, form and, meaning. Fairclough (1993) is of the view that CDA is a type of consideration of discourse that brings forth odd relationships among various ethnic and social entities.

### **Intertextuality in Legal Discourse**

The analyses of intertextuality in legal discourse is intended to study how intertextuality enhances effectiveness in specialist communication and contributes to professional discourse acquisition. Intertextuality is a unique feature of legal discourse as this technique has been a basic component of the legal exposition of law and court judgments for a very long time.

### **Law and Literature**

Emergence and intermixing of the law and literature genres in common law countries all over the world is more or less a recent phenomenon which is evident from the court decisions and judgments around the globe in which quotes and references from the popular work of famous literary figures like Shakespeare, Dickens, Balzac, Kafka, Faulkner, and Montesquieu are actively used. With the integration of literature into legal discourse, the usage of literary reference in pleadings has now become normal practice by law professionals as well as law instructors who feel reluctant to integrate the curriculum of law with the study of literature.

Judges in UK and Ireland often refer to or quote Shakespeare, Stevenson and Dickens in most of their judgments along with many other known literary figures. Judges will in making themselves more available to the general public is evident from a case in which the reference from the popular sword and sorcery teenagers’ series “*Harry Potter*” by “*J.K. Rowling*” was employed. In [Majorstake Limited v. Curtis \(2008\)](#), the Supreme Court of UK quoted a surprising literary reference in which Lord Scott while construing Section 47(2)(b) of the *Leasehold Reform, Housing and Urban Development Act*, as follows:

*“Harry Potter, we are told, received letters addressed to him at The Cupboard under the Stairs, Privet Drive, Little Winging. The Cupboard under the Stairs might have constituted premises for the purpose of letters from Hogwarts but for the purposes of construction of the 1993 Act a normal use of the English language must be assumed.”*

### **Literature and Law Relationship**

The “*Literature and Law relationship*” until today is subject to uncertainty and is considered as an unsettled issue towards which no definite boundaries are drawn yet. But even then, the discipline of law and literature are seen as part and parcel of each other as many literary texts subject matter is legal themes that specifically probe legal issues. This fact is also evident from its practical application that most of the writers are involved in inscribing both “*legal and literary texts*” side by side, whereas a number of judges cite famous works of literature to make their judgments more accessible and expressive.

### **Law and Literature as Interdisciplinary Field**

A number of intellectuals in recent years claim that both literature and law are interdisciplinary fields despite the fact that some observers negate this view by arguing that both the disciplines can never contribute to each other in a significant manner because of the fact that law is a systematic, logical, dry and technical field comprises of rules which are often more rational whereas literature is described as much complex and emotional domain.

## Literature as an Exposition of Law

The importance of literature is evident from its capacity to present an individual a different perspective to a certain set of circumstances allowing them to associate this different fact with the one they are having. This dispensing of new scope and opportunities enables them to confront their impression of justice that in turn has this capacity to alter one's way of reasoning about certain circumstances. However, literature has this power to reshape the 'legal mask' into a 'living face' thereby presenting an alternative image of the law.

## Literature Contribution to Legal Reforms

Contributors towards "modern law and literature movement" generally believe that literature has this capacity to make a legal change through the real portrayal of injustice in society. One of the most discussed works of literature which have contributed towards a legal change is that of the "Bleak House" in which "Charles Dickens" highlights the very misuse of the system many years before it was bound to happen.

## Judgements with Literary Citations

### a) Pity the Nation (Pakistan)

In [Muhammad Azhar Siddiqui case \(2012\)](#), Justice Asif Saeed Khosa proceeded against the then Prime Minister of Pakistan Syed Yousaf Raza Gillani, cited two poems "Pity the Nation" and "Crime and Punishment" by Lebanese poet 'Khalil Gibran' and British poet and clerk 'John Donne' in his additional note. P.M Gillani was declared guilty of "contempt of court" for deliberate defying the instructions of the superior court in the judgment of another case. While agreeing with the judgment of Justice Nasir-ul-Mulk, Justice Khosa has written an additional note in which have cited the poem "Pity the nation" by Khalil Gibran, he goes on to add a new part written by himself that expresses his judicial sentiments on the stark reality of Pakistan's present social and political status in a remarkably creative manner.

*"With an apology to Khalil Gibran, and with reference to the present context, I may add as follows: Pity the nation that achieves nationhood in the name of a religion but pays little heed to the truth, righteousness, and accountability which is the essence of every religion..... Indeed, pity the nation that does not discern villainy from the nobility."*

### b) Behind every Great Fortune, there is a Crime (Pakistan)

In Panama Papers case (2017), Justice Asif Saeed Khan Khosa's dissenting note (which had momentarily given a remedy to Nawaz Sharif along with his family members) started from a reference by Mario Puzo's novel *The Godfather* (1969). Justice Khosa quoted the following reference:

*"The popular 1969 novel ... recounted the violent tale of a Mafia family and the epigraph selected by the author was fascinating: Behind every great fortune, there is a crime. The novel was a popular sensation that was made into an acclaimed film. It is believed that this epigraph was inspired by a sentence that was written by Honoré de Balzac [French novelist and playwright] .... as follows:*

*The secret of a great success for which you are at a loss to account is a crime that has never been found out because it was properly executed). It is ironical and a sheer coincidence that the present case revolves around that very sentence attributed to Balzac..."*

### c) More Sinned Against than Sinning (Pakistan)

In the famous blasphemy case of *Aasia Bibi* (2018), a Christian lady who was awarded death penalty for doing blasphemy, Justice Asif Saeed Khosa gave remarks, which caught the public attention. It was a quote from Shakespeare's famous tragedy 'King Lear' stating:

*"She appeared to be a person, in the words of Shakespeare's King Lear, more sinned against than sinning."*

In Justice Saeed Khosa’s verdict, which was in favor of the Christian woman, his additional note was reflected with quotes from ‘William Shakespeare’ tragic novel ‘King Lear’ to make his point clear that was quite suitable and felicitous as well which Justice Khosa quoted in the following fashion:

*“It is ironical that in the Arabic language the appellants name Aasia means ‘sinful’ but in the circumstances of the present case she appears to be a person, in the words of Shakespeare’s King Lear, “more sinned against than sinning.”*

#### d) Marriages are Made in Heaven (India)

In [Hitesh Bhatnagar, \(2011\)](#), the Superior Court of India comments that although it’s a common understanding that ‘Marriages are made in heaven, at times we are unable to understand and wonder that what really goes wrong while they get back to earth. The Supreme Court by rejecting the appeal, concludes the judgment by citing from George Eliot’s novel “Adam Bede”:

*“We conclude by quoting the great poet George Eliot ‘what greater thing is there for two human souls than to feel that they are joined for life, to strengthen each other in all labour, to rest on each other in all sorrow, ....”*

#### e) Ground that Hath no Profit in it but the Name (UK)

Justice Sedley, in the case of [Strachey v. Ramage, \(2008\)](#), recited a quote from William Shakespeare’s ‘Hamlet’ while describing the source of contention in which a boundary dispute between a farmhouse and some neighboring fields which were in common ownership were involved. Lord Justice Sedley quoted:

*“Little patch of ground that hath no profit in it but the name.”*

#### f) Watergate Scandal (USA)

With reference to the famous case of *United States v. Nixon* (1974), Senator Sam Ervin is remembered by many Americans as a cordial and one of those courageous and upright lawyers who chaired the Senate Watergate hearings in 1973. Ervin was best known for his quoting of literary passages which range from William Shakespeare to Aesop’s fables and so on. Senator Sam Ervin for most of his twenty years in the Senate make use of these oratorical devices to a very different reason by quoting Shakespeare and other literary figures and at one occasion during the Watergate scandal it was said that:

*“Henry VIII (though it was wrongly attributed at the time as ‘Henry IV’) was an intentional call forth by Senator Sam Ervin Jr during the Watergate hearings. “*

#### g) Tragedy of Shakespearean Proportions (South Africa)

*The Director of Public Prosecutions Gauteng case, (2017)*, is another case about a former South African sprint runner who tragically shot the model “Reeva Steenkamp on 14 Feb 2013”. Oscar maintains that he thought that an intruder was taking cover in the bathroom and by mistake, Reeva Steenkamp gets shot in disguise. Judge Eric Leach simplifies the whole incident of Reeva’s death in his judgment as:

*“A human tragedy of Shakespearean proportions.”*

### Findings

Research Questions	Answers Based on Findings
Does the judge’s remark enhance the quality of judgment through the choice of literary references in their obiter dicta?	It is inferred from the discussion that the intended ideology of judge’s remark does enhance the quality of judgment through the choice of literary reference in their obiter dicta.

Is it appropriate for a Judge to use intertextuality as a tool by citing literary references in their obiter dicta?	It is concluded from the discussion that no matter how honest and genuine is judge's feeling, it is not appropriate for a judge to use these literary devices as their role is limited only to adjudicate on the matter of law.
How does the use of this stylistic device portray the political and socio-cultural relationship of the Judges with litigants and the general public?	It is deduced from the discussion that the use of this stylistic device does portray the political and socio-cultural relationship of the Judges with litigants and the general public as all of them share a cause and effect kind of relationship which is dynamic and consequential in nature.

## **Conclusions**

In conclusion, it can be said that citing literature in judicial opinion proves to be a versatile technique, which is used in a restricted or infrequent manner, can enhance and adorn a judgment as there is nothing better than an impressive obiter dictum which enables the judge to elaborate and clarify their judgment. A well thought obiter dicta can help avoid discomfort to the court and has the power to rectify the court's flaws and prevent them from happening in the future. Another genre of obiter dictum aims to attract immediate public attention towards the core issues and, thereby, propel change through legislation. Both dissenting, as well as additional notes in Pakistan Supreme Court's judgments as discussed and analyzed in the present research, have proved that they take priority over the majority view, thereby resulting in the initiation of worthy case law for the futu

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